NAB: No need to take fresh cognisance on a S. 16 (A) transfer Case

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IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Accountability Appeal No.15 of 2001
Criminal Accountability Appeal No.16 of 2001

Present:

Mr. Justice Ahmed Ali M. Sheikh, CJ
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Omar Sial.

Appellants:	Abdul Wahab son of Abdul Samad through M/s. Haq Nawaz Talpur and Mohammad Asad Ashfaque, Advocates for the Appellant in Cr. Acctt. Appeal No.15/2001
	Adil Hayat Akhter son of Mohammad Akhter Appellant in person in Cr. Acctt. Appeal No.16/2001.
Respondent:	National Accountability Bureau through M/s. K.A.Vaswani and R.D. Kalhoro Special Prosecutors, NAB
Date of hearing:	03.12.2018
Date of Order:	06.02.2019

ORDER

MOHAMMAD KARIM KHAN AGHA, J.- Abdul Wahab and Adil Hayat Akhter appellants, were tried by learned Judge, Accountability Court No.III, Karachi for offences under Sections 409 PPC r/w. Section 109 PPC S.9(a)(iii) and Sr.No.2 of schedule of offences of the NAB Ordinance, 1999 (NAO). After full-dressed trial, vide judgment dated 26.01.1997, appellants were convicted and sentenced to suffer R.I. for 07 years and to pay a fine of Rs.1,50,00,000/ (One Crore Fifty Lacs) each and in case of default in payment of fine each appellant was to undergo R.I. for 03 years more (the impugned judgment). The appellants were extended the benefit of Section 382-B, Cr.PC.

2. The appellants filed these appeals against the impugned judgment. The appellants' sentences were suspended and they were released on bail by this court vide orders dated 19-3-2003 and 21-08-2003 respectively

pending decision on their appeals. After promulgation of the National Reconciliation Ordinance 2007 (NRO) the appeals stood withdrawn however after the later striking down of the NRO by the Hon'ble Supreme court in the case of Dr. Mubashir Hassan vs. Federation of Pakistan (SBLR 2010 SC 13) these appeals were revived and the appellants' bail was restored vide orders dated 12-01-2010 and 17-08-2010 respectively pending final determination of their appeals.

3. **This larger bench has been formed pursuant to order dated 29.01.2016 since there appears to be a conflicting judgment and Order of this Court on the same point of law which needs to be resolved in order to ascertain as a preliminary matter whether the impugned judgment is maintainable or not in terms of jurisdiction of the accountability court to try cases, like the instant case,** which have been transferred to it from another court under S.16 (A) NAO without being directly referred to the accountability court by the Chairman NAB under S.18 (g) NAO in terms of cognizance under S.18 (a) NAO. In essence one Divisional Bench of this court in the case of **Abdul Sattar Dero V State** (2002 YLR 1870) found that transferred cases under S.16 (A) NAO needed to be filed as references by the Chairman NAB before the accountability court before the accountability court could take cognizance of the case whilst another Divisional Bench of this court through a later order mentioned below took the opposite view and hence the formation of this larger bench. For ease of reference order dated 29.01.2016 is set out hereunder:-

> "Mr.Rasheed A Rizvi, learned counsel for the Appellant referred to the order dated 26.11.2002 passed by this Court. Relevant paras of the order are reproduced as under:-
>
> *"In view of the above discussions, we are unable to agree with the view expressed by learned Members of the Bench in Abdul Sattar Dero v. State in Cr. Accountability Appeal No.14 of 2001 on first point as the same is against the view expressed by the apex Court in C.P. No.957-K of 2001 (Sardar Ahmed Siyal v. National Accountability Bureau), we are bound to follow the view expressed by the Supreme Court.*
>
> ***We are also unable to agree with the reasoning and the conclusion arrived by the learned Bench on second point that the Accountability Court on receipt of the cases under section 16-A, has no jurisdiction to try the same unless a reference is filed by Chairman***

National Accountability Bureau or by an Officer authorized in this regard under section 18, therefore, we refer the matter to the Chief Justice for formation of larger Bench on the principle laid down in MULTILINE ASSOCIATES V. ARDESHIR COWASJEE (PLD 1995 SC 423) for decision on second point".(bold added)

Thereafter, a larger Bench was constituted by Honorable Chief Justice and larger Bench vide order dated 26.01.2009 passed the following order:

"Learned counsel submits that applicant Abdul Wahab has been released under NRO, therefore this appeal has become infructuous.
This position is not disputed by Mr. Mohammad Aslam Butt, learned DPGA, NAB.
Disposed of accordingly".

In the case of **Dr. Mubashir Hassan vs. Federation of Pakistan** (SBLR 2010 SC 13) NRO 2007 was declared to be an instrument void ab-initio being ultra vires and violative of the various Constitutional provisions and all the cases which were disposed of under NRO were revived including the present appeal.

Mr. Rasheed A. Rizvi learned counsel for the appellant submits that again matter may be referred to the Honourable Chief Justice for formation of a larger Bench. This position is not disputed by learned Special Prosecutor, NAB.

In view of above, office is directed to place the matter before the Hon'ble Chief Justice for formation of a larger Bench or pass any order, which his Lordship deems fit and proper."

4. These appeals initially in terms of maintainability and jurisdiction (as opposed to merit) which issue we intend to decide through this order revolve around a single point of law which concerns whether on transfer of a case under Section 16(A) of the National Accountability Ordinance, 1999 (NAO) from a Special Court to an accountability court under the NAO the transferred case would thereafter require the Chairman, NAB to refile the transferred case by way of a reference under S.18 (g) before the accountability court before the accountability court could take cognizance of the same by way of a Reference under Section 18(a) of the NAO bearing in mind that the subject matter of these appeals were transferred **before** the amendment dated 23-11-2002 was made to Section 16(A) NAO,

whereby such transferred cases were to be deemed to be a reference under the NAO.

5. If our answer to/determination of the question mentioned in the above paragraph is in the affirmative then the impugned judgment will have been passed without jurisdiction by the concerned accountability court and will be null and void and there will be no need to decide the appeals on merits. If, however, our answer to/determination of this question is in the negative then the impugned judgment will have been passed by the concerned accountability court with jurisdiction and these appeals will then need to be decided on merits.

