

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Ejaz Afzal Khan
Mr. Justice Ijaz Ahmed Chaudhry
Mr. Justice Gulzar Ahmed
Mr. Justice Muhammad Ather Saeed

**Criminal Miscellaneous Application No. 486 of 2010 in
Criminal Appeal No. 22 of 2002 AND**

Adnan A. Khawaja *... Appellant*

versus

The State *... Respondent*

**Suo Moto Case No. 4 of 2010 and Civil Miscellaneous
Application No. 1080 of 2010 AND Civil Miscellaneous
Applications No. 1238 and 1239 of 2010**

(Suo Moto action regarding appointment of convicted person namely Ahmed Riaz Sheikh (NRO Beneficiary), as Additional Director General, Federal Investigation Agency)

**Civil Miscellaneous Application No. 1253 of 2010 in Sua Moto
Case No. 4 of 2010**

(Report submitted in Court by Attorney-General regarding Facts Finding Inquiry in the case of Missing Letter No. PS/DG/FIA/2009/5047-49 dated 17.11.2009)

**Civil Miscellaneous Application No. 1254 of 2010 in Sua Moto
Case No. 4 of 2010 AND**

(Additional Documents comprising of Interim Report filed by Secretary Law dated 04.04.2010, pointes formulated by Secretary for Hon'ble Court, Advice of Former Attorney-General and Authorization letter in favour of Mr. Hassan Wasim Afzal, Joint Secretary of Ehtisab Bureau dated 20.05.1998)

Civil Miscellaneous Application No. 1082 of 2010

(Report/Minutes of Hon'ble Chief Justice of Lahore High Court, Lahore)

For Federation:

Moulvi Anwar-ul-Haq, Attorney
General for Pakistan

On behalf of National
Accountability Bureau:

Mr. K.K. Agha, Prosecutor-General
National Accountability Bureau
Mr. Fasih A. Bokhari, Chairman
National Accountability Bureau
Mr. Akbar Tarar, Addl. PG. NAB
Mr. Fauzi Zafar, Addl. PG. NAB
Sheikh Muhammad Shoaib,
Assistant Director, NAB
Mr. Mohsin Ali Khan, Assistant
Director, NAB

In attendance:

Mr. Ahsan Raja, Ex. Additional
Secretary Ministry of Interior along
with his counsel Raja Zulqarnain,
ASC

For Ahmad Riaz Sheikh:

Dr. A. Basit, Sr. ASC

On behalf of Secretary Law:

Nemo

Date of hearing:

10.01.2012

ORDER

Asif Saeed Khan Khosa, J.: This order may be read in continuation of the order passed by this Court on the last date of hearing, i.e. 03.01.2012.

2. We have heard the learned Attorney-General for Pakistan, the Chairman, National Accountability Bureau and the learned Prosecutor-General Accountability and have been dismayed by the fact no progress worth any mention has been made by all concerned in the matters mentioned in the order dated 03.01.2012. The learned Prosecutor-General Accountability has submitted and read out two reports dated 09.01.2012 wherein it has categorically been concluded that the National Accountability Bureau has decided not to proceed in the matters of Mr. Adnan Khawaja and Mr. Ahmad Riaz Sheikh despite clear directions issued by this Court in those regards earlier on. The said reports have been found by us to be utterly unsatisfactory and we find that an attempt has been made through the said reports to screen, shield and protect all those in public offices who were involved in

