

IN THE COURT OF SPECIAL JUDGE (CUSTOMS & TAXATION)
KARACHI

BEFORE :

Sadaf Asif
(Judge)

Case No. 210 of 2019

The statevs..... Mohammad Irfan & others

Crime No. 09/2019 – R&D (East)
U/S. 158(1) (8) (89) (14) (14-A) of the
Customs Act, 1969

Mrs. Ismat Mehdi, Advocate
Mr. Ghulamullah Sheikh, Advocate
Mr. Aqil Ahmed, Advocate
Mr. Asim Muneer Bajwa, Advocate
Mr. Aqeel Ahmed Khan, Advocate
Mr. Ashiq Ali Anwar Rana, Special Prosecutor for the State
Mr. Akram Javed SPP for the NAB

ORDER
15-1-2020

(1) An application under section 16 (A) of the National Accountability Bureau Ordinance, 1999 is moved by the Chairman NAB for transfer of the instant case from this court to the court created under Ordinance, 1999.

(2) Brief facts of the case are that an information in the Collectorate that M/s. M.M. Trading Co., had imported a consignment declared to contain secondhand clothing (men wear, ladies wear, child wear HHR blankets) weighing 23400 kgs., declared to have been shipped from United Kingdom contrary to actual port of loading and filed GD KAPE-HC-16153-31-07-2019 for clearance thereof through their authorized Customs clearing agents M/s. Ali Co. The FIR is lodged against various persons on 3-8-2019. charge sheet has been submitted & this Court took cognizance over the matter .

(3) Heard and perused. Before proceeding further it would be advantages to reproduce the amendment recently incorporated in the NAB Ordinance, 1999 with the title as National Accountability (Second Amendment, 2019). In the Ordinance 1999 section 4 is substituted by the following amendment:-

"4. Application (1) This Ordinance extends to the whole of Pakistan and shall apply to all persons, including those persons who are or have been in the service of Pakistan, except in respect of persons and transactions specified in sub-section (2).

(2) The provision of this Ordinance shall not apply to the following persons and transactions, namely:-

(a) matters pertaining to Federal or Provincial taxation, levies or imposts. Upon the commencement of the National Accountability (Amendment) Ordinance, 2019, all pending:-

(i) inquiries and investigations shall stand transferred to the respective authorities or departments which administer the relevant laws of taxation, levies or imposts in question; and

(ii) trials shall stand transferred from the relevant Accountability Courts to the criminal courts which deal with offences under the respective laws pertaining to taxation, levies or imposts in question;

(b)---

(c)---

(d)---

(4) This amendment is of great significance for deciding the subject application. The sub Section (2) clause clearly excludes from the domain of NAB Ordinance, 1999 the trials which deal with offence under the respective laws pertaining to **taxation, levies or imposts in question**. The pending trials relating to taxation, levies or imposts are ought to be transferred from the NAB Court to the respective Courts created for the said purpose.

(5) As per the contention of the applicant the accused persons of this case have committed offences under section 9 read with the schedule of offences thereto. For the purpose of convenience Section 9 of the NAB Ordinance, 1999 reproduce here under which contemplates that:

