

## IN THE HIGH COURT OF SINDH AT KARACHI

*Present: Ahmed Ali M. Shaikh, CJ and Omar Sial, J*

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### Constitution Petition No. D – 4225 of 2016

The State  
through Chairman, NAB ..... Petitioner

**Versus**

Presiding Officer/Special Judge  
(Customs & Taxation), Karachi & Others ..... Respondents

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### Spl. Crl. Misc. Application No. 201 of 2017

Younus Mandviwala & another ..... Applicants

**Versus**

The State ..... Respondent

*Mr. Zahid Hussain Baladi, Special Prosecutor, NAB for petitioner.*

*Mr. Muhammad Kaukab Sabahuddin, Advocate for respondents No.2 & 3 in C.P. No.D - 4225 of 2016 and for Applicants in Spl. Crl. Misc. Application No. 201 of 2017.*

### JUDGMENT

**Omar Sial, J.:** Through these proceedings NAB has impugned an order dated 14-6-2016 passed by the Court of Special Judge (Customs & Taxation) Karachi. In terms of the said order the learned trial court dismissed an application filed under section 16-A(a) of the NAO, 1999 by the Chairman NAB praying that the case against the respondents 2, 3 and 4 pending adjudication before the Special Court be transferred to an Accountability Court.

2. The background relevant for the present purposes is that an F.I.R bearing number 4 of 2012 was filed against respondents 2 to 4 on 31-5-2012 on the complaint of the Federal Board of Revenue. The primary allegation against the respondents was that they had committed a tax fraud to the tune of Rs. 215.729 million by claiming fake refunds of sales tax.

3. While the case arising out of the aforementioned F.I.R was pending adjudication, the Chairman, NAB on 2-5-2016 moved an application under section 16-A(a) of the NAO, 1999 in the trial court, stating that the respondents appeared to have committed acts of corruption and corrupt practices as defined in the NAO, 1999 and that as there was a

possibility of recovering the looted amount, the case may be transferred to an Accountability Court.

4. On 14-6-2016 the learned trial court passed the impugned order dismissing the application filed by NAB on the following grounds:

- (a) The offence allegedly committed did not fall within the ambit of the NAO, 1999;
- (b) No public servant was impleaded as an accused and therefore the provisions of NAO, 1999 were not attracted;
- (c) The accused in the case were being tried under the customs law and as that legislation was a special law, its provisions, and not those contained in NAO, 1999 would apply.

5. We have heard the learned counsel for the respondents as well as the learned Special Prosecutor, NAB and have also perused the record. The learned counsel for the respondents has echoed the reasoning given by the trial court. In addition, he has also argued that the conditions stipulated in section 33 serial 11 of column 1 of the Sales Tax Act, 1990 have not been fulfilled.

6. We will first address the reasons given by the learned trial court in support of its dismissal order.

7. The allegation against the respondents is that that the firm they are partners in, namely Eksha Industries Karachi was registered under the sales tax legislation on 8.2.2001 as manufacturer of plastic products. From April 2009 onwards the firm was allegedly not operational but yet continued to claim sales tax refunds against zero rated supplies when in fact no production was being effected. The alleged acts of the respondents caused a loss of Rs. 215.729 million to the national exchequer and unlawful gains to themselves. Section 9 of the NAO and in particular clause (iv) of the said section provides that a person is said to commit or to have committed the offence of corruption and corrupt practices *"if he by corrupt, dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse or dependents or any other person, any property, valuable thing, or pecuniary advantage;"* Upon a tentative assessment of the allegations against the respondents it seems that by claiming fake sales tax refunds they have sought pecuniary advantages for themselves and hence their acts fall within the domain of the NAO, 1999. We are therefore unable to agree with the reason given by the learned trial court that the alleged offence does not fall within the NAO, 1999.

8. The lead paragraph of section 9(a) of the NAO 1999 states as follows:

*“A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices....”*

9. It is clear from the above that the NAO 1999 will apply to not only holders of public office but also any other person who is alleged to have committed the acts as stipulated in the succeeding clauses of section 9. The learned trial court’s observation that section 9 will only apply to cases where a holder of public office is an accused and an ordinary person will only fall within its ambit if he aids and abets a public office holder appears to be misconceived. This issue had already been decided by the Hon’ble Supreme Court of Pakistan in **Abdul Aziz Memon vs The State (PLD 2013 SC 594)** in which it was held: *“For what has been discussed above we hold and declare that the provisions of the National Accountability Ordinance, 1999 are applicable even to a person who is not holder of a public office and also to a person who has not aided, assisted, abetted, attempted or acted in conspiracy with holder of a public office and the words “any other person” appearing in section 9(a) of the said Ordinance are to be understood and applied accordingly. For removal of any doubt or ambiguity it is clarified that a standalone private person can be proceeded against under the said Ordinance if the other conditions mentioned in that Ordinance in that respect are satisfied.”* Perhaps this judgment of the Hon’ble Supreme Court was not brought to the attention of the learned trial Judge.

10. The third reason given by the learned trial court that the customs law is a special law and hence will take precedence over NAO 1999 appears to be completely misconceived. For starters the respondents were not being tried under the customs legislation but the sales tax legislation and secondly, the NAO 1999 itself is a special law, section 3 of which provides that NAO 1999 will apply notwithstanding anything contained in any other law. Conflict of laws also does not arise as the Sales Tax legislation came into being in 1990 whereas the NAO in the year 1999. In view of the foregoing, the learned counsel’s argument that section 33 condition of the Sales Tax Act 1990 were not fulfilled also holds no weight.

11. For the above reasons, we set aside the impugned order and further direct that Special Case No. 121 of 2012 arising out of F.I.R. No. 4 of 2012 be immediately transferred to an Accountability Court. Let a copy of this order also be placed in the file of Special Criminal Miscellaneous Application No. 201 of 2017 in which the respondents herein have prayed that they be acquitted in F.I.R. No. 4 of 2012.

JUDGE

CHIEF JUSTICE