

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.232 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE
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Plaintiff: Saddar Market Development Consortium through Mr. Khawaja Shamsul Islam, Advocate.

Defendants: Through M/s. Suneel Kumar Talreja and Pervaiz A. Mastoi, AAG alongwith Mr. Sharafuddin Mangi, State Counsel.

Defendant No.4: Mr. Ejaz Ahmed, Project Director.

NAB: Through Mr. Akram Javed, Spl. Prosecutor NAB alongwith Mr. Parkash I.O NAB.

1. For hearing of CMA No. 5136/2016.
2. For hearing of CMA No.12311/16.

Dates of Hearing: 06.02.2018, 07.02.2018 & 08.02.2018.

Date of Order: 08.02.2018

ORDER

These are two applications filed by the Plaintiff, one under Order 1 Rule 10 CPC (*CMA No.5136/2016*) and the other under Section 94 r/w Section 151 CPC (*CMA No.12311/2016*) through which the Plaintiff seeks impleadment of National Accountability Bureau (**NAB**) as a Defendant and further restraining orders against NAB from arresting them as well as de-freezing of the accounts and stay of proceedings pursuant to a call up notice.

Learned Counsel for the Plaintiff has contended that a tender was floated on 08.10.1993 for pre-qualification by the Defendants for Re-construction and extension of the project in question in which the Plaintiff was the lowest and successful bidder. He has further submitted that admittedly

no funds of the Defendants were involved in this project which was on a built, operate and transfer basis, however, time and again there were several issues which created impediments in the timely completion of the Project, whereas, some Arbitration was also entered into, which was decided in favour of the Plaintiff. Learned Counsel has further contended that finally certain understanding was reached with the Defendants and the contract was renewed on 16.01.2015 providing a further period of two years to complete the Project and once again hurdles were created at the behest of Defendant No.5, which is a Cooperative Society and for such reasons instant Suit was filed and on 28.01.2016, the Defendants were directed to abide by such renewal of Contract dated 16.01.2015. Per learned Counsel subsequently contempt was committed by the Defendants by issuing Show Cause Notice dated 29.03.2016 and again vide order dated 31.03.2016, the said Show Cause Notice was suspended. Learned Counsel submits that in clear defiance of the Court's orders, NAB raided the Office of the Plaintiff and took away the entire record without any search warrants or authorization by the Chairman NAB, whereas, the Bank account was also seized. Learned Counsel further submitted that such action of the NAB Authorities was immediately impugned through CMA No.12311/2016 and vide Order dated 29.08.2016, the Call Up Notice dated 22.08.2016 was stayed and they were directed to satisfy this Court as to how they had taken cognizance in this matter, which was already pending for adjudication. Per learned Counsel it is the very question of jurisdiction of this Court, which has been

usurped and taken over by the NAB authorities without giving any due consideration to the fact that a Civil Suit against the Defendants was already pending and restraining orders were operating. He has contended that NAB Authorities have acted at the behest of Defendant No.5, whereas, the said Defendants after having failed to get any success in respect of their malafide acts instigated the NAB Authorities to enter into this matter, which is purely civil in nature and is to be adjudicated by this Court. According to the learned Counsel during the past many years various investigations and enquiries were conducted by authorities including Anti-Corruption Department and nothing came out of all these proceedings, hence the impugned action of NAB is nothing but victimization. Per learned Counsel no one is above the law and during subsistence of restraining order(s), they ought to have given respect and regard to the orders of the Court before taking such a harsh action. Learned Counsel has contended that all the relief(s), which are being claimed by the Plaintiff squarely falls within the ambit of Specific Relief Act, for which it is only this Court, which has jurisdiction and therefore, the Plaintiffs have correctly approached this Court against the NAB authorities and the objections regarding jurisdiction of this Court so raised on behalf of the NAB Authorities is misconceived. Accordingl to the learned Counsel after the dicta laid down in the case of ***Rafiq Haji Usman v. Chairman, NAB and another (2015 SCMR 1575)*** the matters of Civil nature cannot be investigated into by NAB, and therefore, the listed applications be allowed. In support learned Counsel has

further relied upon **PLD 1998 SC 1445** (*Mehram Ali and others v. Federation of Pakistan and others*), **PLD 2001 Karachi 48** (*Muhammad Akram and 10 others v. Federation of Pakistan and others*), **PLD 1987 Karachi 225** (*Messrs. Mirpurkhas Sugar Mills Ltd. v. Consolidated Sugar Mills Ltd and 3 others*) and **PLD 2015 SC 401** (*District Bar Association, Rawalpindi and others v. Federation of Pakistan and others*).