6. Learned counsel for the appellants submitted that the earlier decision of this court in **Abdul Sattar Dero V State** (2002 YLR 1870) had through its reasoning rightly decided the issue of whether a transfer case u/s 16 (A) NAO had to be converted into a reference before it could proceed before an accountability court. Namely, that it did have to be converted into a reference as under the NAO the accountability court u/s 18(a) NAO could only take cognizance of a reference if it was sent to it by the Chairman NAB and by no other way. As such the reasoning by another later order dated 26-11-2002 by another Division bench of this court in Cr.Acc.Appeal No.15/16/17/20/39/58 (the Order) had misinterpreted the law by holding that transfer cases u/s 16 (A) NAO did not need to be filed by the Chairman by way of a reference and the accountability court did not need to take fresh cognizance of the transfer case u/s 18 (a) and as such the case of **Abdul Sattar Dero** (Supra) should prevail. In particular he contended that the wording in S.16 (A) **at the time** when the references were filed in respect of the current petitions did **not** include the words, "shall be deemed to be a reference under S.18 (a) of the Ordinance" and as such since the Statute had to be read as a whole the legislative intent was that such transfer cases under S.16 (A) had to be re filed by way of a reference before the concerned accountability court as an accountability court could only take cognizance of a case under the NAO if it was filed by the Chairman under S.18 (a) NAO. In support of his contentions he emphasized that once **Abdul Sattar Dero's case** (Supra) was decided the legislature immediately moved to fill this loop hole by

amending S.16 (A) by adding the words, "shall be deemed to be a reference under S.18 (a) of the Ordinance" by an amendment to S.16 (A) dated 23-11-2002 whereby transfer cases were deemed to be references which was a recognition of the fact that this was not originally the legislative intent in respect of cases u/s 16 (A) NAO which should have been prior to the amendment routed through the Chairman in order for the accountability court to take cognizance under S.18 (a) NAO. This being the case since the above process had not been followed the accountability court had no jurisdiction to try the case and as such the impugned judgment was null and void and should be set aside.

7. He also submitted that in any event the Order was per incuriam. This was because the amendment in the law had already been made **before** the Order was announced and as such the Order was void and of no legal effect and thus **Abdul Sattar Dero's case** (Supra) would prevail along with the new wording added by legislative amendment shortly after to S.16 (A) where a transfer case was in effect deemed to be a reference for the purposes of S.18 (a) NAO.

8. On the other hand learned Special Prosecutor, NAB submitted that the reasoning in the Order was correct regarding the lack of requirement for the Chairman NAB to refer a case transferred u/s 16(A) NAO from another court to an accountability court under the NAO by way of a new reference u/s S.18 (g) NAO before the accountability court could take cognizance of the same u/s 18(a) NAO. That this was **not** a legal requirement under the NAO since in effect the NAO provided two separate and distinct mechanisms for filing a reference. The first mechanism was under S.18 (g) NAO whereby the Chairman filed the reference following an inquiry and investigation initiated and conducted by the NAB in which case the Chairman was positively required to file a reference before the court could take cognizance of a reference u/s 18 (a) NAO and the second mechanism was on the transfer of a case by the Chairman NAB from another court to an accountability court in which case there was no requirement for the Chairman to file that case again before the accountability court as a reference before the accountability

court before the accountability court could take cognizance of the same. In this respect he referred to S.16 (A) of the NAO which specifically provided in the unamended wording of S.16 (A) that in such cases it shall not be necessary for the court to recall any witness or again to record any evidence that may have been recorded. According to him by using such language the legislative intent of S.16 (A) was clear. Namely that since the court from which the case was transferred to the accountability court had already taken cognizance of the offense there would be no need to recall witnesses or re record any evidence as the legislature had intended that in transfer cases u/s 16 (A) there would be no need for the Chairman NAB to then re-file the transferred case as a reference. He submitted that another Division Bench of this court in the case of **Abdul Sattar Dero** (Supra) had misinterpreted the unamended S.16 (A) and as such the Order referred to above should prevail in terms of its reasoning. That the legislature only amended S.16 (A) NAO after the case of **Abdul Sattar Dero** (Supra) by adding the words "shall be deemed to be a reference under S.18 (a) of the Ordinance" not because this was originally an omission by the legislature but because this was required to make its original legislative intent clear following the misinterpretation of such intent in the case of **Abdul Sattar Dero** (Supra). Thus, for all the above reasons he submitted that the newly added words in S.16 (A) were superfluous as the legislature had always intended that such transferred cases under S.16 (A) should be regarded as references and there was no need for the Chairman NAB to re-file such cases as new references as the court where they had been transferred from had already taken cognizance of the same. He further submitted that a change of forum from another court to an accountability court would have no bearing on the need to file a new reference in respect of the transferred case as this was purely a procedural issue and did not effect any substantive rights. Thus, the transferred case did not need to be re -filed by the Chairman NAB before the accountability court could take cognizance of the same and as such the accountability court had jurisdiction to try the transferred case and the impugned judgment could not be set aside on this score. In support of his contentions he placed reliance on **Adnan Afzal v. Capt. Sher Afzal** (PLD 1969 SC 187), **Khizar Hayat & others v. The Commissioner, Sargodha** (PLD 1965 (WP) Lahore 349), **Lt. Col. Nawabzada Muhammad Amir Khan v. The Controller of**

Estate & Others (PLD 1961 SC 119), **State v. Saeed Ahmed** (PLD 1962 SC 277), **Siraj Din and Others v. Sardar Khan & Others** (1993 SCMR 745) **and Begum B.H. Syed v. Afzal Jehan Begum & Another** (PLD 1970 SC 29).

9. We have heard the learned counsel for the parties, considered the record and the relevant law.

10. The first issue which we consider that we need to address is whether the Order is per incuriam.

So what do we mean by per incurium?

