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IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

Contempt Application No.10280/2016 in
C.P. No.D-7769 of 2015

Ms. Ayyan Ali

V.

Arif Ahmed Khan & others

Date of hearing:	24.05.2016
Date of order:	02.06.2016.
Applicant/petitioner:	Through Sardar Muhammad Latif Khan Khosa advocate
Contemnors:	Through Mr. Salman Talibuddin, Additional Attorney General for Pakistan.

ORDER

Mohammed Karim Khan Agha, J.- By this order, we intend to dispose of this application under Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 read with Section 3-4 of the Contempt of Court Ordinance, 2003 filed by the petitioner for initiating contempt of court proceeding against the respondents primarily on the grounds of their defiance of the Judgments/orders of this Court and the Hon'ble Supreme Court.

2. The relevant facts for the disposal of this contempt application are that the petitioner whose name was placed on the exit control list (ECL) by the Government of Pakistan Ministry of Interior/respondent No.1 vide memorandum dated 20-11-2015, challenged the same through C.P. No.D-7769/2015 before this Court which vide judgment dated 07-03-2016 was pleased to set-aside and strike down the said memorandum as being passed without lawful authority and therefore being of no legal effect.

3. The said judgment of this Court was challenged before the Hon'ble Supreme Court of Pakistan by the Federation of Pakistan through Model Custom Collectorate Islamabad and others. Both the petitions were dismissed by the Hon'ble Supreme Court vide judgment/order dated 13.04.2016 and the aforesaid Judgment of this Court was upheld.

4. The petitioner through her attorney dispatched the Judgment of this Court as well as the order of the Hon'ble Supreme Court to respondent No.1 and requested it to comply with the same i.e. remove the name of the petitioner from the ECL. It seems that respondent No.1 paid no heed to the request of the petitioner and her name remained on the ECL despite her attorney continuing to follow up on the issue of her removal from the ECL pursuant to the aforementioned Court orders. The petitioner however received no reply from the respondent No.1.

5. The petitioner being a model/actress/singer by profession needed urgently to travel abroad in order to fulfill her contractual obligations especially as she was under peril/threat of being sued if she failed to perform one of her contractual agreements for around $10Million. Respondents No.1 and 6 (FBR) were aware of the petitioners pressing contractual engagements and the possibility of her being sued if she failed to comply with them as this was brought to the attention of the respondents during their appeal before the Hon'ble Supreme Court against the judgment of this Court.

6. Accordingly in order to meet her contractual obligations in Dubai the petitioner booked her flight for Dubai via PIA for 15.04.2016, however, she was not issued a boarding card because her name was still on the ECL despite the judgment of this Court and the Hon'ble Supreme Court which in effect had ordered the removal of her name from the ECL by respondent No.1.

7. The petitioner again booked her flight for Dubai on 20-04-2016 and obtained confirmed Air travel ticket for Dubai via PIA Flight No.EK 603 dated 20-04-2016 and reached Jinnah Airport departure terminal at 22.30 where the FIA officials did not allow her to leave the country because apparently they were following the orders of their superiors in this respect despite the petitioner having with her the relevant Court orders for removal of her name from the ECL.

8. The petitioner was of the view that the respondents have twice committed the grossest contempt of Court by on two occasions blatantly violating the Judgments/orders of both this Court and the Hon'ble Supreme Court by not removing her name from the ECL and allowing her to travel abroad in order to pursue

her profession and avoid being sued for breach of contract and as such filed an application for contempt of Court against the respondents before the Hon'ble Supreme Court which by order dated 25-04-2016 held as under at Para 3;

> "3. Since the original judgment was passed by the High Court, we would not like to entertain this petition simply because the judgment of the High Court merged into that of this Court. If such arguments is accepted, then we don't think this Court would be able to do any work other than to deal with the criminal original applications of this type as in almost every second case, this Court upholds the Judgments or orders of the High Courts. This is what we held in the case of Mian Zamir Ahmed Vs. Ismail decd. Thr. LRs and others (Criminal Original Petition No.15 of 2016 in Civil Petition No.322-K of 2014 decided on 21.4.2016). This petition is also disposed of accordingly. **The petitioner may if so advised, approach the High Court in this behalf. In view of the circumstances of the case it would be appreciated if the petition of the petitioner before the High Court is disposed of as expeditiously as possible preferably within ten days.**" (bold added)

9. Hence this contempt application filed by the petitioner before this Court against the respondents for violating this Courts and the Supreme Courts aforesaid Judgments/orders.

10. Learned counsel for the petitioner submitted that both the Judgment of this Court and that of the Supreme Court had been violated and in particular pointed to Para's 60, 68, 74, 78, and 93 of the Judgment of this Court. Furthermore as the petitioner had malafidely been prevented from leaving the Country by respondent No.1's refusal to remove her name from the ECL in defiance of both this Court and the Hon'ble Supreme Courts order to respondent No.1 to remove her name from the ECL the respondent No.1 had committed contempt of Court which had also seriously damaged her career and opened her up to contractual liabilities.

