

JUDGMENT SHEET
**IN THE LAHORE HIGH COURT LAHORE/
RAWALPINDI BENCH RAWALPINDI/
JUDICIAL DEPARTMENT**

Criminal Appeal No.25-E of 2002

Brig. (R) Imtiaz Ahmad Versus The State

JUDGMENT

DATE OF HEARING	<u>19.06.2015</u>
APPELLANT BY	<u>Kh. Haris Ahmad, Advocate & Syed Maqsooma Zahra Bokhari, Advocate.</u>
RESPONDENT BY	<u>M/s. Muhammad Shoaib Khan, ADPG and Muhammad Shahid Mehmood, Senior Special Prosecutor for NAB.</u>

ALI BAQAR NAJAFI, J.- This judgment shall dispose of the instant appeal as well as Criminal Appeal No.24-E of 2002 titled “*Adnan A. Khawaja Vs. The State*”, Criminal Appeal No.26-E of 2002 titled “*Mrs. Nasreen Imtiaz Vs. The State*” and Writ Petition No.20208 of 2010 titled “*Brig. (R) Imtiaz Ahmad Vs. The State*”, as all the above matters arise out of Reference No.21 of 2000 and involve common questions of law and facts.

2. The appellants, Brig. (R) Imtiaz Ahmad, Adnan A. Khawaja and Mst. Nasreen Imtiaz, challenge judgment dated 31.07.2001 passed by the Accountability Court No.III Rawalpindi passed in Reference No.21 of 2000 whereby the learned Judge Accountability Court convicted and sentenced the appellants, Brig. (R) Imtiaz Ahmad and Adnan A.

Khawaja, under section 10 of the National Accountability Bureau Ordinance, 1999 (hereinafter referred to as the Ordinance, 1999) to suffer 8 years R.I. besides fine of Rs.70,00,000/- with the direction to pay the same within one month failing which the same shall be recovered in accordance with law. The appellant Adnan A. Khawaja was further sentenced to 2 years R.I. with fine of Rs.2,00,000/- which shall be paid within one month failing which the same shall be recovered from him in accordance with law. The convicts were also extended the benefit of section 382 Cr.P.C. They were also disqualified for a period of 10 years, reckoning from the date of their release after serving sentence, from seeking or from being elected, chosen, appointed or nominated as member or representative of any public office, any statutory or local authority of Government of Pakistan and shall also be debarred to apply for or be granted or allowed any financial facilities in the form of any loan or advances or other financial accommodation by any bank or financial institution owned or controlled by the government for a period of 10 years. The properties acquired by the appellants in their own name or in the name of their dependents or co-accused were also directed to be forfeited in favour of the Federal Government.

3. As per the allegations made in the reference filed by Chairman NAB, Brig. (R) Imtiaz Ahmad, accused served as Director Intelligence Bureau, Government of Pakistan from

31.03.1990 to 23.04.1993 and he had accumulated vast properties both movable and immovable which appear to be disproportionate to his known sources of income, therefore, it was deemed necessary to conduct investigation to ascertain the facts. The accused was arrested and remanded to custody of NAB and the case was accordingly investigated during which the allegations were found correct. It was also found that co-accused Nadeem Imtiaz, Abdul Ghaffar Chohan, Shamshad Ali and Adnan A. Khawaja aided and abetted principal accused Brig. (R) Imtiaz Ahmad in the acquisition of properties and assets for which they offered no explanation. Properties and assets are as under:-