11. In the case of **Sindh High Court Bar Association V Federation of Pakistan** (PLD SC 2009 879) while dilating upon the definition of per incuriam in his separate note Justice Ch.Ijaz Ahmed (as he then was) opined as under at P.1238

> "(ii) **MAXIM PER INCURIUM"**
>
> *37. Incuria literally means "carelessness." In practice per incurium is taken to mean per ignoratium and ignored if it is rendered in ignoaratium of a statute or other binding authority.*
>
> *38. What is meant by giving a decision per incurium is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based on that account is demonstrably wrong. See Nirmal Jeet Kaur's case [2004 SCC 558 AT 565 para 21}, 1131], Cassell and Co Ltd. 's case (LR 1972 AC 1027 at 1107, 1113, 1131, Watson's case {AELR 1947 (2) 193 at 196}, Morelle Ltd.'s case (LR 1955 QB 379 at 380), Elmer Ltd.'s case { Weekly Law Reports 1988 (3) 867 at 875 and 878} Bristol Aeroplane Co.'s case {AELR 1944 (2) 293 at page 294} and Morelle Ltd.'s case {AELR 1955 (1) 708}.*
>
> *39. The ratio of the aforesaid judgments is that once the Court has come to the conclusion that the judgment was delivered per-incuruium then the Court is not bound to follow such decision on the well known principle that the judgment itself is without jurisdiction and per-incuruum,, therefore,*

> *it deserves to be over-ruled at the earliest opportunity. In such situation, it is the duty and obligation of the apex Court to rectify it. The law has to be developed gradually by the interpretation of the Constitution then it will effect the whole nation, therefore, this Court, as mentioned above, is bound to review such judgments to put the nation on the right path as it is the duty and obligation of the Court in view of Article 4, 5 (2) read with Article 189 and 190 of the Constitution".*

12. In the case of C.P. No.D-1144 of 2007 **Syed Iqbal Kazmi V Federation of Pakistan** dated 11-09-2018 (unreported) a division bench of this court also undertook a review of the relevant supreme court law in what was meant by the maxim per curium at Para 42 as under;

> *42. The next issue is what do we mean by per incuriam? "Per incuriam" is defined in Blacks law dictionary as under:*
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> *"Per incuriam, adj, (Of a judicial decision)* ***wrongly decided, usu. because the judge or judges were ill-informed about the applicable law.***
>
> *As a general rule the only cases in which decisions should be held to have been given per incuriam are those of decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the court concerned, so that in such cases some features of the decision or some step in the reasoning on which it is based is found on that account to be demonstrably wrong. This definition is not necessarily exhaustive, but cases not strictly within it which can properly be held to have been decided per incuriam, must in our judgment, consistently with the stare deices rule which is an essential part of our law, be of the rarest occurrence. Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991)."*
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> *43. In HRC No.40927-S of 2012* ***Application by Abdul Rehman Farooq Pirzada*** *(PLD 2013 SC 829) which was examining the entitlement of superior court judges who had served more than two years but less than 5 years to be entitled to a pension and whilst holding a judgment of the Supreme Court which had held such entitlement after two years at Para 77 of the Judgment it was potentially suggested/hinted that certain judgments which had been passed during periods of deliberate judicial chaos even if later protected by the constitution could be held to be per incuriam in the following terms*

"77. As a corollary of above discussion, it is also imperative and significant to mention here that the judgment under challenge was passed by a learned three member Bench of this Court consisting of M/s Muhammad Nawaz Abbasi, Muhammad Qaim Jan Khan and Muhammad Farrukh Mahmood, JJ on 6-3-2008, ***at a time when the whole superior judiciary of the Country was in chaos, crises and disarray due to unconstitutional measures taken by the then President/ dictator General (Retired) Pervez Musharraf of Pakistan, who by hook or crook wanted to remain in power and in that perspective attempted to destroy the institutions in the Country, particularly targeted the superior judiciary, to bring them under his thumb and control.*** *The discussion regarding this aspect of the case in the present proceedings is enough to this extent. However, in this context if any further detailed discussion is felt orderly, reference can be made to the judgment of a full Bench of this Court in the case of Sindh High Court Bar Association (supra), wherein this aspect has been extensively discussed and aptly attended to."*

44. *We had considered this aspect keeping in view the factual background to the case as set out above especially the alluded to "sea change" after the 11.03.2007 emergency was imposed and the 7 member bench was replaced with a new bench consisting of 5 new judges who had taken oath under the PCO (and later superannuated before or resigned after the* ***Sindh High Court Bar Association case*** *(Supra) when the judges who had not taken PCO were held never to have left judicial office) who did not even have the benefit of any amicus curiae assistance or those of the lawyers of the various bar counsel's which were parties however we considered that holding the 5 member bench Judgment per incuriam, even if a 2 member bench had the power to do so, may not be the appropriate course and may set a bad precedent and might not give effect to the true meaning of per incuriam which was also discussed thoroughly in* ***Farooq Pirzada's case*** *(Supra) at Para-94 which generally approved Justice Ch.Ijaz's separate note in the* ***Dr Mobashir Hussan case*** *(Supra) as mentioned earlier in the following terms*

Majority view *"94. Now taking up the issue of applicability and effect of this judgment after the implementation of judgment under challenge, so as to see whether it should have prospective or retrospective applicability,* ***the first thing to be noted is that in our short order dated 11-4-2013 we have declared that the law enunciated in the judgment under challenge is "per incuriam".*** *The fallout of such declaration is that it is a judgment without jurisdiction, thus, for all intent and purposes not to be quoted as precedent, rather liable to be ignored. A useful discussion on the concept and import of*

"per incuriam" finds place in the case of Sindh High Court Bar Association (supra), which reads as under:–

"(ii) MAXIM "PER INCURIAM".

37. 'Incuria' literally means "carelessness". In practice per incuriam is taken to mean per ignoratium and ignored if it is rendered in ignoratium of a statute or other binding authority.