11. According to learned counsel for the petitioner there is a concerted and malafide campaign by the respondent No1 and the Respondent No.6 (FBR) to prevent her leaving the Country at any cost for ulterior motives.

12. In support of his contention learned counsel for the petitioner averted to the above narrated facts and the train of events as under:

(a) That the train of illegal and maliciously motivated orders and persecutory acts have continued unabated against the petitioner since mid March 2015. That even the complaint filed by respondent No.6 for the petitioners involvement in money laundering under the Anti-Money Laundering Act 2010 (AMLA) was dismissed by the Special Judge Customs Rawalpindi vide order dated 30.03.2016 thereby erasing and knocking out the very basis of the ECL order which in any event had already been set aside by this Court which judgment had been upheld by the Hon'ble Supreme Court.

(b) That the petitioner has been discriminated against and in this connection cited the example of Gen® Pervaiz Musharaf who was allowed to leave the country the very next day after the Judgment announced by the Hon'ble Supreme Court whereby it was held by the Hon'ble Supreme Court that the Federal Government or the trial court may regulate his movement while in the case of the petitioner there is no such observation and the trial court, this court and Hon'ble Supreme Court have ruled that no restriction can be placed on the freedom of movement of the petitioner. Such discrimination of the fundamental rights of the petitioner guaranteed by the Article 25 of the Constitution of Pakistan is repellant to common sense and abhorrent to conscience. Needless to say that the petitioner has been put to unimaginable sufferance since over a year due to incarceration, mental torture, financial losses and a vicious propaganda campaign against her which has jeopardized her profession and livelihood which is tantamount to the ruination of her life.

(c) That the petitioner was twice deliberately prevented from leaving Pakistan on two occasions in violation of the orders of this Court and the Supreme Court and on the second occasion according to the petitioner on 20-04-2016 when she reached Jinnah Airport departure terminal at 22.30 in order to board her flight the FIA officials in large number under order of DG FIA H.Q. Islamabad and a contingent of Customs Officials on command of the Collector Customs adjudication Islamabad blocked her entry into the departure lounge. She was accompanied by her lawyer and orders of the August Supreme Court and other orders of this court and Customs Court besides the order dated 18.04.2016 removing her name from ECL which were shown to them but they said that they were under orders of their superiors not to allow the petitioner to board the plane and go abroad and that they were not bound by court orders.

(d) According to the petitioner the respondent No.1 after removing her name by way of sham compliance of the Supreme Court order a few hours later again placed her name on the ECL on the request of respondent No.6 (FBR)

(e) That the petitioner belatedly received through post a letter dated 19-04-2016 from the respondent conveying to her that her name had been placed on the ECL on account of personal liability to pay an amount of Rs.52,960,600/- as adjudicated liability upon request of FBR vide their letter.

(f) An ex-party order was fraudulently obtained from the Collector Customs (respondent carrying 3 dates viz. 3.03.2016, 01.04.2016 and 04.04.2016) wherein the petitioners own money U.S. $ 506800=Rs. 52960600/- was confiscated and equivalent amount was imposed as penalty. Muhammad Awais and Mumtaz Hussain were penalized 5 Lacs each notwithstanding judgment of division bench of the Lahore High Court Lahore Ralwalpindi Bench dated 08.09.2015 rendered in ICA 101/2015.

(g) That the petitioner having come to know of the order of the Collector Customs filed Appeal No.46/2016 before the Appellate Tribunal Customs constituted u/s 194 of Customs Act 1969. Likewise Muhammad Awais too separately challenged the Ex-party order. Both appeals are pending adjudication and awaiting hearing due to absence of Chairman and Member of the Tribunal.

(h) Since the appellant tribunal was non functional the petitioner filed WP NO.1106/2016 before Lahore High Court Lahore Rawalpindi Bench and the Hon'ble court while issuing notice to the respondents was pleased to suspend the impugned order/Notice and identical orders were passed in the case of Muhammad Hafeez and additionally the learned Division Bench was further pleased to issue contempt notice to collector customs.

13. Learned counsel submitted that the above mentioned conduct of the respondents No.1 and 6 (FBR) through their acts and orders were tantamount to over reaching the court orders, rendering them subservient and nullifying them through dubious and devious orders.

14. He further submitted that the latest order of respondent No.1 placing the name of the petitioner on the ECL on the request of respondent No.6 (FBR) does not fall within the rule criteria and parameter of ECL policy as adjudged and unequivocally determined by this Court and Hon'ble Supreme Court of Pakistan and as such the second order placing the petitioner on the ECL was not sustainable.

