

**IN THE HIGH COURT OF SINDH AT KARACHI**

Present:  
Mr. Justice Muhammad Shafi Siddiqui  
Mr. Justice Salahuddin Panhwar  
Mr. Justice Yousuf Ali Sayeed

Cr. Accountability Acquittal Appeal No.06 of 2007

State  
Versus  
Ahsan Baseer Sheikh & others

Date of Hearing: 11.03.2024

Appellant/NAB: Through M/s. Nadeem Ali Yousufzai and Manzoor Alam Khan, Special Prosecutors NAB.

Petitioners in C.P. No.D- 32/2011 and 591/2012: Through Malik Naeem Iqbal Advocate.

Petitioner in C.P. No.D- 686/2012: Through Mr. Shahzad Nizam Advocate.

Applicant/objector: Through Mr. Muhammad Sohail Hassan Advocate.

Amicus Curiae on Court notice: Mr. Amir Raza Naqvi Advocate/Amicus Curiae.

**J U D G M E N T**

**Muhammad Shafi Siddiqui, J.-**

**F A C T S**

1. Somewhere in the month of May 2003 on account of fraud and embezzlement in the Katchehri Post Office, an FIR No.35 of 2003 was registered at police station City Court Karachi; followed by another FIR No.3/2003; also registered per record, against accused Izhar Hussain Siddiqui under sections 409, 420, 468, 477-A PPC read with Section 5(2) Act II, 1947<sup>1</sup>. During the investigation, the case pending in Special Court Anti-Corruption No.1 Karachi was transferred to Accountability Court in terms of Section 16(a) of National Accountability Ordinance, 1999 on

<sup>1</sup> Prevention of Corruption Act, 1947

20.08.2003 which was numbered as Reference No.25/2003. The nominated accused persons were then sent up for trial including one Muhammad Hussain son of Altaf Hussain.

2. Nine points were framed by the Accountability Court No.1 in the aforesaid Reference No.25 of 2003 to be determined, relevant ones for the current issue being 8 and 9<sup>2</sup>. During trial Muhammad Hussain expired. Mst. Yasmin, his widow, examined herself and claimed the properties left by deceased Muhammad Hussain as being inherited by herself and her children. It is her case, as recorded by the trial Court while discussing points No.7 and 8, that the I/O called her husband in the office, maltreated him and forced him to deliver all original documents of movable and immovable properties, upon which he had delivered all original documents of the properties. She also claimed to have been summoned by the I/O in the NAB office for a forced plea bargain in the sum of Rs.2 Crores, which was not materialized, per record. The application of plea bargain was not accepted during the life time of the deceased accused Muhammad Hussain.

3. It was case of the Special Prosecutor for NAB before trial Court that since deceased and his wife had entered into a plea bargain, therefore, the properties may be confiscated as the same appear in the challan and have been purchased from the embezzled amount. The stance was denied by Mr. Ali Ahmed Junejo, counsel for the claimant Yasmin Hussain wife of deceased (accused) Muhammad Hussain. The Accountability Court while agreeing with Mr. Ali Ahmed Junejo Advocate, held that the properties left by the deceased accused Muhammad Hussain cannot be made subject matter of the proceedings as the proceedings stand abated vide order dated 22.06.2004. Such order

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<sup>2</sup> Relevant Points No.8 and 9

8. What is the effect of application for plea-bargain made by deceased accused Muhammad Hussain during his life time and the application made by Mst. Yasmeen after the death of her husband deceased accused Muhammad Hussain?
9. What offence, if any, has been committed by the accused?

of the Accountability Court is relevant and hence reproduced for the convenience:

*“Perused the statement of CW-1 Ashraf Ali, Superintendent, Central Prison, Karachi and documents furnished by him, comprising of death certificate issued by Civil Hospital, Karachi, regarding the death of accused Muhammad Hussain, who was facing trial in Reference No.25/2003, U/s: 9/10 of NA Ordinance, 1999.*

*It transpired that UTP Muhammad Hussain had expired on 18.6.2004, as such above proceedings, pending against him stands abated.”*

4. The Accountability Court held that the Special Prosecutor’s contention with regard to confiscation of the properties carries no weight as the proceedings against deceased Muhammad Hussain were abated due to his death and there could be no proceedings against a dead person and if any order is passed against dead person it is a nullity in the eye of law. Points No.7 and 8 were decided accordingly.

5. In the conclusion, the Accountability Court held that so far as Points No.7 and 8 are concerned since accused Muhammad Hussain expired, proceedings of Reference against him have been abated, therefore, no proceedings can be taken against a deceased person with regard to his properties.