*38. **What is meant by giving a decision per incuriam is giving a decision when a case or a statute has not been brought to the attention of the court and they have given the decision in ignorance or forgetfulness of the existence of that case or that statute or forgetfulness of some inconsistent statutory provision or of some authority binding on the court, so that in such cases some part of the decision or some step in the reasoning on which it was based was on that account demonstrably wrong.** See Nirmal Jeet Kaur's case {2004 SCC 558 at 565 para 21), Cassell and Co. Ltd.'s case (LR 1972 AC 1027 at 1107, 1113, 1131), Watson's case {AELR 1947 (2) 193 at 196, Morelle Ltd.'s case (LR 1955 QB 379 at 380), Elmer Ltd.'s case {Weekly Law Reports 1988 (3) 867 at 875 and 878), Bristol Aeroplane Co.'s case {AELR 1944 (2) 293 at page 294} and Morelle Ltd.'s case {AELR 1955 (1) 708).*

39. The ratio of the aforesaid judgments is that once the Court has come to the conclusion that judgment was delivered per incuriam then the Court is not bound to follow such decision on the well known principle that the judgment itself is without jurisdiction and per incurium, therefore, it deserves to be over-ruled at the earliest opportunity. In such situation, it is the duty and obligation of the apex Court to rectify it. The law has to be developed gradually by the interpretation of the Constitution then it will effect the whole nation, therefore, this Court, as mentioned above, is bound to review such judgments to put the nation on the right path as it is the duty and, obligation of the Court in view of Articles 4, 5(2) read with Articles 189 and 190 of the Constitution."

13. After considering the above definition of per incurium it appears to mean in essence that in the context of judgments/orders of the court that such judgments/orders are patently wrong as they were passed in ignorance of the law which most often was not brought to the attention of the court before it passed the order/judgment in question. For instance contrary to a binding order/judgment of a superior court on the same point which was decided before the courts judgment/order and which

had not been brought to its attention and likewise a statute which already answered the legal point which was the subject matter of the judgment/order but which was not brought to the attention of the court before it made its judgment/order which lead to the judgment/order being wrong as a matter of law.

14. Now if we look to the factual background of this case the judgment in the case of **Abdul Sattar Dero** (Supra) was announced on 13-08-2002 whilst the Order was passed on 26-11-2002 approx 3 months and two weeks after **Abdul Sattar Dero's case** (Supra) and **the Order** was in full knowledge of **Abdul Sattar Dero's case** (Supra) as it refers to it in Para 28 and then at Para 36 where it states that it is unable to agree with the same and since **Abdul Sattar Dero's** case (Supra) was not binding on it this lead to this full bench being established. Thus, it cannot be said that the Order was passed in ignorance of any binding decision of a superior court on the same point of law.

15. Interestingly, the hearings of the case which lead to the Order were completed on 08-11-2002 but the Order was not announced until 26-11-2002 in which time S.16(A) had been amended on 23-11-2002 **(3 days earlier)** to include the words, "shall be deemed to be a reference under section 18 of the Ordinance and it shall".

16. The issue is therefore whether the amendment to the NAO 3 days before the announcement of the Order rendered it per incuriam.

17. In our view on balance it does not. This is because, if the legislature had made an error in not intending S.16 (A) to require a transfer case to be filed a fresh as a reference by the Chairman before the accountability court could take cognizance of the same why did an amending Ordinance not come immediately? Why did the legislature take over 3 months to pass an amending Ordinance? It would have been expected that following such a judgment the amending Ordinance would have come within days or at least within a few weeks. Alternatively, it is likely that the legislature knew that it would take some time for the Supreme Court to make a final decision on the matter if the appellant process was adopted so therefore took the step of amending the **legislation to give effect and to make clear what it had originally intended but had been misinterpreted** in **Abdul Sattar Dero's case** (Supra) in order to save precious time.

18. The question also it appears to us is that if we hold the Order per incurium the issue will still remain as to what should be the fate of the cases transferred under S.16 (A) prior to the 23-11-2002 amendment. If it is accepted that as a matter of judicial interpretation that there was no requirement to add a deeming clause to S.16 (A), which in any event is a legal fiction, it would also mean that the transfer of a case made under S.16 (A) NAO prior 23-11-2002 did not need any sanction of the Chairman NAB under S.18 (g) NAO before an accountability court could take cognizance of it under S.18 (a) NAO and this issue needs to be answered.

19. Thus, we do not find the Order to be per incuriam based on the particular facts and circumstances of the case since in our view the issue stills needs to be decided what was the original legislative intent of S.16 (A) (prior to its amendment on 23-11-2002 which in effect made such transfer cases as deemed references for the purposes of S.18 (a) NAO) when read with the NAO as a whole.

Judicial Interpretation of S.16 (A) NAO.

20. Since this issue mainly revolves around two sections of the NAO being S.18 and S.16 (A) we set out the same below, as worded prior to the amendment dated 23-11-2002 whereby the deeming clause was added, for ease of reference.

> ***18. Cognizance of Offences.--(a)*** *The Court shall not take cognizance of any offence under this Ordinance except on a reference made by the Chairman NAB or an officer of the NAB duly authorised by him.*
>
> *(b) A reference under this Order shall be initiated by the National Accountability Bureau on:*
>
> *(i) a reference received from an appropriate government;*
> *(ii) receipt of a complaint;*
> *(iii) its own accord.*
>
> *(c) Where the Chairman NAB or an officer of the NAB duly authorised by him is of the opinion that it is or may be necessary and appropriate to initiate proceedings against any person, he shall refer the matter for inquiry or investigation.*
>
> *(d) The responsibility for inquiry into an investigation of an offence alleged to have been committed under this Ordinance shall rest on the NAB to the exclusion of any*

other agency or authority, unless any such agency or authority is required to do so by the Chairman NAB or by an officer of the NAB duly authorised by him.

(e) The Chairman NAB and such members, officers or servants of the NAB shall have and exercise, for the purposes of an inquiry or investigation the power to arrest any person, and all the powers of an officer-in-charge of a Police Station under the Code, and for that purpose may cause the attendance of any person, and when and if the assistance of any agency, police officer or any other official or agency, as the case may be, is sought by the NAB, such official or agency shall render such assistance provided that no person shall be arrested without the permission of the Chairman or any officer of NAB duly authorized by the Chairman NAB.

(f) Any inquiry or investigation under this Ordinance shall be completed expeditiously as may be practical and feasible.