- I. *Foreign Exchange Bearer Certificates which were encashed by Brig. (R) Imtiaz Ahmad, accused or his dependent family members of the value of Rs.20.08 million.*
- II. *Unit No.9, 1-S, Plaza F-10 Markaz, Islamabad purchased in the name of Abdul Ghaffar Chohan, accused.*
- III. *Unit No.8, 1-S, Plaza F-10 Markaz, Islamabad purchased in the name of Shamshad Ali, accused. Nadeem Imtiaz, accused actively participated in the purchase of this property and in fraudulently concealing that it was purchased for Brig. (R) Imtiaz Ahmad and with the money provided by him.*
- IV. *Unit No.2, 1-S, Plaza F-10 Markaz, Islamabad purchased in the name of Adnan A. Khawaja, accused. Nadeem Imtiaz, actively participated in the purchase of this property and in fraudulently concealing that it was purchased for Brig. (R) Imtiaz Ahmad, accused and money was provided by him (Brig. (R) Imtiaz Ahmad).*
- V. *House No.286, Sector F-10/4, Islamabad measuring 1022 Sq.yards purchased in the name of Shamshad Ali, accused and*

subsequently transferred in the name of Abdul Ghaffar Chohan, accused.

VI. *House No.7, Street No.20, Sector F-7/2, Islamabad measuring 2000 Sq.yards purchased in his own name.*

VII. *House No.6, 9th Avenue, Sector F-8/2, Islamabad measuring 2000 Sq.yards purchased in the name of Nasreen Imtiaz, wife of accused. She is house wife and she has no source of income other than that of her husband.*

During investigation it also revealed that appellant/Brig. (R) Imtiaz Ahmad, accused and his dependent family members had bank accounts in the Union Bank, Islamabad where heavy transactions had been made without any means. The appellant Brig. (R) Imtiaz Ahmad, remained in service of Pakistan and his source of income was the pay he derived from his service, but he acquired Foreign Bearer Certificates and assets in the shape of US Dollars and other properties through corruption and corrupt practices, therefore, he cannot claim immunity from criminal liability under Rule 4 of the Foreign Exchange Bearer Certificates Rules, 1985 or under Section 5 of the Protection of Economic Reforms Act, 1992.

The Chairman mentioned that earlier FIR No.10/94 dated 21.10.1994 was registered against accused (Brig. (R) Imtiaz Ahmad) with FIA/SIU, Islamabad regarding acquisition of assets and properties and later on challan was submitted against accused. He further mentioned that Brig. (R) Imtiaz Ahmad filed Writ Petition No.1379/97 before Honourable High Court, for quashment of said case and the same was accepted vide

judgment dated 04.07.1997. The Chairman also mentioned that properties which were subject of said case are not subject of this reference.

PW-34, Khalid Rasool is the Investigating Officer in this case. He stated that investigation of this case was entrusted to him by Chairman NAB. During investigation it came into his notice that case FIR No.10/94 was also registered against Brig. (R) Imtiaz Ahmad, accused. He collected documents pertaining to the said case. The allegation against accused in the said case was that he acquired assets valuing Rs.2,65,00,000/- and FIR of said case is EXPS whereas report u/s 173 Cr.P.C. is EXPT. Riaz Ahmed, PW produced before him notification regarding appointment of Brig. (R) Imtiaz Ahmad, accused on contract as OSD. He also obtained documents, EXPW34/1-5 regarding appointment and termination of accused as Director Intelligence Bureau by Government of Pakistan. Haq Nawaz, PW produced before him wealth tax documents of Brig. (R) Imtiaz Ahmad, accused and his family members and the same were taken into possession vide memo EXPH. Nasir Ali Qureshi produced before him income tax return etc. He also collected evidence of PEBC encashment regarding Brig (R) Imtiaz Ahmad, accused and his family members which were valuing Rs.20.08 million. During investigation it was found that aforesaid amount (Rs.20.08 million in the shape of FEBC encashment) was not detected during investigation of case FIR No.10/94 and the