4

9. Corruption and Corrupt Practices. (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:-

- (i) If he accepts or obtains from any person or offers any gratification directly or indirectly, other than legal remuneration, as a motive or reward such as is specified in S. 161 of the Pakistan Penal Code (Act XLV of 1860) for doing or for-bearing to do any official act, or for showing or for-bearing to show, in the exercise of his official functions, favour or disfavor to any person, or for rendering or attempting to render any service or dis-service to any persons; or
- (ii) If he accepts or obtains or offers any valuable thing without consideration, or for a consideration which he knows to be inadequate, from any person whom he knows to have been, or likely to be, concerned in any proceeding or business transacted or about to be transacted by him, or having any connection with his official functions or from any person whom he knows to be interested in or related to the person so concerned; or,
- (iii) If he dishonestly or fraudulently misappropriates or otherwise converts for his own use, or for the use of any other person, any property entrusted to him, or under his control, or willfully allows any other person so to do; or
- (iv) If he by corrupt, dishonest, or illegal means, obtains or seeks to obtain for himself, or for his spouse or dependents or any other person, any property, valuable thing, or pecuniary advantage; or
- (v) If he or any of his dependents or benamidars owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for, or maintains a standard of living beyond that which is commensurate with his sources of income;
- (vi) If he mis-uses his authority so as to gain any benefit or favour for himself or any other person, or renders or attempts to render to do so, or willfully fails to exercise his authority to prevent grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority;
- (vii) If he has issued any directive, policy, or any SRO (Statutory Regulatory Order) or any other order which grants or attempts to grant any undue concession or benefit in any taxation matter or law or otherwise so as to benefit himself or any relative or associate or a benamidar, or any other persons or
- (viii) If he commits an offence of willful default; or
- (ix) If he commits the offence of cheating as defined in section 415 of the Pakistan Penal Code, 1860 (Act XLA of 1860) and thereby dishonestly induces members of the public at large to deliver any property including money or valuable security to any person; or
- (x) if he commits the offence of criminal breach of trust as defined in section 405 of the Pakistan Penal Code, 1860 (Act XLA of 1860), with regard to any property including money of valuable security entrusted to him by members of the public at large;
- (xi) if he, in his capacity as a banker, merchant, factor, broker, attorney or agent, commits Criminal Breach of Trust as provided in Section 409 of the Pakistan Penal Code, 1860 (Act XLA of 1860) in respect of property entrusted to him or over which he has dominion, and

(xii) if he aids, assists, abets, attempts or acts in conspiracy with a person or a holder of public office accused of an offence as provided in clauses (i) to (xi)

(b) All offences under this Order shall be non-bailable and notwithstanding anything contained in Ss. 426, 491, 497, 498 and 561-A or any other provision of the Code, or any other law for the time being in force no Court, shall have jurisdiction to grant bail to any person accused of the offence under this Order.

(c) If after completing the investigation of an offence against a holder of public office or any other person, the Chairman NAB is satisfied that no prima facie case is made out against him and the case may be closed, the Chairman NAB shall refer the matter to a Court for approval and for the release of the accused, if in custody.

(6) The schedule appended to NAB Ordinance, 1999 mentions 14 offences which deals as under:-

1. "Any person who aids, abets or through any willful act or omission is instrumental in the commission of the offence of willful default or with wrongful intent for illegal gratification by misuse of power, authority, influence. Nepotism, favouritism writes off, waives, restructures or refinances illegally, improperly or without sufficient justification the principal amount of loan on any financial facility, interest or mark up on any loan or financial facility provided to any person by any bank or financial institution, a co-operative society, a Government Department or an authority established or controlled by the Government shall have committed or be deemed to have committed the offence of corruption or corrupt practices.
2. Refuses to answer questions, or to provide information to any member of the NAB or any other agency when required to do so.
3. Giving false information or fabricating false evidence during inquiry into or investigation of an offence by the NAB or any agency authorized by the NAB in this regard when given by-
(a) a complainant, witness or an accused person or any inquiry officer, and
(b) the investigator of the National Accountability Bureau or concerned agency.
4. Misuse of authority or power in committing any offence specified above by any person holding a public office including any offence under section 161 to 165A of the Pakistan Penal Code)Act XLV of 1860)
5. Deceitfully, fraudulently or dishonestly causing loss to a bank, a financial institution, a co-operative society, a Government department, statutory body or an authority established or controlled by the Federal Government, a Provincial Government, or a local government.
6. Section 168, P.P.C. Public Servant unlawfully engaging in trade.
7. Section 169, P.P.C. Public Servant unlawfully buying or bidding for property.
8. Section 201 P.P.C. causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender.

