

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Ahmed Ali M. Shaikh, C.J.

Mr. Justice Mohammad Karim Khan Agha, J.

Petition number, name of the petitioner and his counsel.

C.P. No.D-3669 of 2014

China International Water & Electric Corporation (CWE) through its Authorized Representative with its office at House No.162, 29th Street, Khayaban-e-Mohafiz, Phase 6, DHA, Karachi V. Federation of Pakistan & others.

Through Mr. Haider Waheed, Advocate.

Counsel for the Respondents

Mr. Muhammad Altaf, Special Prosecutor, NAB

Mr. Mahmood Alam Rizvi, Advocate for the Respondent No.3

On Court Notice: Mr.Aijaz Ahmed Qureshi, Deputy Chief Inspector Stamps

Dates of hearing: 21.02.2018, 21.03.2018 and 30.04.2018

Date of order: 14.05.2018

ORDER

Mohammad Karim Khan Agha, J: By this order, we propose to dispose of the above mentioned petition filed by the petitioner (China International Water & Electric Corporation) (CWE) against the respondents Karachi Port Trust (KPT) and the National Accountability Bureau (NAB).

2. Briefly stated the facts of the case are that the petitioner was awarded a contract by the respondent/KPT for dredging and reclamation of Pakistan Deep Water Container Port (PDWCP).

3. All the costs of executing the contract including stamp duty were to be borne by the KPT. However, the petitioner on behalf of the KPT applied to Chief Inspector Stamps for an exemption of and a reduction in the stamp duty, which was granted by the Chief Inspector of Stamps in exercise of his powers under section 9 of the Stamp Act, 1899 and the amount of stamp duty was reduced to Rs 8.5 million. Thereafter it appears that the NAB sent letters to the petitioner under section 19 of the National Accountability Ordinance, 1999 (NAO) informing the petitioner that it had opened

an inquiry against the petitioner on account of fraudulently depositing a deficient amount of stamp duty.

4. Pursuant to this inquiry NAB sent a letter dated 20.5.2014 to the KPT (the impugned letter) informing the KPT that the petitioner had fraudulently deposited deficient stamp duty and evaded amount of stamp duty of Rs. 3,00,76,367/- alongwith penalty of Rs. 60,152,734/- and informed the KPT that such an amount was subject to the provisions of section 23 NAO and directed the KPT to withhold the aforesaid amount from any payments which were due to the petitioner. The petitioner has challenged the impugned letter.

5. Learned counsel for the petitioner submitted that the impugned letter was without lawful authority since the KPT had no power to withhold any lawfully payable dues to the petitioner under section 23(a) of the NAO and that the impugned letter did not amount to any kind of freezing order and thus should be set-aside as being issued without any lawful authority. In support of his contentions, he placed reliance on **Chaudhry Muhammad Akram Warraich v. Chairman, National Accountability Bureau, Islamabad and others** (2010 YLR 2766) and **Dr. Muhammad Azam Kasi V. The State through Deputy Prosecutor General Accountability Court No.1, NAB, Quetta** (2012 P Cr. LJ 1950).

6. Learned counsel for the KPT submitted that it was following the impugned letter since in its view, it wanted to avoid any liability under section 23 of the NAO and even otherwise the deficiency in stamp duty was subject to civil litigation before the High Court. That the Board of Revenue had declared the exemption letter given to the petitioner as fake and was seeking to recover the deficiency in stamp duty from the KPT when in fact any deficiency of stamp duty under the contract was the responsibility and liability of the petitioner and as such KPT was also withholding payment of dues otherwise payable to the petitioner under the contract until the petitioner paid to KPT the deficiency in stamp duty which the KPT would pass onto the Board of Revenue.

7. Learned Special Prosecutor NAB submitted that NAB had opened an inquiry into the deficiency in the amount of stamp duty paid by the petitioner to the Board of Revenue based on the

petitioners alleged fake exemption letter from the Board of Revenue and as such the impugned letter had been legally sent by the NAB under section 23 NAO and even if the impugned letter did not fall under section 23(a) NAO it amounted to a freezing order under section 12 of the NAO.