same was not included in its challan. The accused declared the said assets in their wealth tax statement during year 1996-97 (revised statement for the year 1990 to 1993). It was found that Brig. (R) Imtiaz Ahmad, accused purchased Unit No.9, 1-S Plaza in F-10 Markaz of Islamabad from Mt. Sharam Bibi for Rs.28,00,000/- in 1993 in the name of Abdul Ghaffar Chohan as Benamidar. Later on Brig. (R) Imtiaz Ahmad obtained General Power of Attorney to sell from Abdul Ghaffar Chohan in 1998-99. He recorded statement of son of Mst. Sharam Bibi in this connection. Brig. (R) Imtiaz Ahmad, accused also purchased Unit No.8, 1-S Plaza in F-10 Markaz, Islamabad from Irshad Ahmed in the name of Shamshad Ahmed for Rs.29,32,500/- in 1993 as Benamidar. Nadeem Imtiaz son of Brig. (R) Imtiaz Ahmad, accused paid Rs.16,00,000/- through pay order EXPW12/2. Later on Brig. (R) Imtiaz Ahmad sold the said property to Qasim Hafeez for Rs.70,00,000/- in year 2000. He paid Rs.5,00,000/- to Mehmood Ahmad for getting possession of the said property. Brig. (R) Imtiaz Ahmad, accused purchased House No.286 in F-10/4 Sector, Islamabad in the name of Abdul Ghaffar Chohan as Benamidar. He purchased this property in 1993 for Rs.63,00,000/- from Chaudhary Asif. During investigation it was found that Brig. (R) Imtiaz Ahmad, accused obtained General Power of Attorney with power to sell from Abdul Ghaffar Chohan. At the time of said sale Nadeem Imtiaz paid Rs.20,00,000/- to the

vendor through pay order. The signatures of Nadeem Imtiaz were sent to handwriting expert for comparison and the result was positive. Brig. (R) Imtiaz Ahmad, accused purchased Unit No.2 1-S Plaza in F-10 Markaz, Islamabad in the name of Adnan A. Khawaja, accused as Benamidar in 1996. He purchased this unit from Muhammad Zakria for Rs.30,48,000/- and Nadeem Imtiaz, accused paid sale price in court on behalf of vendee. He obtained certified copies of civil suit (Muhammad Zakria Vs. Nadeem Imtiaz) and order passed by civil court and Appellate Court. He also collected evidence from CDA about the aforesaid property. The Power of Attorney executed by Muhammad Zakria in favour of Adnan A. Khawaja, accused was obtained from CDA. During investigation employee of CDA, Syed Sabir Hussain Shah stated that original Power of Attorney was received by Mukhtar Hussain, servant of Brig. (R) Imtiaz Ahmad, accused after signatures. Nadeem Imtiaz, accused invested Rs.39,00,000/- in Ali Plaza, Blue Area, Islamabad for purchasing three shops in the name of Faisal Sakhi Butt as Benamidar. He purchased said property from Dr. Shaukat Ali and Faisal Sakhi Butt obtained Power of Attorney from the owner. Nadeem Imtiaz, accused had paid amount through pay order etc. Dr. Shaukat Ali has died. Brig. (R) Imtiaz Ahmad, accused purchased house No.6 in F-8/2, Sector 9th Avenue, Islamabad in 1999 in the name of his wife, Mst. Nadeem Imtiaz for Rs.80,00,000/-. He purchased

house No.7 in F-7/2 Sector, Islamabad in 1999 for Rs.1,40,00,000/-. Brig. (R) Imtiaz Ahmad, accused and his family members had eight Pak currency accounts and eight Foreign currency accounts in Union Bank, Islamabad and there were huge amounts transactions in the said accounts. The accused used to avail loan facility and he gave collateral security in the shape of US dollars etc. Brig. (R) Imtiaz Ahmad, accused and his family members obtained loan from Deutsche Bank, Islamabad against FEBC worth Rs.90,00,000/-. They had also dolloars and against the same they received loan. The accused purchased aforesaid FEBC during 1990-91. The Investigating Officer obtained record from CDA of remaining properties also. He also obtained certified copies of Power of Attorney from the office of Registrar, Islamabad. During investigation it was found that accused had acquired/owned assets disproportionate to their known sources of income. Brig. (R) Imtiaz Ahmad, accused also acquired property/assets in the name of his co-accused and family members as "Benamidar". The Investigating Officer recorded statements of PWs, completed investigation and challaned the accused.