9. Section 218 P.P.C. Public Servant framing an incorrect record or writing with intent to save a person from punishment or property from forfeiture.
10. Section 219 P.P.C. Public Servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.
11. Section 468 P.P.C. forgery for the purpose of cheating.
12. Section 471 P.P.C. using as genuine a forged document which is known to be a forged.
13. Section 472 P.P.C. making or counterfeiting a seal, plate etc. with the intent to commit a forgery punishable under S. 467 of the Pakistan Penal Code, or possessing with like intent any such seal, plate, etc. knowing the same to be counterfeit.
14. Section 477-A, PPC Falsification of accounts"

(7) The learned Special Prosecutor for NAB in support of his arguments has referred a case of Sardar Ahmed Siyal and another Vs. National Accountability Bureau reported as 2004 SCMR 265 and argued that whenever request is filed for transfer of the case to NAB Court it is imperative to accede to such request and even a show cause notice to the accused is also not necessary. I have respectfully gone through the entire referred case. In the said case an application by Chairman, NAB was filed before Court of Special Judge Anti-Corruption, Hyderabad and Sukkur for transfer of certain cases to the NAB Court. The Special Judge Anti Corruption Hyderabad and Sukkur allowed the application which was impugned before Division Bench of Hon'ble High Court of Sindh, Hyderabad Circuit. The Hon'ble Court was pleased to dismiss the petition giving rise for fling leave to appeal before Hon'ble Supreme Court of Pakistan. The Hon' Supreme Court of Pakistan has held while declining leave to appeal that "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 or 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. The language of the provision unequivocally reflects the intention of the Legislature that the provision is self-contained and self-executory leaving no option for the Court before whom cases involving scheduled offences are pending but to transfer the same. It is rather imperative to accede to such request unless it can be shown to the satisfaction of the Court that the offence against the accused does not fall amongst the offences included in the Schedule. "

(8) The Hon'ble Supreme Court of Pakistan through this judgment has made it abundantly clear that cases involving schedule offence i.e. corruption, corrupt practice, misuse of power, misappropriation of property and matters contacted thereto under the Ordinance shall be transferred to the NAB Court without issuing show cause notice to the accused persons. The ratio decidendi is that the court should be satisfied that the offence against the accused falls amongst the offences included in schedule. On query by this court the Learned Prosecutor appearing for the NAB replied that the offences involved in the subject cases cause loss to the government exchequer. I am not in agreement with this reply of the Learned Prosecutor. If this is the whole criteria for transfer of the case from this Court to NAB Court, the Customs Act 1969 will become redundant.

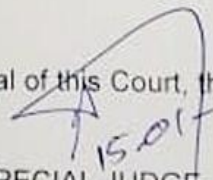
4

(9) There are certain basic objects in the regulation of the Customs Act, 1969. First, it is source of revenue, second an import tax may serve as a means of protecting the goods of home industries against foreign competitors. Customs Act, 1969 is a special statute whereas NAB Ordinance promulgated in the year 1999. There is no provision available under the Ordinance 1991 which derogates Customs Court from exercising its exclusive jurisdiction to try the offence under the Customs Act, 1969, Prevention of Smuggling and allied taxation statutes.

(10) The instant case falls under the provisions of the Customs Act, 1969 of mis-declaration, etc., for the subject consignment with the Customs Authority in the Customs matter at the stage of import. None of the allegation in the instant case is of corruption, corrupt practice, misuse of power, misappropriation of property and matters connected thereto under the Ordinance, 1999. For foregoing reasons and in view of the amendment (Ordinance No. XXVII of 2019) dated 28-12-2019 amending NAB Ordinance 1999 application in hand is dismissed accordingly.

Announced in open court.

Given under my hand and seal of this Court, this 15th day of January, 2020.


SPECIAL JUDGE
SPECIAL JUDGE (CUSTOM & TAXATION)
KARACHI