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

9. The issue in hand seems to be whether the impugned letter which was in effect issued under section 23 of the NAO by NAB to the KPT allows the KPT to withhold any dues which it owes to the petitioner based on its aforesaid contract with the petitioner on account of NAB's inquiry in to the allegation that the petitioner had caused loss to national exchequer by allegedly paying deficient amount of stamp duty and which was payable by it and/or whether the impugned letter amounted to a freezing order under section 12 of the NAO.

10. In order to determine this issue we consider it would be of assistance to set out section 23, 12 and 13 of the NAO which concern cautioning of property and freezing of property by NAB which in essence this case revolves around along with the impugned letter.

11. Section 23 of the NAO reads as under:

"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 (1), 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." (bold added)

12. Section 12 of the NAO reads as under:

"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.

(b) If the property ordered to be frozen under sub-section (a) is a debt or other moveable property, the freezing may be made.—

- (i) by seizure; or
- (ii) by appointment of receiver, or
- (iii) by prohibiting the delivery of such property to the accused or to anyone on his behalf, or
- (iv) by all or any such or other methods as the Court or the Chairman NAB as the case may be, deem fit.

(c) If the property ordered to be frozen is immovable, the freezing shall, in the case of land paying revenue, be made through the Collector of the district in which the land is situated, and in all other cases.—

- (i) by taking possession; or
- (ii) by appointment of receiver, or
- (iii) by prohibiting the payment of rent or delivery of property to the accused or to any other person on his behalf; or
- (iv) by all or any such methods as the Chairman NAB or the Court may deem fit;

Provided that any Order of seizure, freezing, attachment or any prohibitory order mentioned above by the Chairman NAB, shall remain in force for a period not exceeding [fifteen] days **unless** confirmed by the Court, where the Reference under this Order shall be sent by Chairman NAB.

Provided further that notwithstanding [anything to the contrary contained therein] the Order of Chairman NAB or the Court shall be effective from the time of passing thereof, or proclamation thereof in a Newspaper, widely circulated and dispatch at the last known address of the accused [either by registered post A.D. or courier service or [***] electronic media as the Court may deem proper having regard

to the facts and circumstances of the case.]

(d) If the property ordered to be frozen consists of livestock or is of a perishable nature, the Chairman, NAB, or the Court may, if it deems proper and expedient, order the immediate sale thereof and the proceeds of the sale may be deposited with the Chairman NAB or the Court, or as either may direct as appropriate.

(e) The powers duties, and liabilities of a Receiver, if any, appointed under this section shall be the same as those of a Receiver appointed under Order XI, of the Code of Civil Procedure, 1908 (Act V of 1908).

(f) The order of freezing mentioned in sub-sections "a" to "e" shall remain operative until the final disposal of the case by the Court, and in the event of the acquittal [or release] of the accused, shall continue to remain operative for a period of ten days after receipt of certified copy of the order of acquittal by NAB, where-after it shall be subject to an order by the Court in which an appeal, if any, is filed." (bold added)

13. Section 13 of the NAO reads as under:

"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 any appeal against such order before the High Court]." (bold added)

14. The impugned letter reads as under:

CONFIDENTIAL

GOVERNMENT OF PAKISTAN BY
FAX/TCS
NATIONAL ACCOUNTABILITY BUREAU, SINDH
PRCS BUILDING 197/5, DR. DAUDPOTA
ROAD, Tel:021-99207845
KARACHI CANTONMENT.
Fax:021-99207862

SINDH
1/NAB Sindh/2014/381

2178/54/IW-2/CO-A/T-

25th May, 2014.

To: M/s Khalid Mobin Arshad
Secretary,
Karachi Port Trust,
KPT Head Office Building,
Edujee Dinshaw Road,
Karachi.

Subject: Inquiry against Officers/ Officials of Chief
Inspector Stamps (BOR), Government of
Sindh, M/s. China International Water &
Electric Corp. (GIWE), and others.

1. This Bureau is conducting an inquiry against Officers / Officials of Chief Inspector Stamps (BOR), Government of Sindh, M/s. China International Water & Electric Corp. (CIWE) and others under the provisions of National Accountability Ordinance, 1999.