appointments/promotion of the said convicted persons. Upon our query the learned Prosecutor-General Accountability has confirmed the fact that in the reports mentioned above a clear conclusion about lack of criminal intent of all concerned and involved has been recorded without even holding a formal inquiry or investigation, which we have found to be strange and unusual. The learned Prosecutor-General Accountability has gone on to submit that even in the matter of proceeding against Malik Muhammad Qayyum, a former Attorney-General for Pakistan, a decision has been taken by the National Accountability Bureau not to initiate or take any proceeding despite a clear direction having been issued by this Court in that respect. The Chairman, National Accountability Bureau has not only owned the above mentioned reports but has adopted a defiant attitude by stating before us that the decision whether to proceed against any person under the National Accountability Ordinance, 1999 or not is a decision which falls within his exclusive jurisdiction and he has decided not to proceed against any person in the matters of Mr. Adnan Khawaja, Mr. Ahmad Riaz Sheikh and Malik Muhammad Qayyum. He has stated before us in most categorical terms that no inquiry or investigation is warranted in those matters and he has stated so in contemptuous disregard of the fact that this Court has already passed an order for taking proceedings in those matters. We have particularly noticed the defiant posture and position adopted by the Chairman and have been struck by his willful disobedience to the earlier directions issued by this Court. It appears that instead of obeying the directions of this Court he has decided to take this Court head on, which attitude we find to be contumacious, to say the least. The Federal Secretary Law, Justice and Human Rights Division was absent from this Court on the last date of hearing on account of being abroad and even today he has failed to appear and we have been informed that he is unwell and is receiving medical treatment but nothing has been produced before us to substantiate the same. It appears that he prefers foreign sojourns upon his commitments before the highest Court of the country. The learned Attorney-General for Pakistan has stated that there is no change in the situation since the last date of hearing and no

step in furtherance of this Court's earlier directions has been taken by anybody during the interregnum. We have also heard Mr. Ahsan Raja who has tried to convince us that he had no malicious intent in the matter of promotion of Mr. Ahmad Riaz Sheikh.

3. The judgment in the case of Dr. Mobashir Hassan v. Federation of Pakistan (PLD 2010 SC 265) had been passed by this Court way back on 16.12.2009 and in that judgment this Court had issued some very clear and specific directions to the Federal Government and others which were required by the Court to be implemented and executed immediately. Later on a review petition filed against that judgment was dismissed by this Court and orders were again issued to the Federal Government and others to carry out the directions of this Court without any further loss of time. However, various interim orders passed by this Court in the present and other proceedings bear ample testimony to the unfortunate fact that over the last about two years the Federal Government has demonstrated no interest in carrying out some of the directions of this Court. It is quite clear to us by now that the Federal Government and the National Accountability Bureau are not serious in the matter at all and those concerned are only interested in delaying and prolonging the matter on one pretext or the other. On the last date of hearing it had been made clear to all concerned that they were being given the last and final opportunity till today and it appears that they have consciously decided to defy and disobey this Court. This Court has already shown a lot of grace and magnanimity in the matter and has demonstrated a lot of patience and restraint in this regard over the last about two years but in the present dismal and most unfortunate state of affairs the Court is left with no other option but to, as warned in categorical terms on the last date of hearing, take appropriate actions in order to uphold and maintain the dignity of this Court and to salvage and restore the delicately poised constitutional balance in accord with the norms of constitutional democracy. We are conscious that the actions we propose to take are quite unpleasant but maintaining the necessary constitutional poise and balance is a part of our duties, particularly when we have made an

oath before Allah Almighty to “preserve, protect and defend the Constitution of the Islamic Republic of Pakistan” and to “in all circumstances ----- do right to all manner of people, according to law, without fear or favour, affection or ill-will”.

4. When the Objectives Resolution of 1949, made a substantive part of the Constitution of the Islamic Republic of Pakistan, 1973 by Article 2A thereof, mandates that “the independence of the Judiciary shall be fully secured” and when Article 37(d) of the Constitution stipulates it as a Principle of Policy that the State shall “ensure inexpensive and expeditious justice” the Constitution does not contemplate an “independent” judiciary whose decisions may be flouted with impunity or implementation of whose judgments may be left to the whims or caprice of an indifferent Executive. Likewise, when Article 189 of the Constitution gives the decisions of the Supreme Court “binding” effect and when Article 190 of the Constitution commands in no uncertain terms that “All executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court” the Constitution does not envision an Executive professing only “respect” towards the decisions of the Supreme Court but at the same time derisively or disdainfully paying little or no heed to implementation or execution of such decisions. Obedience to the command of a court, and that too of the Apex Court of the country, is not a game of chess or a game of hide and seek. It is, of course, a serious business and governance of the State and maintaining the constitutional balance and equilibrium cannot be allowed to be held hostage to political tomfoolery or shenanigans. Article 5 of the Constitution declares in most unambiguous terms that

“(1) Loyalty to the State is the basic duty of every citizen.