6. Aggrieved of such overall findings, as detailed above, and as some of the other accused persons were acquitted, Criminal Accountability Acquittal Appeal No.6 of 2007 was filed. On 21.01.2009 this Court ordered that before proceeding further the Deputy Prosecutor General be called to show as to how the properties of a person can be confiscated without finding him guilty as confiscation is a kind of punishment recognized under section 10 of National Accountability Ordinance, 1999 (as being prosecuted thereunder up until then), which may be imposed only on a person found guilty. On the same day i.e. 21.01.2009 a Misc. application bearing CMA No.4964/2008 was filed by

Sohbat Khan and Mirza Khurshid Alam for joining them as parties to enable them to show that Muhammad Hussain was only ostensible owner and the property/properties were actually purchased from the funds of the lucky committee. They had also separately filed CP No.D-2199 of 2007 for the same relief.

7. On 03.02.2009 learned Division Bench observed that Muhammad Hussain son of Altaf Hussain who was facing trial of misappropriation and embezzlement, died during the trial and proceedings against him were abated. The other co-accused who were facing the same charges were acquitted by the trial Court i.e. Accountability Court No.1 by judgment dated 28.02.2007. The respective stands of the legal heirs of Muhammad Hussain and the other set of claimants of properties i.e. Sohbat Khan and Mirza Khurshid Alam by virtue of application, referred above, was also taken into consideration on the same date i.e. 03.02.2009.

8. DPG Nab, as disclosed in the order, frankly conceded that on the death of the accused criminal liability cannot be transferred to his legal heirs and the confiscation of property, which is a kind of punishment provided in Section 10 of National Accountability Ordinance, 1999, can be made only on the conviction of an accused and a person cannot be convicted or punished after his death and that abatement is not a punishment, hence no confiscation.

9. On the above understanding of law, as conceived by the learned Division Bench, the DPG NAB did not press the prayer regarding confiscation of the properties of deceased Muhammad Hussain which devolved amongst his legal heirs and the acquittal appeal was partly dismissed to the extent of such prayer. The findings of the trial Court regarding claim of Sohbat Khan and Mirza Khurshid Alam was also held to be beyond the jurisdiction of the trial Court. The appeal was ordered to

be proceeded only against the remaining respondents to which this Bench is not concerned.

10. This could have ended the controversy as far as conviction of Muhammad Hussain and the confiscation of properties are concerned, as conceded, however, the legal heirs of Muhammad Hussain then moved an application (M.A. No.963/2009) for return of documents deposited by the deceased Muhammad Hussain. This application was taken up on 20.05.2009. The “subsequent Bench” that heard the application then took a view that when there were allegations against accused that embezzled amount was used in acquiring certain properties, accumulated/ retained by him illegally and Reference has been filed, its adjudication was necessary and if the accused person died during pendency of Reference or a criminal case then expiry/death of said accused does not automatically put an end to it. The process of forfeiture/confiscation of properties acquired from embezzled money based on principle called “non-conviction based forfeiture of properties” which are subject matter of Reference having nexus with embezzled money; nor his death during the proceedings will entitle his legal heirs to get a clean title of the properties, which are subject matter of the reference. The subsequent learned Division Bench then took following view:-

*“We further observe that normally criminal cases and appeals abate after the expiry of an accused but this abatement can affect the case to the extent of the punishment, provided under the sections of law involved in the FIR and the case to that extent will abate but as far as the property, which has also been made a subject matter of reference or the FIR with the allegations of embezzlement, fraud, cheating etc. cannot ipso facto be cleared from the allegations and will not vest clear title on the deceased accused, therefore, his legal heirs too could not be in position to claim the same until the allegation in respect to the property is being disproved. The abatement, after expiry of an accused, can only be in respect to his personal corporeal would be punishments*

*but not in respect to the properties, as such, the properties, which are made subject of the reference to involve an accused person in a criminal case or a reference etc. cannot automatically be taken out of the allegations and their status and title is to be considered by the court even after the death of an accused person. Under the reference of NAB, the properties, which are made subject matter of a reference are normally considered public property until vice-versa held by proper adjudication, therefore, death of an accused cannot do that job.*

***We find that our above observation is conflicting with the observation recorded on 03.02.2009 in this appeal by another Bench, therefore, this matter may be referred to the Hon'ble Chief Justice for constitution of a Larger Bench to answer the following question:-***

***“Whether the properties which are subject matter of a reference or a criminal case and allegedly left by a deceased accused can be inherited by his L.Rs only on the basis of abatement of the criminal proceedings or the title of the properties and its acquisition as well entitlement require due investigation and adjudication.”***

***Office to make a reference to the Hon'ble Chief Justice accordingly.”***

11. In view of two orders i.e. 03.02.2009 and 20.05.2009 the matter was then referred to this larger Bench and consequently on the last date i.e. 11.03.2024 we heard learned counsel for parties as well as amicus curiae Mr. Amir Raza Naqvi who kept us conscious about the question framed as we perused record.