The reference was filed against Brig. (R) Imtiaz Ahmad, accused and others. However, Nadeem Imtiaz, accused did not appear in court and he was declared proclaimed offender. Abdul Ghaffar Chohan and Shamshad Ali, accused became

approver. Only Brig. (R) Imtiaz Ahmad and Adnan A. Khawaja, accused faced trial.

Brig. (R) Imtiaz Ahmad and Adnan A. Khawaja, accused appeared in this court and charge under section 10 of the Ordinance, 1999 was framed against them to which they pleaded not guilty and claimed trial whereupon prosecution evidence was recorded. The prosecution examined 34 witnesses in all to prove its case.

4. On 10.03.2001 the charge against both the appellants was framed as under:-

“That during period from 1990 to 1999 you Brig.(R) Imtiaz Ahmad and Adnan A. Khawaja accused acquired properties and assets at different places (detail whereof has been given in the reference) which are disproportionate to your known source of income; that you Brig.(R) Imtiaz Ahmad also acquired properties and assets (detail whereof has been given in the reference) in your name and in the name of your dependents and Adnan A. Khawaja and that you also acquired properties (detail whereof has been given in the reference) in the names of Abdul Ghaffar Chohan and Shamshad Ali Chohan (approvers) as benamidars and thereby committed offence of corruption and corrupt practices as defined in section 9 which is punishable u/s 10 of NAB Ordinance, 1999 within the cognizance of this court.”

5. In order to prove its case the prosecution has produced as many as 34 witnesses besides documentary evidence whereas the defence has produced as many as 8 witnesses besides documentary evidence and the court summoned and examined four witnesses i.e. CW1 to CW7 as court witnesses. In a statement under section 342 Cr.P.C. the appellant/Brig. (R) Imtiaz Ahmad has denied the allegations and in response to question No.11 regarding the deposit of US Dollars 1,27,277 by his family members in Deutsche Bank for obtaining loan of Rs.8.6 million, he replied as follows:-

“It is incorrect. Initially account was opened with US Dollars 8,000/-. We used to receive loan from Pak rupee account for purchasing dollars from the market and deposited the same in said bank in foreign currency account. So there was amount of US Dollars 1,27,287. At that time our loan in Pak rupee account increased. We had only US Dollars 8,000 and profit earned from foreign currency account and the remaining amount was for the adjustment of Pak rupee loan account.”

In response to question No.16 as to why this case against him and why the PWs deposed against him, he replied as follows:-

“I had been serving in Army before my appointment as Director I.B. During Army service too I had been performing duty relating to intelligence services in most sensitive areas. I also worked as Director ISI from 1977 to 1990. In 1994 I was involved in I.B.S.S. fund case, but I was acquitted. The case FIR No.10/1994

regarding assets was registered against me but the same was quashed by Hon'ble High Court. In this reference assets mentioned in case FIR No.10/1994 have been again included. My assets were declared lawful by Hon'ble High Court in writ petition No.1379/97. Different governments involved me in different cases due to their political designs. I was arrested by the present government on 17.10.1999 and kept me in illegal detention till 26.05.2000 and showed me arrest on 26.05.2000. However they took me to different hospitals for treatment but never produced before any Magistrate during said period. The approvers have made statements under pressure and promise because present government and NAB authorities have promised to exonerate them from Income Tax, wealth tax, banking circle and foreign exchange inquiries which are pending against them. The PWs have made statements against me under the pressure of NAB. The approvers made statements to save their contracts and business relating to government. They deposed against me to get crores of rupees from government.”

6. Adnan A. Khawaja/appellant also denied the allegations against him and to a question why this case against him and why the PWs have made statements against him, he replied as under:-

“The I.O. pressurized me to become a false witness against Brig (R) Imtiaz Ahmad co-accused but I refused. On my refusal he falsely

implicated me in this case due to his malafide.
None of the PWs made statement against me.”

After the evidence, the appellant was convicted as mentioned in para 2.