(g) The Chairman NAB, or any officer of the NAB duly authorised shall appraise the material and the evidence placed before him during the inquiry and the investigation, and if he decides that it would be proper and just to proceed and there is sufficient material to justify filing of a reference, he shall refer the matter to a Court.

(h) If a complaint is inquired into and investigated by the NAB and it is concluded that the complaint received was prime facie frivolous or has been filed with intent to malign or defame any person the Chairman NAB or Deputy Chairman NAB or an officer of the NAB duly authorized by the Chairman NAB, may refer the matter to the Court, and if the complainant is found guilty, he shall be punishable with imprisonment for a term which may extend to one year or fine or with both.

16-A. Transfer of case. *(a) Notwithstanding anything contained in any other law for the time being in force, the Chairman NAB may apply to any Court of Law or Tribunal that any case involving any offence under this Ordinance pending before such Court or Tribunal shall be transferred to a Court established under this Ordinance, then such other Court of Tribunal shall transfer the said*

case to any Court established under this Ordinance and it shall not be necessary for the Court to recall any witness or again to record any evidence that may have been recorded.

(b) In respect of any case, pending before a Court, the Prosecutor General Accountability or any Special Prosecutor authorized by him in this behalf, having regard to the facts and circumstances of the case and in the interest of justice and for the protection and safety of witnesses, considers it is necessary that such case is transferred for trial, he may apply for the transfer of the case from any such Court in one Province to a Court in another Province or from one Court in a Province to another Court in the same Province,--

(i) *to the Supreme Court of Pakistan in case the transfer is intended from a Court in a Province to a Court in another Province; and*

(ii) *to the High Court of the Province in case the transfer is intended from one Court in a Province to another Court in the same Province.*

and the Supreme Court or the High Court, as the case may be, if it is in the interest of justice, transfer the case from one Court to another Court, and the case so transferred shall be tried under this Ordinance without recalling any witness whose evidence may have been recorded.

(c) The accused may also make an application to the Supreme Court for the transfer of a case from a Court in one Province to a Court in another Province and to the High Court for transfer of a case from one Court in a Province to another Court in the same Province and the Supreme Court or the High Court, as the case may be, if it is in the interest of justice, transfer the case from one Court to another Court, and the case so transferred shall be tried under this Ordinance without recalling any witness whose evidence may have been recorded.

The trichotomy powers

21. Our constitution is based on the trichotomy of powers shared between the legislature, the executive and the judiciary each of whom has its distinct and separate role to play in our system of governance and each of which is supposed to act as a check and balance on the other organs of state operating within its own defined sphere of power as provided in the law and the Constitution.

22. Within the trichotomy of powers it is the role of the legislature to make laws and the role of the judiciary to interpret those laws if such interpretation is necessary. It is well settled law that if a statute has expressly provided for something without any ambiguity then there is no question of the courts interpreting the same as the legislative intent is clear and the Act/Ordinance must be given effect to unless it is deemed to be contrary to the constitution. The judiciary's role of interpretation of the statute only arises when the statute is to a certain extent either unclear or ambiguous or is prima facie in violation of the constitution and in such cases it is for the judiciary to interpret that piece of legislation by trying to ascertain the intent of Parliament in passing that legislation. The Courts have absolutely no authority or power to substitute their views for those

intended by the legislature simply because they may disapprove of a particular law and the way in which that law is being applied.

23. In this respect reference is made to the case of **Justice Khurshid Anwar Bhinder V Federation of Pakistan** (PLD SC 2010 P.483. Relevant P.492 -493) whereby it was held as follows:-

> *"A fundamental principle of Constitutional construction has always been to give effect to the intent of the framers of the organic law and of the people adopting it. The pole star in the construction of a Constitution is the intention of its makers and adopters. When the language of the statute is not only plain but admits of but one meaning the task of interpretation can hardly be said to arise. It is not allowable to interpret what has no need of interpretation. Such language beside declares, without more, the intention of the law givers and is decisive on it. The rule of construction is "to intend the Legislature to have meant what they have actually expressed". It matters not, in such a case, what the consequences may be. Therefore if the meaning of the language used in a statute is unambiguous and is in accord with justice and convenience, the courts cannot busy themselves with supposed intentions, however admirable the same may be because, in that event they would be traveling beyond their province and legislating for themselves.* ***But if the context of the provision itself shows that the meaning intended was somewhat less than the words plainly seem to mean then the court must interpret that language in accordance with the indication of the intention of the Legislature so plainly given. The first and primary rule of construction is that the intention of the Legislature must be found in the words used by the Legislature itself. If the words used are capable of one construction only then it would not be open to the court to adopt any other hypothetical construction on the ground that such hypothetical construction is more consistent with the alleged object and policy of the Act.*** *(bold added)*

24. In this case, in our view, it is apparent that some ambiguity arises when S.18 (a) and the unamended S.16 (A) are read together. This ambiguity in essence concerns the issue of cognizance. Namely, under S.18 (a) NAO an accountability court can only take cognizance of a reference filed by the Chairman NAB under S.18(g) NAO whereas under S.16 (A) NAO after the Chairman NAB exercises his powers to transfer a case pending before another court there appears to be no indication that any further cognizance needs to be taken under S.16 (A) by the

accountability court since the court from where it had been transferred from had already taken cognizance and the case **will continue** from the position it was at the time of transfer without the need to recall any witness or re record any evidence.

25. The question is essentially therefore whether before the case transferred by the Chairman under S.16 (A) to the accountability court before proceeding further has to be routed to the accountability court via the Chairman NAB by way of a reference under S.18 (g) NAO before the accountability court can take cognizance of the same under S.18 (a) NAO.