15. He also contended that the illegally swelled tax demands and the collector customs ex-party adjudication are all under challenge by the petitioner and stand judicially rejected and that the petitioners life and liberty have been endangered as can be evidenced from the reign of terror let loose by the bureaucracy sheepishly and tamely dancing to the tunes of the government/ministry.

16. He lastly contended that the extreme malafide acts of the respondent No.1 and 6 (FBR) was tantamount to over reaching the order of this court and August Supreme Court and the whole judicial system stands ridiculed. The respondents have compounded the contempt, magnified and glorified their authority and rendered rule of law completely subservient to their whims. The acts and order dated 19.04.2016 passed by the respondent on the advice of respondent NO.6(FBR) is without application of mind, the suspended ex-party order of the Collector Customs adjudication in which an appeal had been filed and respondent No.6 (FBR) notice to pay penalty within 7 days is unconscionable. The order in any case having been injuncted and aborted in the presence of the standing counsel of the Federation could not be made the basis of placing the name of the petitioner on the ECL yet again. The order is thus per in curium, non-est, and non-existent in the eyes of law.

17. On the other hand the learned Additional Attorney General for Pakistan (AAGP) denied that there was any malafide acts on the part of the respondents in placing the name of the petitioner on the ECL who had acted strictly in accordance with the law. Furthermore and more importantly he submitted that the contempt application was not sustainable. This was because the respondent had complied with the Judgment of this Court as upheld by the Hon'ble Supreme Court by removing the name of the petitioner from the ECL by withdrawing memorandum dated 20-11-15 which was struck down by this Court and was the subject matter of the Judgment. Hence both the Judgment of this Court and the Hon'ble Supreme Court had been complied with. The petitioner was now on the ECL by virtue of a new memorandum which was not the subject matter of this Courts judgment and the Supreme Courts order.

18. We have considered the submissions of learned counsel on behalf of both parties and minutely examined the record.

19. We have observed that the Prayer of the petitioner in her application reads as under:

PRAYER

It is therefore respectfully prayed that the Respondents may be directed to remove the name of the petitioner from ECL in the execution and implementation of the order of this

Hon'ble Court dated 07.03.2016 passed in CP No.7769/2015 as confirmed by the Hon'ble Supreme Court of Pakistan vide judgment/order dated 13.04.2016 in CP No.896/2016. It is further prayed that the respondents having obstructed, ridiculed violated, defied and eroded the categorical mandate issued by this Hon'ble Court and the Hon'ble Supreme Court quashing the orders dated 20.11.2015 placing the name of petitioner on ECL may be punished for committing grossest contempt of this Hon'ble Court and the Hon'ble Supreme Court of Pakistan. **It is also prayed the maliciously, mischievous order dated 19.04.2016 being a scandalous attempt to nullify the orders of the Hon'ble Court and Hon'ble Supreme Court and being per in curium, non-est and no orders in law be annulled and respondents be punished u/s 476 Cr.PC and personally saddled with heavy cost.**" (bold added)

20. At the outset we would therefore make it clear that whilst deciding this matter in our view the application concerns both the memorandum dated 20-11-15 (the first memo) which was struck down by this Court and which judgment was upheld by the Hon'ble Supreme Court and the memorandum dated 19-4-2016 (the second memo).

21. In our view in order to reach a just decision and do complete justice in this case we need to take into consideration the history of this case and its current position.

22. This matter first came before this Court when the petitioner challenged the first memo. During oral arguments the learned counsel for the petitioner submitted that the actions of the respondents were based on malafide which in his view was evident from the chronology of events leading up to the petition where by the petitioner was in effect being hounded and victimized by the respondent No.1 and 6 (FBR). When we passed our judgment dated 7-3-2016 we attempted to deal with the petition in an elaborate manner by touching upon most points which had been raised including various applicable Articles of the Constitution. With respect to malafide we stated as under at Para's 86 and 87 of the Judgment:

Malafides

86. Although we have not addressed the question of malafides in any detail as put forward by the learned counsel for the Petitioner, we observe that the Federal Board of Revenue/Customs Authorities appear now to be keen to press for a case of money laundering against the Petitioner. The reason to us seems

> apparent. Namely, that money laundering is covered under para 3 of the policy referred to above and would entitle the Ministry of Interior to place the Petitioners name on the ECL if satisfied with the reasoning of any such recommendation.
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> 87. **Since almost a year has elapsed since the FIR and facts of the case came to light and no case has so far been registered against the Petitioner for money laundering we would expect that the concerned authorities act in a bona fide manner strictly in accordance with the law and in particular the Constitution in this respect.** (bold added)

23. We note that our concern proved correct and the respondents did immediately move an application against the petitioner for money laundering which was dismissed on 30-3-16 by the relevant Court. This was done in our view primarily to defeat the Judgment of this Court.