7. M/s. Kh. Haris Ahmad and Syeda Maqsooma Zahra Bokhari, Advocates for the appellants contend firstly, that the charge was defectively framed and necessary legal requirements of section 222 Cr.P.C. were not followed inasmuch as it was joint in nature, comprising of two paras and the precise allegations were not mentioned but only a reference was given to the report under section 173 Cr.P.C. Secondly, contend that the investigation was not properly conducted, the appellants were not given fair chance to incorporate his defence, therefore, violation of provision of Article 10-A of the Constitution of Islamic Republic of Pakistan, 1973 was made. Places reliance upon **Ghumman case PLD ----- Lahore -----**-. Thirdly, contend that in the statement under section 342 Cr.P.C., the evidence collected against him was not put to him in the form of questions, therefore, the prosecution had not been able to fulfill the legal requirements. Fourthly, contend that the requirement of section 26 of the Ordinance, 1999 for declaring a person as an approver was not fulfilled as there does not exist any order by the Chairman declaring PW1 and PW2 as approvers. Fifthly, contend that FIR No.10/1994 registered

under section 5/2/47 at P.S FIA SIU, Islamabad, related to the period 1980-1993 on the same allegations of misappropriation of Rs.15/20 million, whereafter the investigation was conducted and the said FIR was quashed in W.P.No.1379 of 1997 titled “Brig. (R) Imtiaz Ahmad Vs. Federation of Pakistan” on 04.07.1997, therefore, the same allegations cannot be re-agitated, otherwise it would be violation of Article 13 read with section 403 Cr.P.C. Sixthly, contend that no illegal source of income was investigated by the NAB authorities, therefore, the question as to whether the assets built by the appellants were beyond the valid source of income cannot be proved. Places reliance upon GHANI-UR-REHMAN versus NATIONAL ACCOUNTABILITY BUREAU and others (PLD 2011 SC 1144). Seventhly, contend that the prosecution has not levelled any allegation of misappropriation of the government funds, therefore, in a case for assets beyond means, the allegations must have nexus with the allegation of misappropriation of government funds. Eighthly, contend that the income tax returns and wealth tax statement are for the purposes of tax collection and not for the purposes of making out a NAB case for which the NAB authorities have the exclusive jurisdiction to investigate and dig out any illegal source of income which they have failed to do. Ninthly, contend that there was no law stopping the NAB authorities to probe the source of income of the appellant who happened to be the former head of the

Intelligence Bureau, Government of Pakistan, as under section 27 of the Ordinance, 1999 all the said agencies are bound to provide information to the NAB authorities. Finally contend that the involvement of appellant/Brig. (R) Imtiaz Ahmad has not been proved and Adnan A. Khawaja/appellant had successfully proved his valid source of income, therefore, pray for setting aside of the conviction order.

8. Conversely, M/s. Muhammad Shoaib Khan, Addl. Deputy Prosecutor General and Muhammad Shahid Mehmood, Senior Special Prosecutor for NAB contend that it is a fit case on the basis of the written admission by appellant made on the basis of documentary proof of declaration by appellant filed in his parent Department and in the income tax and wealth tax returns in which the appellants have categorically stated about their valid sources. Refer to para 33 of the judgment on the strength of their arguments. Also give reference to Exh.PW21/1-173 and letter Exh.PM as well as Exh.PW21/174-184 along with letter Exh.PN. Further contend that PW1 and PW2 were legally declared as approvers and finally pray for dismissal.

9. We have heard the learned counsel for the parties as well as learned Special Prosecutor and Addl. Deputy Prosecutor General for NAB and perused the record.

10. Under Section 222 Cr.P.C., the framing of charge has been explained which is reproduced as under:-

“222. Particulars as to time, place and person. (1)

The charge shall contain such particulars as to the time and place of alleged offence, and the person (if any) against whom; or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and in the charge so framed shall be deemed to be charge of one offence within the meaning of section 234;

Provided that the time included between the first and last of such dates shall not exceed one year.”

It reveals that the above said charge was not framed in accordance with its requirements.