On the other hand, learned Special Prosecutor NAB has contended that such controversy regarding jurisdiction of this Court has been set to naught by the Hon'ble Supreme Court in the case reported as **PLD 2002 SC 408** (*Mst. Zahida Sattar and others v. Federation of Pakistan and others*) and Plaintiff be directed to approach the appropriate Court having jurisdiction to seek its remedy. Per learned Counsel neither the NAB is a necessary party nor a proper party in this matter, whereas, the action of NAB Authorities is purely criminal in nature under the NAB Ordinance, therefore, this Court has no jurisdiction. He has further contended that even in the listed applications, the prayer is to the effect that NAB may be restrained from arresting the Plaintiff, which apparently can only be granted by a Court having jurisdiction in criminal matters. Insofar as the de-freezing of accounts is concerned, the learned Prosecutor has referred to Section 12 of the NAB Ordinance and has contended that it is only the Accountability Court, which can pass an order for de-freezing. Learned Special Prosecutor has also referred to Sections 32 and 36 of the NAB Ordinance and has contended that in view of such

provisions, this Court has no jurisdiction in the matter, whereas, the plaintiff may be asked to join investigation, pursuant to call up notice.

I have heard the learned Counsel for the Plaintiff as well as Special Prosecutor NAB and perused the record. This is a Suit for Declaration, Direction, Injunction and recovery of Damages, wherein, the primary grievance of the Plaintiff appears to be against Defendant No.5, as the Plaintiff seeks Specific Performance of the Building Contract dated 15.02.1993 and according to the Plaintiff, time and again the construction work has been stopped and or interrupted on account of bureaucratic hurdles of the official defendants with the alleged connivance of Defendant No.5 and their office bearers. It is further case of the Plaintiff that pursuant to some understanding on 16.01.2015 an extension was granted in completion of the contract for a period of two years and before such period could expire, such hurdles were created and for that instant Suit was filed. It further appears that on 28.01.2016 when for the first time the case was placed before the Court, notice was issued and till the next date, it was directed that Defendants shall abide by the renewal Letter dated 16.01.2015. On the next date, time was sought on behalf of the Defendants to file Vakalatnama and counter affidavits but on 29.03.2016, a Show Cause Notice was issued and through order dated 31.03.2016, the operation of the impugned Show Cause Notice was suspended and on the same date, CMA No.5136/2016, which is an application under Order 1 Rule 10 CPC for impleading NAB as a Defendant was also fixed for orders, on

which notices were directed to be issued. It may be clarified that till that date perhaps the Plaintiff had no direct grievance against NAB so as to seek any restraining order against them. Thereafter on various dates, matter was listed before the Court and finally CMA No.12311/2016 under Section 94 CPC was filed against NAB and on 29.08.2016, the impugned Call-up Notice dated 22.8.2016 was stayed with further directions to NAB to satisfy as to their conduct and action taken in this matter despite certain restraining orders already in field. Through this CMA, the Plaintiff has made multiple prayers including a prayer that no arrest be made by NAB; for suspending the Call-up Notices as well as de-freezing of the account of the Plaintiff. The precise argument put forward on behalf of the Plaintiff is to the effect that since this is purely a Civil matter between the parties, therefore, NAB has no jurisdiction to intervene, and if so, then this Court is the appropriate Court having jurisdiction to restrain them and or to pass all such orders including the orders regarding arrest of the Plaintiff as well as in respect of Call up Notice and for de-freezing of account. Time and again learned Counsel for the Plaintiff was confronted as to how this being a Civil Court can exercise such jurisdiction as is being prayed for. The learned Counsel though made efforts to satisfy the Court through various provisions as well as Judgments and precedents but in my view none are relevant. The reference to Specific Relief Act is of no help insofar as the enquiry initiated by the NAB is concerned. There is no cavil to the proposition that the Plaintiff can seek specific performance, if any agreement has

been executed; but then such specific performance can only be pleaded against the parties, who have entered into such agreement and for that instant Suit has been entertained and interim orders have already been granted, whereas, any further discussion on the merits of the case is not to be made as it may prejudice the entire case of the parties. Merely, for the fact that the Plaintiff seeks specific performance of some contract, which is apparently entered into with some government organization against whom, the NAB authorities have initiated some case; under the garb of a status-quo order the NAB authorities cannot be restrained by a Civil Court. Moreover, and notwithstanding this observation, now in view of dicta laid down by the Honourable Supreme Court in the case of ***Abdul Aziz Memon v The State (PLD 2013 SC 594)*** even a private person can be investigated into by the NAB Authorities.