24. We also recall that as a matter of grace we allowed our judgment to be suspended for 10 days to allow the respondents to approach the Supreme Court in appeal. **Such concession was made in reliance on the bonafides of the respondents and them approaching this Court with clean hands.** Unfortunately as will be illustrated later in this judgment by the acts and conduct of the respondent No.1 and 6 (FBR) this was a misconceived assumption on our part

25. In our judgment we had also touched upon Articles 2(A), 4,5,9, 10(A), 14, 15, 18 and 25 of the Constitution largely for the purpose as explained in para 43 of our judgment in the following terms:

> "43. The primary purpose of briefly dwelling on the above Constitutional provisions is to emphasize the importance of those Articles in a citizen's life **and the need for the Federal Government or any other body to act cautiously and strictly in accordance with law before making decisions which may impinge on such Articles and in particular with respect to placing a citizens name on the ECL".** (bold added)

26. In essence we were making it clear that the executive authorities could not play around with people's lives in an arbitrary/whimsical or unlawful manner since every citizen of the State had certain rights under the Constitution which could not be usurped, denied or violated by the State.

27. In terms of malafide in the case of **Chief Justice of Pakistan V President of Pakistan** (PLD 2010 SC 61) a full bench of the Hon'ble Supreme Court held as under at P.215

> "The last question requiring examination is regarding the malafide. There are different kinds of malafide, i.e. personal malice and bias, malafide in fact and malafide in law. **The action on the basis of personal malice or bias may contain the element of mala fide. The action taken in colourable exercise of power and misuse of law for an ulterior motive or extraneous consideration may be termed as malice in law and fact which is a mixed question of law and fact and is subject to proof either by way of direct or circumstantial evidence or on the basis of admitted facts. The personal malice can sufficiently be proved by the evidence brought on record whereas a presumption of malafide of fact can be raised on the basis of circumstantial evidence. In the present case we find that the personal malice and bias of the President against Chief Justice of Pakistan was floating on the surface of record as the circumstances leading to the action of President and the manner in which the reference was sent to Supreme Judicial Council would be sufficient to prove the malice of President without any further evidence and proof.**
>
> There is no cavil to the proposition that ordinarily the mala fide being a question of fact is to be proved through the evidence **but the court may taken into consideration the circumstances leading to the action and the motive behind it for determination of inferential question of malafide.**
>
> The seriousness and uniqueness of malafide action by the Head of State in performance of his constitutional duty is not to be readily or easily accomplished, therefore standard of proof of malafide of constitutional authorities of State should be high such as clear and convincing evidence which is defined as measure or degree of proof which may produce in the mind of trier of facts a firm belief or conviction as to the allegation sought to be established, it is intermediate i.e. more than a mere preponderance but not to the extent of certainty as is required beyond a reasonable doubt in criminal cases which does not mean clear and unequivocal. The standard of proof in ordinary civil cases may be insufficient to prove mala fide because of its seriousness but at the same time the standard of proof required in criminal cases beyond reasonable doubt is too high to prove mala fide, which test is used in criminal cases as the accused may be imprisoned and suffer loss of liberty. In view thereof the malafide of fact in the normal circumstances is required to be established through the positive evidence and not merely on the basis of allegations **but the personal malice of a person in official position can be examined in the context as to whether the action in official capacity was extraneous and for collateral purpose which was taken in bad faith or such an action was in good faith. The**

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colourable exercise of power in transgression to the Constitution for personal reason and interest may be an act of malafide which may exclude the element of bona fide. There can be no exception to the rule that malafide may not be attributed to a provision of law, but colourable exercise of power under such provision with an ulterior motive and personal interest may bring the action within ambit of malafide for the purpose of Judicial Review.

In the light of foregoing discussion I am of the firm view that in the facts and the circumstances of the present case, **the action of the President was the result of personal malice which was not taken in good faith, rather it was motivated for collateral purposes which is sufficiently proved on record and in consequence thereto the Supreme Court of Pakistan in exercise of its power of Judicial Review could justifiably examine the matter in its original jurisdiction and quash the reference on the ground of mala fide."** (bold added)

28. In determining the issue of malafide in this application a brief review of the chronology of events surrounding this case is both significant and relevant.

01.The first memo placing the petitioner on the ECL was dated 20-11-2015.

02.The first memo was struck down by this Court on 7-3-2016 whereby this Court indicated that there should be no malafide conduct i.e. by making a belated charge of money laundering in order to defeat the order of this Court by then bringing the case of the petitioner within the ambit of the ECL Policy.

03.After the judgment of this Court an application to charge the petitioner with money laundering was made which was dismissed by the concerned Court on 30-3-16.