11. Moreover, a perusal of above charges reveals that in all these charges, the known illegal source of income of the appellants has not been given and it was left to the defence to prove that they owned these properties out of their illegitimate sources of income. In order to understand whether this approach is legal, here it will be appropriate to reproduce Section 9(a)(v) and sub-clause (vii) of the Ordinance, 1999.

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

- (i) -----
- (ii) -----
- (iii) -----
- (iv) -----
- (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) -----
- (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 person] or

12. The above clause of the Ordinance, 1999 has been abundantly made clear that disproportionate assets can only be ascertained with reference to the known source of income and the burden to prove this known source of income has been primarily upon prosecution as interpreted by the apex Court in KHAN ASFANDYAR WALI versus FEDERATION OF PAKISTAN through Cabinet Division, Islamabad and others (PLD 2001 SC 607), the relevant extract is as under:-

“Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This interpretation appears to be reasonable in the context of the background of the Ordinance and the rationale of promulgating the same notwithstanding the phraseology used therein. The above provisions do not constitute a bill of

attainder, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set up, it is necessary to issue the following directions for effective operation of section 14(d):

(1) The prosecution shall first make out a reasonable case against the accused charged under section 9 (a)(vi) and (vii) of the National Accountability Bureau Ordinance, 1999.

(2) In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt.”

13. The overall effect of the above provisions as well as the law laid down by the Supreme Court of Pakistan is that an accused person cannot be held responsible for having owned the properties purchased through unknown source of income or illegitimate means. We have scanned the entire evidence but could not find a word in the prosecution case under which the accused was required to explain the specific source beyond the known source of income.

14. The accused was made to explain his legal source of income and in response to which he has not only produced his own defence witnesses but has also explained his entire assets and has reasonably explained the source to purchase those assets which were in the form of profits in various business which he has declared in the Wealth Tax Statement and Income Tax Returns as well as in Declaration Form prescribed for a government servant. In our considered opinion by merely

showing the details of assets and without disclosing the source of income, the prosecution has not been successful in shifting the onus to the accused to prove his innocence.

15. We have not been able to point out a single piece of evidence or even allegation either at the investigation stage or before the trial court to suggest that appellant Brig. (R) Imtiaz Ahmad, has allegedly misused his authority to earn the ill-gotten money in order to build up his assets illegally. The learned trial court on its own while adopting the inquisitorial proceedings has calculated the known source of income in the judgment whereas to our opinion the court was simply required to weigh the prosecution evidence and to see as to whether it had successfully proved the case against the appellants beyond reasonable doubt. To cater the situation we have been guided again by the Supreme Court of Pakistan in GHANI-UR-REHMAN versus NATIONAL ACCOUNTABILITY BUREAU and others (PLD 2011 Supreme Court 1144), wherein it was held that the prosecution must bring on record the misuse of authority of the public servant to show that the assets built by him is disproportionate to the known source of income. Relevant extract of said judgment is reproduced as under:-

“The law now stands settled that in order to prove commission of an offence under section 9(a)(v) of the National Accountability Ordinance, 1999 it has to be proved by the prosecution as to what were the known sources of income of the accused person at the relevant time and that the resources or property

of the accused person were disproportionate to his known sources of income and it is after such proof has been led and the necessary details have been provided by the prosecution that the onus shifts to the accused person to account for such resources or property because mere possession of any pecuniary resource or property is by itself not an offence but it is failure to satisfactorily to account for such possession of pecuniary resource or property that makes the possession objectionable and constitutes the relevant offence. In the case in hand the appellant's sources of income had never been brought on the record by the prosecution and had never been quantified by it at any stage of this case and, therefore, it was not possible for the learned trial court to conclude or to hold that the appellant or his dependants or so-called benamidars owned or possessed assets or pecuniary resources disproportionate to the appellant's income. It is unfortunate that the investigating officer of this case as well as those responsible for prosecution of this case before the learned trial court had, probably on account of their sheer incompetence, utterly failed to do the needful in this regard and it is regrettable that even the learned trial court as well as the learned appellate court had completely failed to advert to this critical aspect of the present case."

16. After having found the above said legal lacunas we still would like to discuss the prosecution as well as defence evidence.