(2) Obedience to the Constitution and law is the inviolable obligation of every citizen ----- ”

In a recent interview with Mr. Hamid Mir on Geo Television the Co-Chairperson of the major political party in the ruling coalition at the federal level, who also happens to be the President of Pakistan, has categorically stated that under his Co-Chairpersonship his

political party has taken a political decision not to obey some part of the judgment handed down by this Court in the case of *Dr. Mobashir Hassan (supra)*. Even the Prime Minister of Pakistan and the Federal Minister for Law, Justice and Human Rights Division have been harping on the same theme for quite some time on different occasions through speeches made on the floors of the National Assembly and the Senate and also through print and electronic media. Their conduct in the matter also goes a long way in confirming what they have been proclaiming. Such an attitude, approach and conduct *prima facie* shows that the Co-Chairperson of the said political party, the Prime Minister and the Federal Minister for Law, Justice and Human Rights Division have allowed loyalty to a political party and its decisions to outweigh and outrun their loyalty to the State and their "inviolable obligation" to obey the Constitution and all its commands. We may unhesitatingly observe that in our country governed by a Constitution political loyalty cannot be accepted as stronger than loyalty to the State and dictates of a political master or party cannot be allowed to be put up as a defence to failure to obey the Constitution. The old sage Aristotle had once observed that "When laws do not rule, there is no Constitution". Justice Louis Brandeis of the United States Supreme Court had observed in the case of *Olmstead v. United States* (227 U.S. 438, 485) that

"In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy."

As already observed above, we the Judges of the Supreme Court have made an oath before Allah Almighty to "preserve, protect and defend the Constitution of the Islamic Republic of Pakistan" and, thus, it is our bounden duty to take appropriate action whenever we find that the Constitution is not being obeyed or its express commands are, wittingly or otherwise, being disregarded. Let nobody forget that in the not too distant past we stuck to our

commitment to the Constitution and constitutionalism and were not shy of giving personal sacrifices for fulfillment of that commitment.

5. This brings us to the actions we may take against willful disobedience to and non-compliance of some parts of the judgment rendered and some of the directions issued by this Court in the case of *Dr. Mobashir Hassan (supra)*. This Court has *inter alia* the following options available with it in this regard:

Option No. 1: In such a case of a brazen and blatant failure or refusal of the Federal Government to obey and execute the relevant judgment and directions of this Court the buck stops at the office of the Chief Executive of the Federation, i.e. the Prime Minister. At the time of entering upon his exalted office the Prime Minister had made an oath that " ----- I am a Muslim and believe in the Unity and Oneness of Almighty Allah, the Books of Allah, the Holy Quran being the last of them, ----- the Day of Judgment, and all the requirements and teachings of the Holy Quran and Sunnah". He had further sworn before Allah Almighty that "as Prime Minister of Pakistan, I will discharge my duties, and perform my functions, honestly, to the best of my ability, faithfully in accordance with the Constitution of the Islamic Republic of Pakistan and the law" and that "I will not allow my personal interest to influence my official conduct or my official decisions". While invoking the name of Allah, the most Beneficent, the most Merciful, and also seeking His help and guidance, the Prime Minister had also made an oath that "I will preserve, protect and defend the Constitution of the Islamic Republic of Pakistan". It is evident that in his oath the Prime Minister had made an unambiguous commitment with Allah Almighty not only to conduct himself completely in accord with the commands and requirements of the Constitution, including those of Articles 2A, 37(d), 189 and 190 thereof, but also totally in sync with the requirements and teachings of the Holy Quran. In the matter of making of oaths the Holy Quran has *inter alia* ordained as follows:

“And make not Allah’s name an excuse in your oaths against doing good, or acting rightly, or making peace between persons; For Allah is One who heareth and knoweth all things. Allah will not call you to account for thoughtlessness in your oaths, but for the intention in your heart; And He is oft-forgiving, most forbearing.”
(S. II: 224-225)

“Allah will not call you to account for what is futile in your oaths, but He will call you to account for your deliberate oaths: ----- But keep to your oaths. Thus Allah makes clear to you His signs, that ye may be grateful.”