04.The Hon'ble Supreme Court upheld the Judgment of this Court on 13-4-16.Notably on instructions learned AAGP has informed us that the respondent at that hearing did not bring to the attention of the Court the fact that steps were in motion to retain the petitioner on the ECL in the event that the judgment of this court was upheld on different grounds i.e. owing money to the government etc. It would therefore appear prima face that the respondent No. and 6 (FBR) was attempting to conceal matters from the Hon'ble Supreme Court

05.On 13-4-16 the respondent No.1 was aware that pursuant to Court orders the petitioners name had to be removed from the ECL since they were a party to the proceedings and they were by way of abundant caution informed by counsel acting on behalf of the petitioner (in the event the first memo was not removed until 18-4-2016 i.e. 5 days after the order of the Hon'ble Supreme

Court for reasons which will come apparent from the remainder of the chronology)

06. On 15-4-16 the petitioner attempted to leave Pakistan however she was deliberately and illegally stopped from doing so since it appears that quite deliberately the respondent No.1 not withstanding the orders of the Hon'ble Supreme Court and being in full knowledge of the same had refused to take her name off the ECL in defiance of the Supreme Courts order. The respondent No.1 was also aware of the petitioners contractual obligations which she needed to fulfill in Dubai or else be sued for millions of $US which contracts were produced before the Supreme Court. In effect this act by the respondent No.1 of not removing the name of the petitioner from the ECL in defiance of the Supreme Court's order was damaging the petitioner's livelihood. This action by respondent No.1 appears not only to be in violation of the Supreme Courts order but also in Violation of Articles 2(A), 4,5,9, 10(A), 14, 15, 18 and 25 of the Constitution which had been discussed in our judgment as mentioned earlier.

07. On 15-4-16 presumably after the respondent No.1 stopped the petitioner from leaving Pakistan respondent No.6 (FBR) wrote to the respondent No.1 asking it to place the petitioners name on the ECL on account of personal liability to pay approx RS 52M.

08. On 18-4-16 the respondent No.6 (FBR) confirmed the outstanding amount and that the petitioner in effect had insufficient assets to meet the liability.

09. After receipt of the above correspondence from the respondent No.6 (FBR) the petitioners name was taken off the ECL allegedly in compliance with the Supreme Courts order on 18-4-2016.

10. Almost immediately there after, apparently in a matter of hours according to the petitioner, the petitioners name was put back on the ECL by respondent No.1 through the second memo due to her inability to meet her personal liabilities of RS 52M and the fact that if she was allowed to leave Pakistan the money would not be recovered. The petitioner was not immediately informed about this new decision to place on her on the ECL not withstanding the directions given in our judgment at Para 91 which we will deal with later in this judgment. In essence respondent No.6 (FBR) are suggesting that the petitioner is going to abscond. Ironically according to respondent No.6 (FBR's) assessment even if the petitioner stayed in Pakistan she could still not meet her liability which she is apparently disputing through litigation. In effect respondent No.6 (FBR) is suggesting that anyone owing the Government money cannot leave the country ever until it is paid even if it is the subject of litigation in the Courts which litigation may take years to decide by the concerned forum. In our judgment we dealt with absconsion at Para's 88 and 89 in the following terms:

Absconsion.

88. The question of absconsion had weighed heavily on our minds whilst deciding this case however we were of the view that this issue should have been pursued at the time when the Petitioner sought bail and again at the time when she sought the return of her passport rather than at this stage. We note that on neither occasion did the respondents deem it appropriate to appeal these decisions all the way to the Supreme Court in respect of either the grant of bail or the return of the passport despite knowing that the object of its return was for traveling for business and to see her ailing mother. The respondents have also so far as we are aware not sought the Petitioner's cancellation of bail on the grounds that there is a serious risk of her absconding.

89. We have also in reaching our decision in light of the question of absconsion considered the potential violations of the Constitution by the Respondents as discussed above, the fact that the trial is not likely to conclude in the near future which we understand is at the very initial stages, the fact that the Petitioner has already been prevented from leaving Pakistan for approx one year and cannot be prevented indefinitely from leaving the Country whilst on bail and having not been convicted of any crimes (in this respect a number of other citizens on the ECL have been allowed to travel abroad whilst facing trial) and that her detention in Pakistan may hinder her professional career, her need to see her ailing mother (a contention which has not been rebutted) and the principles laid down in **Wajid Shamas ul Hasan's case (Supra)** where it was held at P.631 as under:

"Moreover, the petitioner has already been granted bail on 21.12.1996 in the said criminal case by order of the Sindh High Court, Karachi. The liberty of the petitioner could not be curtailed by mere registering a criminal case for which he may or may not be criminally liable. Mere registration of F.I.R. in a criminal case cannot be a ground for depriving a citizen of the exercise of all fundamental and other Constitutional rights. The registration of a criminal case has no nexus with and is extraneous to the object of the Statute. (bold added).

The Hon'ble Supreme Court in its order upholding our judgment noted as under in respect of absconsion at Para's 5 and 6.