26. In interpreting statutes we are of the view that the intention of the legislature can be gleamed to a certain extent by reading the Statute as a whole. The key is to try to find the intent of the legislature rather than usurping the legislature's power to legislate as was held in the case of **Lt.Col.Nawabzada Muhammed Amir Khan** (Supra) at P.143

> *"We are satisfied that this is a case where the Court can modify the Language of an enactment.* ***It will be observed that there cannot be the slightest doubt in the present case as to the intention of the Legislature.*** *In fact, it is admitted on behalf of the appellants that the failure to make a consequential amendment in section 57 could only be due to a slip. After providing the Controller could determine value subject to an appeal to the Appellate* ***Tribunal the Legislature could not possibly have intended that duty should be paid only on the account which was filed by the accounting party itself.*** *All that has happened is that the draftsman failed to refer in section 57 to the provisions relating to determination in accordance with the amended Act.* ***That we can modify the language of an Act to give effect to the manifest and undoubted intention of the legislature is a proposition which is well supported by authority and well justified in reason.*** *As stated in Crawford on Statutory Construction (section 201 p. 348):*
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> *"**If the true meaning of the legislature appears from the entire enactment, errors, mistakes, omissions and misprints may be corrected by the Court, so that the legislative will may not be defeated.** As a result, spelling, grammar, numbers and even words, may be corrected. This, as already stated, is simply making the strict letter of a statute yield to the obvious intent of the Legislators. But it must clearly, or at least with reasonable certainty, appear that the error is in fact one before the Court will be justified in making the proper correction or amendment or the Court will invade the province of the*

legislature and exercise legislative power. But when satisfied of the error, the Court may make the necessary correction. In accord with this principle, an erroneous description may be made to describe the thing actually intended or a misnomer made to name the thing really meant."

In Maxwell's Interpretation of Statutes the rule is thus stated on p. 229, 1953 Edition:

"Where the language of the statute in its meaning and grammatical constructions, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence."

In Salmon v. Duncombe and others (11 A C 634), their Lordships of the Privy Council said

"It is however, a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a Court of Justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used. And they have set themselves to consider, first, whether any substantial doubt can be suggested as to the main object of the legislature, and, secondly, whether the last nine words of section 1 are so cogent and so limit the rest of the statute as to nullify its effect either entirely or in a very important particular."

There being no doubt in the present case that the duty which the legislature intended to be realized was that which was to be determined in accordance with the provisions of the Act. We find we have jurisdiction to modify section 57 so as to rectify the draftsman's mistake and to read in it references to the Controller and the Appellate Tribunal, etc., and we would hold that the proper duty could be realized in spite of the defective wording of section 57.(bold added)

27. In our view S.18 NAO and S.16 (A) NAO are two separate and distinct provisions in the NAO. S.18 NAO in essence takes effect u/s 18 (b) when the NAB (i) receives a reference from an appropriate government or (ii) receipt of a complaint or (iii) of its own cause. Then u/s 18(c) if the Chairman NAB is of the opinion that it is or may be necessary and appropriate to initiate proceedings he shall refer the matter for inquiry or investigation which under S.18 (d) shall be carried out by the NAB to the

exclusion of any other agency unless such other agency or authority is required to do so by the Chairman NAB. Section 18 (e) sets out the powers which the Chairman NAB shall have to enable him to carry out an inquiry or investigation which u/s 18(f) should be carried out expeditiously and once the investigation is complete u/s 18(g) the Chairman NAB shall appraise the material and the evidence which is placed before him and if he decides it proper and just to proceed and there is sufficient material justifying the filing of a reference he shall refer the matter to court which by virtue of S.18(a) shall take cognizance of the reference.

28. Thus, after receiving the complaint and initiating the inquiry and then investigation the Chairman NAB if after appraisal of the material/evidence collected during the course of the inquiry/investigation and he considers it proper and just to proceed and there is sufficient material to justify the filing of the reference he shall send it to the accountability court which shall take cognizance of the same.

29. Thus, S.18 NAO is a self contained section whereby the inquiry and investigation based on the initial complaint is carried out by the NAB and it is the Chairman who finally decides whether to file a reference based on the material/evidence collected during his own investigation and cognizance follows by the accountability court u/s 18(a) NAO.

30. Yes, it is true that u/s 18(a) a court cannot take cognizance of an offense under the NAO unless a reference is filed by the Chairman NAB. However we are of the view that this **only applies** to investigations carried out by the NAB u/s 18 and **not** transfer cases u/s 16 (A).

31. In our view S.16 (A) is a distinct, separate and independent provision of the NAO which applies to situations where the investigation has already been carried out by an investigative agency other than NAB based on a complaint received by that investigative agency and the concerned court other than an accountability court has **already taken cognizance** of the matter and is proceeding with the same.

32. In our view on a transfer of a case by the Chairman NAB u/s 16 (A) it is not necessary for such case to be routed to the Chairman NAB who needs to file the same as a reference before an accountability court can

take cognizance of the matter. **In our view this was never the intention of the legislature.**

33. This is because:

(a) S.16 (A) is a follow on to S.16 which deals with the trial of offense and as such pre supposes that the transferred case which is already in trial will simply be continued by the accountability court to where it is transferred without the need for the transferred case to be sent by way of a reference u/s 18 **and**

(b) the language of S.16 (A) shows that the Chairman NAB may apply to any court of law or tribunal that any case involving any offense under the NAO pending before such court or tribunal **shall be transferred to a court under this ordinance.** Such courts are accountability courts. The language therefore used in S.16 (A) makes it absolutely clear that transfer cases will go straight to the accountability courts for trial. Thus, in our view the legislature intended that under the separate and distinct transfer provision u/s 16 (A) that there was no requirement that the transferred case be routed through the Chairman NAB to be filed by way of reference before the accountability court could take cognizance of the same. **If this had been the intent of the legislature it would have clearly stated so in S.16 (A) which it could easily have done but choose not to.** This interpretation of the legislative intent is further bolstered by the fact that S.16 (A) also clearly provides that on such transfer to the accountability court,

"it shall not be necessary for the court to recall any witness or again to record any evidence that may have been recorded"