“And take not your oaths, to practise deception between yourselves, with the result that somebody’s foot may slip after it was firmly planted, and ye may have to taste the evil consequences of having hindered men from the path of Allah, and a mighty wrath descend on you.”

(S. XVI: 94)

“They swear their strongest oaths by Allah that, if only thou wouldst command them, they would leave their homes. Say: Swear ye not; Obedience is more reasonable; Verily Allah is well acquainted with all ye do.”

(S. XXIV: 53)

“God has already ordained for you, (O men), the dissolution of your oaths (in some cases); and God is your protector, and He is full of knowledge and wisdom.”

(S. LXVI: 2)

“Heed not the type of despicable man, --ready with oaths”

(S. LXVIII: 10)

According to clause (f) of Article 62(1) of the Constitution “A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless ----- he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law” (*underlining has been supplied for emphasis*). By virtue of Article 113 of the Constitution the same qualifications are also required for election to or being chosen as a member of a Provincial Assembly. In the above mentioned backdrop the apparent persistent, obstinate and contumacious resistance, failure or refusal of the Chief Executive of the Federation, i.e. the Prime Minister to completely obey, carry

out or execute the directions issued by this Court in the case of *Dr. Mobashir Hassan (supra)* reflects, at least *prima facie*, that he may not be an "honest" person on account of his not being honest to the oath of his office and seemingly he may not be an "ameen" due to his persistent betrayal of the trust reposed in him as a person responsible for preserving, protecting and defending the Constitution and also on account of allowing his personal political interest to influence his official conduct and decisions. According to the Preamble to the Constitution "sovereignty over the entire Universe belongs to Almighty Allah alone, and the authority to be exercised by the people of Pakistan within the limits prescribed by Him is a sacred trust" and "the State shall exercise its powers and authority through the chosen representatives of the people". A chosen representative of the people deliberately violating such a sacred trust and disregarding his commitment in that regard with Allah Almighty may hardly qualify to be accepted as "ameen". In the circumstances of this case mentioned above this Court has an option to record a finding in the above mentioned regards and it may hand down a declaration to that effect in terms of clause (f) of Article 62(1) of the Constitution which finding or declaration may have the effect of a permanent clog on the Prime Minister's qualification for election to or being chosen as a member of Majlis-e-Shoora (Parliament) or a Provincial Assembly. Somewhat similar oaths had also been made by the Co-Chairperson of the relevant political party before entering upon the office of the President of Pakistan and by the Federal Minister for Law, Justice and Human Rights Division before entering upon the office of a Federal Minister and apparent breaches of their oaths may also entail the same consequences.

Option No. 2: Proceedings may be initiated against the Chief Executive of the Federation, i.e. the Prime Minister, the Federal Minister for Law, Justice and Human Rights Division and the Federal Secretary Law, Justice and Human Rights Division for committing contempt of this Court by persistently, obstinately and contumaciously resisting, failing or refusing to implement or execute in full the directions issued by this Court in its judgment

delivered in the case of *Dr. Mobashir Hassan (supra)*. It may not be lost sight of that, apart from the other consequences, by virtue of the provisions of clauses (g) and (h) of Article 63(1) read with Article 113 of the Constitution a possible conviction on such a charge may entail a disqualification from being elected or chosen as, and from being, a member of Majlis-e-Shoora (Parliament) or a Provincial Assembly for at least a period of five years.

Option No. 3: In exercise of its powers under Article 187 of the Constitution read with Rules 1 and 2 of Order XXXII of the Supreme Court Rules, 1980 and all other enabling provisions this Court may appoint a Commission to execute the relevant parts of the judgment passed and directions issued in the case of *Dr. Mobashir Hassan (supra)*.