2. During the course of inquiry, it has been established that Karachi Port Trust awarded the contract of Dredging and reclamation works Pakistan Deep Water container port worth Rs.19,288,183,520/- to the subject company. On the awarding of contract M/s China International Water and Electric Corporation had fraudulently deposited deficient stamp duty of Rs.85,00,000/- instead of Rs.3,85,76,367/-. The aforesaid company had evaded Stamp duty sum of Rs. 3,00,76,367/- which has caused loss to national exchequer. However, Board of Revenue Government of Sindh has adjudicated this issue and requested to recover evaded amount of Stamp Duty of Rs.300,76,367/- along with one time penalty totaling of Rs.60,152,734/-. This amount to the tune of Rs.60,152,734/- loss caused by aforesaid company to the national exchequer **is subject to the provisions of Section 23 of NAO, 1999 which reads as follows**"

"23.(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 subsection (1), 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.

3. In view, therefor, you are hereby **directed** to withhold the amount of loss caused to national exchequer from the running bill of the accused persons.

4. The acknowledgment may be provided to Mr. Masood Ahmed Deputy Director (Investigation) at IW-II NAB Sindh, Barracks-35, Pak Secretariat opposite Passport Office, Saddar Karachi by **23rd May, 2014.**

5. Forwarded for your information and further necessary action.

Sd/-
Deputy Director (Coord)
For Director IW-2
(Muhammad Saleem
Ahmed)"

15. In our view it is quite apparent that section 12 and 23 of the NAO are quite distinct sections with different meanings and different legal consequences. At the outset we are of the view that the impugned letter cannot amount to a freezing order under section 12 NAO since only the Chairman NAB or the Court trying an accused for an offence under the NAO may order the freezing of property and even then such order shall only remain in force for 15 days unless confirmed by the Court. The impugned letter has neither been written by the Chairman NAB nor has any copy of an order of the Chairman NAB freezing the property been produced or for that matter the Court to the KPT and as such the impugned letter cannot be termed a freezing order. Even a plain reading of the letter indicates that the letter relates to S.23 NAO and **not** to a section 12 freezing order under the NAO. Even in the event that the impugned letter could be regarded as a freezing order (which we do not believe to be the case as mentioned above) the impugned letter was dated 20.5.2014 and more than 15 days have expired since its issue and as such since it has not been confirmed by the Court it will automatically have ceased to have effect. Thus, the impugned letter is not a freezing order under S.12 NAO.

16. In our view section 23 of the NAO is itself a self executing section which will automatically come into effect once NAB opens an inquiry or investigation into any offence under NAO which cautions that any property which is the subject matter of the

inquiry cannot be transferred or a charge allowed to be created thereon and that in the event that any transfer of any right, title or interest or creation of a charge on such property takes place it shall be void and that any person who transfers the property or creates a charge on such property shall be subject to prosecution.

17. In our view the impugned letter simply puts the KPT on notice that section 23 of the NAO is applicable to the petitioner **and** the KPT. The impugned letter **cannot direct** the KPT to withhold the amount of loss caused to national exchequer from the running bill of the accused persons. What the impugned letter can do and in effect does is warn the KPT that if it transfers any property or creates any interest over the property or pays any monies allegedly owed by the petitioner to the national exchequer it **may** be subject to the legal consequences as set out in S.23 NAO. It is therefore up to the KPT whether or not it pays the monies allegedly owed to the petitioner by the KPT. If it does so then the KPT runs the risk of being hit by S.23 if deemed applicable to the given situation whereas if it does not pay such monies it potentially opens itself up to any legal action which the petitioner, if any, deems appropriate to take against it. **If a freezing order had been in place the KPT would have had no option but to comply with the freezing order.** We consider it both sensible and prudent that NAB send out such caution letters to concerned parties so that they may be put on notice and determine their best course of action in such cases however NAB cannot make such directions as contained in the impugned letter.

18. We are fortified in our view by the case of **Chaudhry Muhammad Akram Warraich v. Chairman, National Accountability Bureau, Islamabad and others** (2010 YLR 2766) which held vis a vis the relationship between S.12 and 23 NAO at page 2770 (para-9) as under:-

"9. A combined reading of the above two provisions indicate the position in law to be as under:-

- (1) Under Section 12 power is available to the Chairman NAB as well as the Court trying an accused for an offence under the Ordinance of 1999 to order freezing of his property or a part thereof whether in the possession of the accused or any of his relatives or associates or any person on his behalf.