Thus, if witnesses do not need to be recalled to again re record their evidence as their original evidence before the trial court in which the matter was proceeding **before** the S.16 (A) transfer will remain apart of the trial court record before the accountability court in our view it is quite apparent that the legislature did not intend in transfer cases u/s 16 (A) NAO that the transferred case would be routed through the Chairman NAB and filed as a reference under S.18 (g) and only then would the accountability court be able to take cognizance of the case u/s 18(a) NAO. This is because the fresh taking of cognizance by the accountability court would be **contrary** to the legislature's specific requirement that there was no need to recall witnesses to or again to re record any evidence that may have already been recorded. If the accountability court u/s 18(a) was again intended to

take cognizance of the transfer case under S.16 (A) **this would completely defeat the intent of the legislature where the legislature had specifically provided that, "it shall not be necessary for the court to recall any witness or again to record any evidence that may have been recorded". This is because on taking fresh cognizance under S.18(a) this would mean that all witnesses would have to be recalled and again their evidence be re recorded which the legislature had specifically provided was not to be the case and**

(c) In our view, as a matter of logic, common sense and reason it would not make any sense for a transfer case to go through the route of it being refiled by the Chairman NAB by way of a reference u/s 18(g) before the accountability court could take cognizance of the same as this would result in the whole trial being delayed and slowed down with evidence needed to be re recorded keeping in view S.16 which contemplated the completion of the trial within 30 days. Such an interpretation would be contrary to one of the main legislative intentions as expressed in both the preamble and S.16 NAO which aimed at speedy corruption trials proceeding on a day to day basis and being completed within 30 days and would tend to lead to a manifestly absurd or anomalous result which could not have been intended by the legislature **and**

(d) Before the case is transferred the Chairman has to make an application. It is true that following **Sardar Ahmed Siyal V NAB** (2004 SCMR 265) that once the application is made the trial court must transfer the case provided that the offense being tried also falls under the NAO however, **even otherwise** the Chairman must give reasons for the transfer application. Usually as indicated in the case of **Rauf Bakhsh Kadri V The State** (MLD 2003 777) the Chairman does not file references and by implication transfer cases due to the limited capacity and resources of NAB **unless** those cases properly fall within the purview of the NAO being either mega corruption cases or cases where a plea bargain are possible since the recovery of ill gotten money is one of the prime objectives of the NAO as set out in its preamble and S.25 concerning the ability of an accused to enter into a plea bargain (which legal provision is not available in any other law dealing with accountability or white collar crime). Thus, the Chairman's NAB's application under S.16 (A) could even be seen/deemed or implied to be a reference transferring the transferred case to the accountability court since before he made his application the Chairman NAB would have (a) satisfied himself that the offense charged in the transfer case fell within the purview of the NAO and (b)

satisfied himself that there was sufficient evidence in the transferred case warranting its transfer to the accountability court as a reference and (c) that it was proper and just to proceed with the case based on it being a mega corruption case and/or there being the possibility of the recovery of ill-gotten money through plea bargain which would not be available under any other law. Thus, since the transfer case **according to the legislative intent** should be regarded as a reference based on the Chairman's application u/s 16 (A) there would be no need for the accountability court to take fresh cognizance of the matter especially as cognizance had already been taken by the court from which the case was transferred and the requirement that no witness be recalled and that no evidence be re recorded. In **Kadri's case** (Supra) it was held as under at P.791 Para's 28 to 32;

"28.In the instant case since we are satisfied that a literal construction of clauses (i) to (v) cannot stand the test of constitutionality and thus they have to be read down to the extent that a Constitutionally permissible classification is established. Mr. Khalid Anwar pointed out that clause (ix) of section 9(a) which defines the offences of cheating and criminal breach of trust with respect to the properties of the public at large scale to be triable under the Ordinance created a perfectly reasonable classification and its constitutionality could not be questioned. ***Learned Prosecutor General himself conceded that each and every instance of corruption of a small functionary of the state or acceptance of a small amount of illegal gratification might not be triable under the Ordinance. Even otherwise the observations of the Honourable Supreme Court in Asfandyar Wali's case indicate that the Legislation was intended to deal with large scale corruption of public officers and others that they had indulged in during the recent past. We can also take notice of the fact that in most cases references have been filed in respect of white-collar crime of a large magnitude. Moreover it must be kept in view that one of the objects of the Ordinance which distinguishes it from previous laws is return of assets acquired through corrupt means, corruption or corrupt practices through the process stipulated in sections 25, 25-A and 26. Obviously commencement of proceedings under the Ordinance could be justified upon rationale hypothesis if it is found that it would be in the national interest to allow the accused to secure a pardon if the amount likely to be recovered is fairly substantial.***

29. At the same time an important feature of this Ordinance which distinguishes it from all previous laws is that it provides for recovery of assets acquired through corruption or misuse of power as well outstanding dues of financial institution and

Government agencies through the mechanism of plea-bargaining. The creation of the offence of "willful default" has been upheld by the Honourable Supreme Court. However, Accountability Court can take cognizance of an offence only upon a reference being made by the Chairman, NAB or any officer duly authorized by him. These provisions tend to show that only when the amount involved is substantial and it is considered worthwhile to employ the coercive methods of recovery that a reference under the Ordinance would be justifiable.

30. For the foregoing reasons we are inclined to hold that the qualifications laid down in clause (ix) will also have to be read in the other clauses of section 9(a). In other words the discretion of the Chairman, NAB or an officer authorized by him to file a reference before the Accountability Court is not absolute or arbitrary. ***Such reference could be filed only when the Chairman or the Authorized Officer is satisfied that the amount involved is of large magnitude and resort to the facility of plea-bargaining to the accused would be in the national interest. In the absence of such satisfaction a case could only be triable under the ordinary law.***

31. As regards the new offences created by the Ordinance we are constrained to observe that strictly speaking, it is not possible for us to declare them ultra vires the Constitution. Nevertheless, it is expected that the Chairman, NAB will keep in view the spirit of the law in accordance with the guidelines referred to in para 29 ***and file references only when the amounts involved are large enough and it is worthwhile in the public interest and some mens rea on the part of the defaulter is involved.***

32.Since filing of a reference is essentially the function of the Chairman, NAB (though it may be amenable to judicial review in proper cases) and since he in view of the experience of the Institution is in a better position to determine whether the amount involved in these cases could be classified as large or otherwise. *We would remand these matters to the Chairman, NAB to re-examine these cases from the above stand-point. In case he is satisfied that the amounts involved are large enough to justify proceedings under the Ordinance, they may continue before the Accountability Courts. In case he is not so satisfied the cases may be transferred to the appropriate courts and such courts may proceed with them from the stage they had reached without recalling witnesses. A definite decision is expected to be taken within one month from today and till such time the interim order passed earlier will continue. The petitions stand disposed of in the above term."*(bold added)