Insofar as the impugned action of NAB including but not limited to the raids on the Office of the Plaintiff and the Call up Notice as well as freezing of account is concerned, it may be observed that NAB Ordinance provides a complete mechanism to agitate such issues. If the Plaintiff is aggrieved by any action of the NAB Authorities then perhaps recourse to all such objections is available within the NAB Ordinance either before the Accountability Court or for that matter before a Constitutional Court under Article 199 of the Islamic Republic Constitution of Pakistan, 1973. In the case of ***Khan Asfandaryar Wali and others v. Federation of Pakistan through Cabinet Division Islamabad and others (PLD 2001 Supreme Court 607)***, complete guidelines have

been provided in respect of remedies available to an affected person as admittedly in the NAB Ordinance even bail could not be granted by the Accountability Court. However, the Hon'ble Supreme Court has been pleased to lay down the law that such jurisdiction cannot be taken away at least from a Court under Article 199 (ibid). Therefore, in all fairness, the Plaintiff ought to have approached the appropriate Court having jurisdiction in the matter but not this Court in ongoing proceedings merely for the reason that some dispute related to it is pending before a Civil Court. These proceedings before this Court may be an added tool to the case of the Plaintiff on merits that Civil Matter is already under adjudication, therefore, the NAB Authorities have no jurisdiction; but such question can only be determined and decided by the Court having appropriate jurisdiction including the Court exercising jurisdiction under Article 199 (ibid).

The learned Counsel for the Plaintiff has vehemently relied upon the case of **Rafiq Haji Usman (supra)** to contend that the Hon'ble Supreme Court has been pleased to hold that disputes of civil nature are not to be taken up by the NAB authorities. Firstly, I may observe that the case of **Rafiq Haji Usman (supra)** is in respect of granting bail to the accused under a NAB case as observed. It may be of some help to the case of the Plaintiff while seeking bail on the ground that certain civil proceedings are already pending in respect of the dispute, but that pendency in no manner can confer any jurisdiction to this Court either for granting bail or for ordering de-freezing of the account of which

cognizance has been taken under the NAB Ordinance. Therefore, reliance placed on the case of **Rafiq Haji Usman (supra)** at least for the present purposes before this Court is not relevant, but may be of help when Plaintiff seeks appropriate remedy before the Court having appropriate jurisdiction.

The learned Counsel had also argued that a Civil Court can grant all such relief(s) as could be granted by a Court exercising Constitutional Jurisdiction and in support he has relied upon **Mirpurkhas Sugar Mills Ltd (Supra)**. Again there is no cavil to this proposition and in fact same view has also been taken by another learned Single Judge of this Court in the case reported as **Messrs Bank of Oman Ltd., Vs. Messrs East Trading Co. Ltd. And others (PLD 1987 Karachi 404)**, which was also discussed by me in the case reported as **Engro Elengy Terminal (Pvt) Limited v. Federation of Pakistan (2017 PTD 959)**. However, again for the sake of clarity, it may be observed that even while exercising Constitutional jurisdiction, there are two aspects of the matter before the Court. There has been instances when the Constitutional Court has even passed orders in respect of certain criminal matters, in which cognizance has already been taken either by the prosecution or the trial Courts. To that again there cannot be any cavil in view of the settled position of law. The other category of cases is in which the Constitutional Court can and may exercise jurisdiction, which are civil in nature. Insofar as the civil matters are concerned including challenge to any enactment in law as well as vires of such law, again there is no cavil that the same can be challenged

before a Civil Court (however, subject to certain limitations) and a Civil Court can always look into such aspect(s) of the matter in addition to a Constitutional Court. However, when a matter is exclusively of a nature, wherein, only criminal proceedings are to take place, then perhaps this proposition as well as the Judgment(s) relied upon cannot come to the rescue of the Plaintiff. Needless to observe that this Court cannot grant bail as pleaded neither a de-freezing order in this manner or suspend a call up notice seeking information and or calling upon to join the enquiry proceedings. Therefore, (with the exception as above), I am not inclined to agree with this proposition so argued by the learned Counsel for the Plaintiff. Again I am observe for that the plaintiff ought to have approached the Court having jurisdiction against the impugned action of NAB as apparently this Court lacks such jurisdiction.

In view of hereinabove facts and circumstances, and the discussion as above, listed applications were dismissed by means of a short order on 08.02.2018 and these are the reasons thereof.

Judge