### **FINDINGS**

12. As far as instant appeal is concerned, the question under the circumstances of the case in all fairness never arose, as it was conceded by DPG during pendency of appeal and consequently the order dated 03.02.2009 formed a cut and dried decision in instant appeal, as never challenged. The accused Muhammad Hussain tried under National Accountability Ordinance, 1999 which provide punishment only after

conviction and abatement is not conviction. The question posed however is irrespective of conviction.

13. The question in general is of extreme importance referred by Hon'ble Chief Justice to this larger Bench and thus required consideration and answer as this Bench found itself under such obligation. The question does not refer to NAB law or has restricted the forfeiture issue only under NAB law where under the accused was tried.

14. Taking example of the facts of the case in hand (only for the purpose of reaching an answer to the question), it is not in dispute that accused Muhammad Hussain expired when the trial was being conducted and his trial for conviction was not taken to its logical end i.e. either conviction or acquittal. The FIRs which culminated into Reference, has two offshoots; firstly that one of the accused persons namely Muhammad Hussain has embezzled the accounts of "Katchehri Post office" and the other, which is related to question posed to us is that out of the embezzled amount he allegedly acquired the properties and hence available either for confiscation or otherwise, as an independent issue. It is an attempt by prosecution to create lien over property/properties acquired through embezzled money.

15. A simple answer to the above question is that there may not be an automatic end to the confiscation/forfeiture of property/properties on the death of accused. NAB Ordinance may however have some restrictions in terms of Section 10 as punishment is only followed by conviction, however the object of forfeiture on the count of such accusation is not abated in presence of other available law such as Anti-Money Laundering Act, 2010. In fact the original FIR lodged under the Prevention of Corruption Act, 1947 does provide an independent determination of disproportionate wealth accumulated through known sources of income. In the cases involving embezzlement of funds, which

constitute crime proceeds, it is often seen that accused and/or culprits do not keep the crime proceeds as it is but they re-appropriate it in different forms, which may be moveable and/or immovable properties or at times these proceeds form valuable assets beyond jurisdiction. Prosecution and investigating agency thus has two-fold job such as in the instant case i.e. conviction of the accused in respect of accusation and charges leveled against him and the other is to trace the embezzled money and/or properties acquired therefrom. (It is to be kept in mind that case was originally tried by Special Court under Act of 1947, which later on was transferred to NAB Court). As ill luck would have it, the accused passed away (in the instant case) and the prosecution found itself helpless insofar as establishing charges to convict the accused under NAB Ordinance and hence they conceded. However the other limb of the Reference cannot be ignored or brushed aside just on the count that since accused has expired or not traceable or is a fugitive, etc. Thus, the other part of investigative process would not come to an end and legal heirs could not get away with all embezzled money and/or properties with a clear title on the principles of legally acquired properties. Had it been a case of acquittal on merit, the forfeiture cannot be conceived but where the proceedings were abated for any reason such as death, accused not traceable or fugitive etc. it does not become a case of honourable acquittal. However, it all depends under which law accused is being tried, which provides independent process of forfeiture on account of referred accusation. However, the case here is slightly different as to how the legal heirs of accused (deceased) have acquired the property. The prosecution may, notwithstanding the demise of the accused or unavailability could have proved “independently” the charges by tracing the missing links of crime money and undoubtedly it is State who has to discharge this burden without any shadow of doubt and the burden no doubt is heavier than before.



16. Section 10 of National Accountability Ordinance, 1999 deals with two juristic offshoots. The initial part of it deals with the holder of public office, or any other person who commits the offence of corruption and corrupt practices who shall be punishable with rigorous imprisonment for a term which may extend to 14 years and with fine. The other limb of this section deals with the assets and pecuniary resources of such holder of public office or person who are found to be in disproportionate wealth to the known sources of his/her income or which are acquired by money obtained through corruption and corrupt practices, whether in his name or in the name of any of his/her dependents, or benamidars, liable to be forfeited. Object being two fold (i) conviction having a set of evidence beyond reasonable doubt and (ii) forfeiture based on standard of probabilities under normal jurisprudence.

17. As seen, the second limb of Section 10 of National Accountability Ordinance, 1999 however is dependent on the first limb. So under National Accountability Ordinance, 1999 forfeiture is dependent on conviction hence provide fetters for prosecution under NAB Ordinance only. However, this is not the end for prosecution/State, as the object of tracing money can be toed under any other law available such as Anti-Money Laundering Act, 2010.

18. For prosecution/State to press upon the confiscation of the properties, subject matter of the criminal case, it is for them to provide the missing links for acquiring properties and/or valuables by tracing the crime proceeds and take matter of confiscation to its logical end against the legal heirs now.