17. **PW-1, Abdul Ghaffar** s/o Abdul Rasheed and PW2/Shamshad Ai Chohan s/o Abdul Rasheed are statedly the approvers. However, Section 26 of the Ordinance, 1999 requires the approval by the Chairman NAB even before trial prior to the amendment dated 23.11.2002 introduced by Ordinance No. CXXXIII of 2002. The power to decide an application by Chairman NAB for full or conditional pardon to a person with a view to obtain evidence against a person

supposedly concerned, directly or indirectly in or privy to the offence has not been found to have been examined as despite the best efforts by the learned prosecutor, we have not been able to dig out any such order passed by Chairman NAB allowing them to become the approver. Although there exists the order passed by this Court whereby the District Magistrate was directed to record the statements of said two witnesses as approver but as already said, the order of the Chairman was not available. Upon the insistence of learned prosecutor we have read the statements of PW-1 and PW-2 who stated that according to them, since they wanted to get NOC in order to get registration to work with Dr. Abdul Qadeer Khan Research Laboratory, therefore, through Mohsin Naqvi and Jafar Ali Mir, he contacted the appellant Brig. (R) Imtiaz Ahmed, who was working in ISI, whereafter his name was cleared. Since then he developed relations with him. In 1993 he statedly purchased plot No. 1-S-9, F-10 Markaz Islamabad for Rs.28,00,000/- and paid Rs.5,00,000/- to Mst. Sharam Begum. According to him, appellant Brig. (R) Imtiaz Ahmed, paid Rs. 28,00,000/- but the property was transferred in the name of PW-1 as Benamidar. In 1998-99, he received an irrevocable power of attorney from this witness. However, Mst. Sharam Begum, who sold off the plot did not appear anywhere as a witness. The appellant Brig. (R) Imtiaz Ahmed, also statedly purchased a house in F-10 Sector, Islamabad for Rs.63,00,000/- in 1993 from one Asif Ali etc.

but the said Asif Ali, did not appear as a witness. Rs. 33,00,000/- was paid from the account of this witness whereas Rs. 33,00,000/- was paid by the appellant Brig. (R) Imtiaz Ahmed. Later, this property was transferred in the name of PW-1 after when the appellant paid Rs. 33,00,000/- to this witness and again irrevocable power of attorney was issued in his name. However, he admitted that CDA has not transferred this plot in his name on the request of FIA but later plot was transferred on the pursuance of the appellant. Although he admitted that he had no copy of above said power of attorney. He admitted that his company namely, Rexo Engineering Works was registered in 1986 at Kamra Complex. He admitted that although he went to the office of NAB but nobody recorded his statement. He has also admitted that he opted on his own to become an approver in October or November 2000 as he alongwith PW-2 his brother Shamshad Ali Chohan, filed applications in the court. He admitted that while recording his statement before the District Magistrate, Adnan A. Khawaja, co-appellant was not present. This witness also admitted that Rs. 15 million was outstanding against the Government since 1997 and only Rs. 20,00,000/- was received in the previous 16 months. This witness later in his statement denied the execution of irrevocable power of attorney Exh-DA and Exh-DB though admits his signatures but was affixed on the blank papers. His statement, otherwise, does not appear to be confidence

inspiring. Likewise, **Shamshad Ali Chohan son of Abdul Rashid, PW-2** also admitted that Unit No. 8 situated in F-10 Markaz, Islamabad was purchased by the appellant Brig. (R) Imtiaz Ahmed, in his name as Benamidar for total price of Rs. 29,32,500/- paid by him in 1993 to Irshad Ahmed, the previous owner. The deal was struck through Abdul Ghaffar, PW-1, brother of this PW-2. Irrevocable power of attorney Exh-PC was procured from said Irshad Ahmed. This property was sold off in 1999 to Qasim Hafeez, for Rs. 70,00,000/- but only Rs. 36,00,000/- was mentioned through Rana Iftikhar Ahmed, property dealer. He admitted that he neither paid the amount nor was in possession of the same. He admitted that another plot was purchased by PW-1 Abdul Ghaffar, in the name of Munshi Khan and PW-2 which was sold off in the year 1997. This witness has admitted that a cheque was issued to Umer son of Imtiaz Ahmed, which was dishonored later and a car was handed over to him and thereafter they decided to become approver. While getting his statement recorded before the District Magistrate, he has also explained that proper procedure regarding consent, undue pressure, willing statement could not be followed. He has also shown his lack of knowledge on the declaration of Unit No.8 in amnesty scheme. **PW-3, Brig. (R) Iftikhar Muhammad** son of Ch. Sultan Muhammad, a friend of M. Zikria, who lived in London and holder of power of attorney on his behalf in respect of Unit No.2, I-s Plaza, F-10