Option No. 4: Although in the present proceedings nobody has so far raised the issue pertaining to the protections contemplated by Article 248 of the Constitution yet if anybody likely to be affected by exercise of these options by this Court wishes to be heard on that question then an opportunity may be afforded to him in that respect before exercise of any of these options.

Option No. 5: It is a statutory duty of the Chairman, National Accountability Bureau under the National Accountability Ordinance, 1999 to proceed against any person *prima facie* involved in misuse of authority while holding a public office. On the last date of hearing, i.e. 03.01.2012 this Court had directed the Chairman to attend to the matters of appointment of Mr. Adnan Khawaja as Managing Director of the Oil and Gas Development Company Limited (OGDCL) against merit and appointment/promotion of Mr. Ahmed Riaz Sheikh as Additional Director, Federal Investigation Agency (FIA) at a time when both of them were convicted persons and to proceed against all those who were responsible for such appointments/promotion. The Chairman has also failed so far to initiate any action against Malik Muhammad Qayyum, former Attorney-General for Pakistan, in view of the direction issued in that regard in the judgment passed

in the case of *Dr. Mobashir Hassan (supra)*, as modified in review to his extent. Today the Chairman has appeared before this Court in person and he has not only failed to advance any satisfactory explanation for his inaction in the above mentioned regards but has also manifested defiance towards this Court by categorically refusing to carry out the earlier directions issued by this Court *qua* proceeding in the matter of the above mentioned persons. Such inaction on his part in derogation of his statutory duty *prima facie* amounts to misconduct attracting the last part of section 6(b)(i) of the National Accountability Ordinance, 1999 dealing with removal of the Chairman from his office. Apart from that we have gathered an impression that he has attempted to screen, shield and protect the relevant persons from criminal charges which may attract consequences in some criminal and other laws. In these circumstances appropriate recommendations or directions may be made or issued by this Court in such regards.

Option No. 6: The constitutional balance *vis-à-vis* trichotomy and separation of powers between the Legislature, the Judiciary and the Executive is very delicately poised and if in a given situation the Executive is bent upon defying a final judicial verdict and is ready to go to any limit in such defiance then instead of insisting upon the Executive to implement the judicial verdict and thereby running the risk of bringing down the constitutional structure itself this Court may exercise judicial restraint and leave the matter to the better judgment of the people of the country or their representatives in the Parliament to appropriately deal with the delinquent. After all the ultimate ownership of the Constitution and of its organs, institutions, mechanisms and processes rests with the people of the country and there may be situations where the people themselves may be better suited to force a recalcitrant to obey the Constitution. It may be advantageous to reproduce here the relevant words of the Preamble to the Constitution of the Islamic Republic of Pakistan, 1973:

“we, the people of Pakistan ----- Do hereby, through our representatives in the National Assembly, adopt, enact and give to ourselves, this Constitution”.

6. The learned Attorney-General for Pakistan is hereby put on notice to address arguments before this Court on the next date of hearing, after obtaining instructions from those concerned, as to why any of the above mentioned options may not be exercised by us in these matters. It goes without saying that any person likely to be affected by exercise of the above mentioned options may appear before this Court on the next date of hearing and address this Court in the relevant regard so that he may not be able to complain in future that he had been condemned by this Court unheard. The learned Attorney-General for Pakistan is directed to inform all such persons mentioned above about the passage of this order and also about the next date of hearing.

7. On account of constitutional importance of these matters the Honourable Chief Justice is requested to consider the desirability of hearing of these matters on the next date of hearing by a Larger Bench of this Court.

8. Adjourned to 16.01.2012 on which date the learned Attorney-General for Pakistan, the Federal Secretary Law, Justice and Human Rights Division, the Chairman National Accountability Bureau and the learned Prosecutor-General Accountability shall appear before this Court in person.

Judge

Judge

Judge

Judge

Judge

Islamabad
10.01.2012
Not approved for reporting.

M. Yasin