- (2) Under the first proviso if such a freezing order is passed by the Chairman NAB that order can ensure for a period of maximum of 15 days unless it is confirmed by the Court where the reference under the Ordinance shall be sent by the Chairman NAB.
- (3) Section 23 bars transfer by any means whatsoever or creation of charge on property when an inquiry or investigation or proceedings are pending before NAB or the Court.
- (4) If in violation of section 23 any person transfers any property or creates a charge over it he shall be liable to be prosecuted and if found guilty shall be liable to be punished to imprisonment which may extend to three years as well as fine.
- (4A) However, if transfer etc., is made with the permission of the Court it shall be a valid transfer.
- (5) There appears to be no power available to Chairman NAB to pass any order under section 23. Section 23 is a self-executing section and it creates an offence. Thereafter, any person who violates the provisions of section 23 renders himself liable to prosecution and if found guilty, to punishment. But that is different from saying that Chairman NAB has any power under section 23 to freeze any account. We have not been able to discover any such power in section 23. The power of Chairman NAB to freeze any property does not flow out of section 23. It flows out of section 12 and the section clearly specifies a maximum period of 15 days for the life of such an order of freezing passed by the Chairman NAB. Such order of Chairman NAB can go beyond 15 days only and only if it is confirmed by the Court where reference shall be filed by the Chairman NAB.
- (6)
- (7)
- (8) There is clear and marked distinction between the provisions contained in section 12 and those of section 23. Section 12 authorizes the Chairman, acting on his own to freeze the property of an accused person. Obviously such freezing of property is for a maximum period of 15 days unless confirmed by the Court. So there is power of freeze; not a drop can enter and not a trickle can escape. On the other hand, section 23 declares "transfer by any means whatsoever or create a charge on any property owned" by the accused person or in his possession. Thus, what falls within the mischief of section 23 is 'transfer' and 'creation' of a charge. Thus, if an amount is held in a bank account section 23 does not freeze that bank account. That

bank account can be operated, both in terms of deposits made in it and withdrawals from it but for legitimate and bona fide needs, in the case of the present context, of the company. Thus, the company, Privilege Farms (Pvt.) Ltd., can withdraw money from the account for the purpose of meeting its expenses and other legitimate needs but it cannot transfer the fund or create a charge on them. Concomitantly an obligation is also created in respect of the Bank: it must satisfy itself before allowing any withdrawal that the withdrawal is not for the purpose of a transfer. **Therefore, the scope of prohibition under section 23 though automatic and without any order by the Chairman NAB or the Court is of a far more limited extent that the order of freeze under section 12 which order is a complete and total bar of any movement into and or any withdrawal from the bank account in question.**

- (9) In the present case the first letter cautioned the bank under section 23. The second letter which is dated 11th May, 2010 merely reiterated the first. But if a direction was given to the bank that it shall not "transfer" the funds in the account till finalization of inquiry proceedings and decision of competent authority. It may be pointed out that even the second letter merely talked of "transfer" and did not say that the account be frozen. **As far as caution is concerned, since an inquiry is pending in the NAB no wrong can be ascribed if the NAB informs the bank that inquiry in respect of amount in a particular account is pending in the NAB. Thereafter, section 23 shall suo motu kick in and if any transfer is allowed or charge is allowed to be created on it, the bank, who could but for conveying of this information, otherwise have claimed that it had no knowledge of the pending inquiry, stands informed of a particular inquiry. Therefore, note of caution as conveyed in the letter dated May 7, 2010 does not only inform the Bank, of pendency of a investigation and inquiry and does nothing more.**" (bold added)

19. The upshot of the above discussion is that we set aside the direction contained in paragraph 3 of the impugned letter as reproduced herein above **which letter otherwise remains in tact** and allow the KPT to act as it deems fit keeping in view the fact that it is now aware of the S.23 NAO caution imposed by NAB.

20. The petition stands disposed of in the above terms