"5. Respondent No.1, no doubt, has been charged in a case mentioned above which is still pending adjudication in the competent Court of law. But mere pendency of a criminal case cannot furnish a justification for prohibiting her movement. It has never been the case of the petitioners that the respondent is involved in any of the cases listed in Rule 2 of the Exit

from Pakistan (Control) Rules, 2010 in general or Rule 2(1)(b) in particular, inasmuch as she has not been charged to have embezzled a large government's funds or committed institutional fraud. In the absence of any such allegations, we don't think the respondent's movement could be prohibited under the Ordinance or the Rules mentioned above."

"6. The apprehension of the learned ASC for the petitioners that where the respondent has been charged for committing serious offences as mentioned above, removal of her name from ECL would amount to letting her off for good, is misconceived as despite removal of her name from ECL, her attendance could still be enforced or dispensed with by the Trial Court in conformity with the relevant provisions of the Cr.P.C."

11. In continuing the chronology, on 20-4-2016 the petitioner for the second time attempted to leave Pakistan from the Jinnah airport and was prevented from doing so by the FIA officials apparently on the orders of their superiors. The petitioner was not informed that the first memo had been removed and replaced with the second memo.

12. The petitioner then moved the Hon'ble Supreme Court for contempt of its order as she had not been allowed to leave Pakistan apparently because her name was on the ECL.This hearing took place on 25-04-16 and on instructions learned AAGP has informed us that respondent No.1 at that hearing did not bring to the attention of the Court the various letters and maneuvering by respondent No.6 (FBR) to ensure that the petitioner's name remained on the ECL and in fact the first memo had been removed and the second memo passed in its place. It would therefore appear prima face that the respondent No.1 was attempting to conceal relevant matters from the Hon'ble Supreme Court. In our view at that hearing the respondent should have candidly told the Hon'ble Supreme Court that the Judgment had been complied with and as such there was no contempt of the Supreme Courts orders and that a second memo had been passed replacing the name of the petitioner on the ECL after the removal of the first memo.

29. From the above chronology in our view it is quite apparent that respondent No.6 (FBR) and respondent No.1 were bent upon keeping the petitioner on the ECL at any cost for ulterior/extraneous reasons best known to themselves. When the first memo was struck down for not falling within the ECL policy respondent No.6 (FBR) immediately moved to put the petitioner in a money laundering case which fell within the ECL policy in order to defeat our judgment. However when this failed respondent No.6 (FBR) moved to use outstanding dues to the Government to place the petitioner's name on the ECL which as per Para 5 of the

Supreme Court order cited above may not even qualify to place the name of the petitioner on the ECL.

30. In our view the respondent No.1 deliberately and malafidely did not take the petitioners name off the ECL for 5 long days after the passing of the Hon'ble Supreme Courts order which respondent No.1 was well aware of and within that time illegally and malefidely stopped the petitioner from leaving the country to perform her professional commitments and as can be seen from the chronology the respondent No.1 kept her name on the ECL until they had in connivance with respondent No.6 (FBR) maneuvered a new reason to place her on the ECL which they hoped would come within the ECL policy.

31. Looking at the history of the case and the chronology of the events in the case it is in our view obvious to any reasonable man that this is a classic case of State functionaries using their might and power in order to bully and intimidate a citizen of this country. In our view, the only reasonable inference based on the conduct of respondent No.1 and respondent No.6 (FBR) in defying the Court orders by not removing the petitioners name from the ECL immediately and then when finally belatedly removing her name from the ECL (5 days after they had knowledge of the court orders) and then almost immediately replacing the petitioners name on the ECL was motivated by malafides for ulterior motives/extraneous considerations for reasons best know to themselves. As in the **Chief Justice of Pakistan's** case (Supra) the malafides of respondent No.1 and 6 against the petitioner was floating on the surface of the record through the circumstances which lead to the removal of the petitioners name from the ECL and the subsequent replacement of her name on the ECL within a matter of hours on account of the maneuverings of respondents 1 and 6 (FBR) and such malafide as shown from the record is sufficient material to enable us to quash/strike down the second memo on account of malafides.

32. Furthermore, in our view the conduct of respondents No.1 and 6 in keeping the name of the petitioner on the ECL in defiance of the Court orders and trying to circumvent them through devious means had the effect of undermining the judiciary and trying to defeat its orders which is not expected of such senior Government officials. We observe that throughout this saga respondent No.1

and respondent No.6 (FBR) have not appeared before this Court or dealt with the case of the petitioner with clean hands and as such we are using our inherent powers to do complete justice as a matter of equity in our Constitutional jurisdiction to the petitioner.

33. On account of the malafide conduct of respondent No.1 and 6 the petitioner finds herself in the position of a person whom an FIR is registered against and is arrested and jailed and as soon as he is bailed out of jail in respect on that FIR a new FIR is immediately registered against him and he is arrested and returned to jail with such practice continuing in a vicious circle. In the example cited above the malafide objective is to keep the accused in jail at all costs while in the instant case the malafide objective is to keep the petitioner from leaving Pakistan at all costs. Such practices undermine the public's confidence in both State institutions and its functionaries and the judiciary and are clearly an abuse of the process of law and are to be stamped out by the Courts.