19. In situations where the accused, for one reason or the other, is not available, the non-conviction based (NCB) assets forfeiture has emerged internationally as an alternate confiscation tool, which is also

endorsed by United Nations Convention Against Corruption (UNCAC), Financial Action Task Force (FATF), Organization for Economic Cooperation and Development (OECD), E.U and many others. These conventions have been implemented via appropriate legislations in many developed and developing countries however we find ourselves far behind.

20. The magnitude of evidence required for the conviction is on very higher pedestal as compared to non-conviction based forfeiture, which requires separate evidentiary threshold to demonstrate that particular assets have an illicit origin or illicit financial flow. Illicit financial flows refer to movement of money that is illegal in its source. In such a situation where the accused are not available, dead, missing, unknown, immune etc. the burden of proof may however be on the side of prosecution than in a situation where those accused persons have surrendered themselves to the Court and have to show means to acquire such properties. Once the stolen funds whether public or private (entrusted to State), like one here, have been transferred or transformed into another, they are extremely difficult to be traced. The two objects have now emerged as dependent on separate set of evidence which may have common links.

21. In order to overcome such puzzles the United Nations has brought a convention against corruption (UNCAC) and the fundamentals of the said Convention was/is the return of assets to whom it belongs. Criminal forfeiture is an in personam order i.e. an action against a person that requires criminal trial followed by his/her conviction. Criminal conviction means that the prosecution must first establish guilt (beyond reasonable doubt) or such that the Judge is “intimately convinced”. Criminal forfeiture systems can be object based which means that the

prosecuting authority must prove that the assets in question are proceeds or instrumentalities of the crime.

22. In above given situation non-conviction based assets forfeiture is possible because it is an in rem action against the property and not personem and consequently abatement of trial for conviction does not play role in abatement of forfeiture in general. The concept is based on the notion that if a “thing” offends the law, it may be forfeited to the State or for those who ought to have derived benefit there from.

23. We observed above that Act of 1947 ibid does provide independent process of tracing disproportionate wealth to known source of income; we now see how far Anti-Money Laundering Act, 2010 could have helped the object of tracing ill-gotten money despite non-conviction of accused. Anti-Money Laundering Act, 2010 provides for prevention of money laundering and forfeiture of property derived from or involved in money laundering. The Court under Anti-Money Laundering Act, 2010 is specified under Section 20 i.e. Sessions Court established under Code of Criminal Procedure and NAB along with FIA are shown as investigating or prosecuting agency for the “purposes” described therein, which include attachment and forfeiture of properties acquired through embezzled money. Section 2(xxvi) and 2(xxviii) describe predicate offence, specified in Schedule-1 to Anti-Money Laundering Act, 2010, and proceeds of crime which also means any property derived or obtained directly or indirectly by any person from the commission of a predicate offence and covers the crime proceeds of instant case. More importantly Section 2(xxxi) also describes the property involved, derived of such proceeds, notwithstanding its current holder. For the purposes of Anti-Money Laundering Act, 2010 it is enough under section 3 if a person possesses it with a belief that such property is proceeds of crime. Again the belief of the holder is immaterial for the prosecution to proceed

thereunder as the person may have been holding it without such belief however it would be discovered later being matter of trial. Such offence or offences are punishable under section 4 of the ibid Act of 2010. Pre-conviction of any accused is immaterial for a trial under Anti-Money Laundering Act, 2010. It would be against the person holding such property/properties.

24. So if someone holding embezzled or ill-gotten money, NAB Ordinance is not the only law which can toe the object of tracing money embezzled; the Anti-Money Laundering Act, 2010 would come to rescue the investigating agencies if the NAB Ordinance has some restrictions and have not been tuned by legislature to the above discussed requirements.

25. With the above understanding of law the question is answered accordingly as above and summarized below, whereas in the instant case, the conclusion was reached on 03.02.2009 when Deputy Prosecutor General NAB conceded and did not press forfeiture and no appeal preferred and hence forfeiture in this case alone is not possible. The question however is answered as under:-

**Question:** Whether the properties which are subject matter of a reference or a criminal case and allegedly left by a deceased accused can be inherited by his L.Rs only on the basis of abatement of the criminal proceedings or the title of the properties and its acquisition as well entitlement require due investigation and adjudication?

**Answer:** Under the given circumstances, the properties left by deceased can be inherited by the legal heirs however, it shall be subject to any proceedings as may competently be brought/undertaken by the State for forfeiture/confiscation within the framework of the relevant law (as discussed) as abatement alone will not restrict such actions.

26. Before parting we may observe that since this question is answered accordingly in the Criminal Accountability Appeal/Reference, as above, the petitions tagged with this appeal be placed before the Court as per roster for its disposal in accordance with law.

27. In the end we are thankful to Mr. Aamir Raza Naqvi Advocate, who was appointed as amicus curiae, for providing valuable assistance in the matter.

Dated: 27.04.2024

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