(e) **and** the need to harmoniously interpret and read statutes in a holistic manner in order to uncover the

intention of the legislature. In this case we find that when the Statute is read as a whole with its requirement of expeditious disposal of corruption cases in our view it was the **intention of the legislature** to create two distinct provisions for dealing with two different ways in which a case could be placed before the accountability court. In the first case u/s 18 where the whole complaint and its inquiry/investigation remained with the NAB until the Chairman's final decision as to whether or not to file a reference u/s 18(g) only the accountability court could take cognizance based on this mode of receipt of the reference. The second case would be where the NAB had not been involved in the complaint, investigation, the filing of the case and the cognizance of the case had already been taken by another court in which case the separate provision of S.16 (A) was added **where the legislative intent was for the case to continue from where it had left off before the other court from which it had been transferred u/s 16 (A) with no need to recall witnesses or record evidence and thus the accountability court would continue to hear the transferred case from the stage from which it had been transferred with no requirement of taking fresh cognizance which would only slow down the proceedings in the case which would not be in conformity with the intent of the legislature at either the preamble or S.16 NAO for the speedy trial of corruption cases**. In this respect reliance is also placed on **State V Saeed Ahmed** (PLD 1962 SC 277)

34. Even in the case of **Sardar Ahmed Siyal** (Supra), which amongst other things, held that on a S.16 (A) transfer application by the Chairman NAB no notice needed to be given to the accused it was held as under at P.269

> *"We have examined the provisions of clause (a) of section 16-A of the Ordinance reproduced hereinabove, which clearly tends to show that notwithstanding anything contained in any other law for the time being in force, the Chairman, National Accountability Bureau may apply to any Court of law of Tribunal for transfer of the case involving a scheduled offence pending before such Court or Tribunal and, on receipt of such application, such Court or Tribunal shall transfer the said case to any Court established under the Ordinance.* ***It would appear that the object of the special law is to expedite the disposal of cases involving corruption, corrupt practices, misuse of power, misappropriation of property and matters connected thereto under the Ordinance and to avoid procedural delays and technicalities."*** (bold added)

35. In addition as mentioned in para 33 (c) above this may be one of the rare and exceptional situations where the court **might** be permitted to read in to the legislation at S.16 (A) that on transfer the case would be "deemed to be a reference" to tie in with other language used in S.16 (A) that there would no need to recall witnesses or re record their evidence to give effect to the true intent of the legislature and avoid a manifestly absurd or anomalous result which could not have been intended by the legislature. Namely, that after the transfer application was complied with the case in trial would have to be routed to the Chairman NAB to file the same as a reference under S.18(g) before the accountability court before it could take cognizance of the same under S.18 (a) NAO which would lead to the accountability court again having to recall witnesses and record evidence afresh which as per S.16 (A) and the need to ensure speedy trials the legislature deliberately intended to avoid. In this respect reliance is placed on the case of **The collector of Sales Tax Gujranwala V Messrs Super Asia Mohammed Din and sons** (2017 SCMR 14227) which at P.1438 Para 8 held as under with regard to reading in words to statutes:

> *"It is settled law that the principle of reading in or casus omissus is not to be invoked lightly, rather it is to be used sparingly and only when the situation demands it. In fact the Courts should refrain from supplying an omission in the statute because to do so steers the Courts from the realms of interpretation or construction into those of legislation. This principle has been aptly dealt with by this Court in the judgment reported as* ***Abdul Haq Khan and others v. Haji Ammerzada and others*** *(PLD 2017 SC 105) in which it was observed that:-*
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> > *"The reading in of words or meaning into a statue when its meaning is otherwise clear is not permissible. As a matter of statutory interpretation, Courts generally abstain from providing casus omissus or omissions in a statute, through construction or interpretation.* ***An exception to this rule is, when there is a self-evident omission in a provision and the purpose of the law as intended by the legislature cannot otherwise be achieved, or if the literal construction of a particular provision leads to manifestly absurd or anomalous results, which could not have been intended by the legislature. However, this power is to be exercised cautiously, rarely and only in exceptional circumstances."*** **(bold added)**

36. Thus, we find based on the reasons as set out in **paragraph 33 (a) to (e)** above that it was **always the intention of the legislature** that the

transferred case would be considered as a reference and that there was no need for the accountability court to take fresh cognizance of the same. Thus, we find that the words added to S.16 (A) by the amendment dated 23-11-2002 being "shall be deemed to be a reference under S.18 (a) of the Ordinance" **was always the intention of the legislature and that these words were only added by the legislature through later amendment in order to clarify its original intent. Therefore, we disagree with the findings in the case of Abdul Sattar Dero** (Supra) **as in our humble view it did not ascertain the true intention of the legislature in considering the unamended S.16 (A) NAO when read together with the rest of the NAO in a holistic manner.**

37. Thus, the upshot of the above finding is that all S.16 (A) transfer cases **prior** to the date of the aforesaid amendment being 23-11-2002 shall proceed under the NAO without the need for the accountability court to take fresh cognizance of the same as it was **always the intention of the legislature that such cases were to be treated as references for which the accountability court u/s 18(a) did not need to take fresh cognizance as cognizance had already been taken prior to their transfer** and hence the use of the wording in S.16 (A) that "it shall not be necessary for the court to recall any witness or again to record any evidence that may have been recorded" and by finding such legislative intention no further delay would be caused in the completion of the trial which is in consonance with the rest of the statute that trials conducted under the NAO should be speedy as per the preamble and S.16 (a) NAO.

38. **We therefore find that the accountability court had jurisdiction to try the transfer cases in these instant appeals and as such the impugned judgment is upheld on this score and as a result thereof the office shall fix the appeals to be heard and decided on merit on 19-03-2019 as per roster with notice to the appellants who shall be present on that date before this court.**