34. As such on account of the malafide and discriminatory conduct of the respondent No1 and respondent No.6 (FBR) as narrated above we strike down the second memo on account of it being made on account of malafides.

35. We also find that on account of their malafide conduct as can be seen from the record read with our judgment dated 7-3-2016 the respondent No.1 and respondent No.2 (FBR) have violated the rights of the petitioner as enshrined under Article 2(A), 4, 5, 9, 10(A), 14, 15, 18 and 25 of the Constitution in replacing her name on the ECL through the second memo.

36. It would not be out of place here to briefly touch upon the issue of bias bearing in mind that the respondents are required to make their decisions fairly without showing favour or disfavour to any party and that their decisions are not motivated by extraneous considerations.

37. Although in this case the decisions/orders of the respondents are administrative in nature we are of the view that the same test, or perhaps to a lesser extent, for bias as for judges also should apply to other persons making administrative

decisions since ultimately they are makings decisions which may well adversely effect the rights of an individual and as such the public at large must not have any perception that a decision maker has any bias in making the decision since such perception would tend to undermine the confidence of the public in the decision making process.

38. In the case of **Asif Ali Zardari V The State** (PLD 2001 SC 568) the Supreme Court while discussing the question of bias in a judge observed the following:

> "At P.568. "Bias" is synonymous with "partiality", and has strictly to be distinguished from "prejudice". Under particular circumstances, bias has been described as a condition of mind; and has been held to refer, not to views entertained regarding a particular subject-matter, **but to the mental attitude or disposition toward a particular person and to cover all varieties of personal hostility or prejudice against him.**
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> **Not only is a person affected by an administrative decision entitled to have his case heard by the agency seized with its determination, but he may also insist on his case being heard by a fair Judge, one free from bias. Bias in this context has usually meant that the adjudicator must have no financial interest in the matter under dispute, but it is not necessariiy so limited and allegations of bias have been upheld in circumstances where there was no question of any financial interest.**
>
> "At P.569. **There must be circumstances from which a reasonable man would think it likely or probable that the justice, or chairman, as the case may be, would, or did, favour one side unfairly at the expense of the other. The Court will not enquire whether he did, in fact, favour one side unfairly. Suffice it that reasonable people might think he did. The reason is plain enough. Justice must be rooted in confidence; and confidence is destroyed when right-minded people go away thinking; "The judge was biased".**
>
> "At P.570. Bias is said to be of three different kinds:
>
> (a) A Judge may have a bias in the subject-matter which means that he is himself a party or has direct connection with the litigation, so as to constitute a legal interest.
>
> A 'legal interest' means that the Judge is 'in such a position that a bias must be assumed'.
>
> (b) Pecuniary interest in the cause, however slight, will disqualify the Judge, even though it is not proved that the decision has in fact been affected by reason of such interest. For this reason,

where a person having such interest sits as one of the Judges, the decision is vitiated.

(c) A Judge may have a personal bias towards a party owing to relationship and the like or he may be personally hostile to a party as a result of events happening either before or during the trial. **Whenever there is any allegation of personal bias, the question which should be satisfied is – "Is there in the mind of the litigant a reasonable apprehension that he would not get a fair trial?" The test is whether there is a 'real likelihood of prejudice', but it does not require certainty.' 'Real likelihood' is the apprehension of a reasonable man apprised of the facts and not the suspicion of fools or 'capricious person'.**

No doubt, the Judges of the superior Courts are blessed with a judicial conscience but the question nonetheless is whether a particular Judge of the Subordinate or the Superior Judiciary against whom the allegation of bias is alleged is possessed of judicial conscience. This litmus test is indeed very difficult but certainly not impossible. The circumstances of a particular case wherein bias of a Judge is alleged would themselves speak volumes for the same. In other words, the principle is well-settled that a Judge of the superior Court is a keeper of his own conscience and it is for him to decide to hear or not to hear a matter before him. **However, in the present case the Supreme Court declined to adhere to the said settled principle because bias is floating on the surface of the record."** (bold added)

39. In the above case the bias of the decision maker floating on the surface of the record was sufficient to vitiate the entire trial.

40. As in **Asif Ali Zardari's case** (Supra) after carefully examining the record we are of the view that there is bias by respondent No1 and 6(FBR) floating on the surface of the record in the case of the petitioner and her removal and subsequent replacement on the ECL. In our view a reasonable man who had studied the history of the case and the record would come to the conclusion that the petitioner was not treated fairly and was treated in a bias manner by the decision maker (i.e. the respondent No1 through its conduct) who for extraneous and ulterior motives which were best known to itself seemed to be bent upon keeping the petitioner's name on the ECL by hook or by crook at any cost by even ignoring Court orders and maneuvering matters in terms of ensuring that she remained on the ECL.

41. In our view the bias of the decision maker (respondent No.1) floating on the surface of the record is sufficient to strike down and set aside the second memo and as such we strike down and set side the second memo on the ground of bias.

42. One of the sacred roles of the Court is to uphold the Constitution and ensure that the rights of the citizens are guaranteed and protected and that those rights are not taken away or crushed by the power of State functionaries acting in a whimsical, arbitrary, illegal, malafide or bias manner. In protecting those rights it is hoped that the public's faith and confidence in the judiciary and its fair and even handed administration of justice would be enhanced.

43. As was held in **Chief Justice of Pakistan's case** (Supra) at P.66.

> "The critical indispensability of dispensation of justice in a society, be it between men and men or between the governors and the governed, could never be over-emphasized. The fact that it is justice and justice alone which could ensure peace in a society and its consequent strength, security and solidarity, was one of the serious lessons taught to the civilization by its history. And history, be it ancient, biblical, medieval or contemporary, also tells us that societies sans justice had never been permitted to pollute this planet for very long and had either to reform themselves paying heavy costs usually in blood or had else been wiped off the face of this earth. The French, the Russian, the Chinese and more recently, the Iranian revolution are some such lessons. It is perhaps for this very reason that doing of justice is conceivably the most repeated Quranic Command after 'SALAAT' and ZAKKAT'.

44. In Summary we, therefore, for the reasons discussed above,

(a) strike down/set aside the second memo dated 19-04-2016 since it is based on malafide.

(b) strike down/set aside the second memo dated 19-04-2016 since it is based on bias.

(c) strike down/set aside the second memo dated 19-04-2016 since it has been malafidely and biasly passed in violation of Articles 2 (A), 4, 5, 9, 10(A), 14, 15, 18 and 25 of the Constitution.

(d) direct respondent No.1 to immediately without any delay remove the name of the petitioner from the ECL.

(e) direct that the name of the petitioner shall not again be placed on the ECL without the prior approval of this Court.

45. **In addition** we note from the Report of MIT II dated 30-03-2016 that the directions contained in our Judgment dated 7-3-2016 have not yet been complied with/implemented despite a lapse of almost 3 months. Even today a simple check on the Ministry of Interior's website shows that the names of those on the ECL have not been placed on the website as per this Court's directions. **We therefore once again direct the Secretary Ministry of interior to comply with the directions in our aforesaid judgment and forward a compliance Report to this Court within 5 days of the date of this order failing which the secretary Ministry of Interior shall appear in person and explain his position** and thereafter the matter shall proceed in accordance with law. For ease of reference the directions contained in our aforesaid Judgment are set out below:

> "91. We direct the Ministry of Interior to comply with the directions as set out in Para's 61 and 62 of this Judgment which are set out below for ease of reference:
>
> > (a) **We hereby direct the Ministry of Interior to place on its website all those persons who are currently on the ECL and who are thereafter added to the ECL within 3 days of their addition along with details of their CNIC, address, father's name and information as to what steps may be taken by them to appeal/review such decision.** (bold added)
> >
> > (b) In addition **the Ministry of Interior is further directed** to ensure that each and every effectee within 7 days of his / her name being placed on the ECL is served with a hard copy of the Memorandum together with a speaking order as to why he / she have been placed on the ECL and the procedure for appeal / review and to ensure that any such review or appeal through a speaking order is heard with a right of personal hearing and decided within 30 days of such an appeal / review being received by the Ministry of Interior so that the right of review/appeal is meaningful and effective rather than illusionary or rendered redundant.

46. In so far as the contempt of Court application is concerned whilst showing restraint and expressing its annoyance at the attempt to circumvent its orders this Court recognizes that it does not always have the time to proceed with each and every case concerning the contempt of its orders by senior Government

functionaries and as mentioned in this case the Court in showing restraint does not intend to pursue the issue of contempt in this case any further. However it is observed that State functionaries shall implement the orders of this Court in letter and spirit (starting with the directions contained in this order) lest they open themselves up to contempt proceedings.

47. The office is directed to both facsimile and send by TCS and registered post a copy of this order immediately to the Secretary Ministry of interior for immediate compliance and MIT II shall forward a compliance Report to this Court within 6 days of the date of this order.

48. The office is directed to fix this matter before this Court on 09-06-2016 according to roster as an urgent matter so that this Court may satisfy itself that the directions made in this order have been complied with by respondent No.1 in both letter and spirit.

Dated: 02.06.2016.

Mr. Saeed A.Memon learned Standing Counsel verbally requests that since the Federation of Pakistan intends to assail the above order before the Hon'ble Supreme Court of Pakistan therefore operation of this order may be suspended for a period of 10 days from today. In the interests of justice the request is allowed and the operation of the above order is suspended for a period of seven (7) days from today.