Markaz, Islamabad, as Nadeem Imtiaz, was a tenant of shop No.2, when he failed to pay the rent he was asked to vacate but upon his refusal a suit for ejection was filed. During its pendency, he agreed to pay the rent and this witness agreed to sell the same for a consideration of Rs.30,48,000/- as arrears of rent in June 1996, meanwhile, said Zikria, returned from U.K. who was not happy with the sale but preferred to execute a separate agreement with Adnan A. Khawaja, later. This witness in cross-examination denied that in his presence the amount was paid in the bank and in fact M. Zikria, transferred the property to Adnan A. Khawaja. He admitted that Adnan A. Khawaja, owned a factory in Hattar and is running a phone shop. He admitted that he moved an application to Ministry of Interior in 1994 for the payment of rent but admittedly in this year he was not a Government servant. However, he denied that any inquiry was pending against the appellant Brig. (R) Imtiaz Ahmed, in the year 1994. **PW-9/Azhar Islam**, Manager Operation, Union Bank, admitted that Account No.CD0063480009 (Umar Imtiaz and Nasreen Imtiaz) was opened in December 1997, and the opening debit balance was Rs. 49,00,000/- and later further amounts were added. He admitted that Account No. CD0078580001 belonged to the appellant Brig. (R) Imtiaz Ahmad, and admitted that there was no credit balance in the said account. He admitted that the appellant used to purchase foreign currency after drawing

money from his loan accounts and deposited the same in the foreign currency account as the same was legal transaction. **PW-21/Nasir Ali Qureshi**, Deputy Commissioner, Income Tax, Rawalpindi, produced the income tax till assessment years 1997-98 and record of wealth tax till assessment years 1998-99. He did not produce any wealth tax statement of the appellant from 1989 to 1997. **PW-23/M. Kishwar Kiani**, Hand Writing Expert, FIA Headquarters, Islamabad, stated that signatures of Nadeem Imtiaz, shown on the pay order slips dated 19.12.1993, Exh.PW-23/2 and dated 15.12.1999, Exh.PW-23/1 were found genuine though admitted that said signatures were not procured either in the court or by the orders of the court. **PW-25/Tasawar Hussain**, Assistant Accounts Officer, Federal Treasury Office, Islamabad who had not brought the original bank challan Ex.PW-25/2, therefore, he could not be appreciated. **PW-27/Mehmood Ahmed**, son of Meraj Din, a tenant of shop who admitted that rent receipts used to be provided by Mst. Parveen wife of Ghaffar Chohan through Nadeem Imtiaz and has also admitted that 2/3 times he paid the rent to Tahir Amer Khan in the absence of Ghaffar Chohan and Nadeem Imtiaz. It shows that property was not in the name of Nadeem Imtiaz. **PW-29/Raza Munawwar**, Additional Commissioner, Income Tax, admitted that Abdul Ghaffar Chohan, had declared the Unit No.9, F-10 Markaz, Islamabad in the wealth tax statement and that US \$ 93,987/- and Sterling

Pounds 55,789/- were assessed during the year 1995-96 of said Abdul Ghaffar Chohan. **PW-30/Nisar Ahmed Kiani**, Manager Deutsche Bank, Islamabad admitted that Umer Imtiaz and Nasreen Imtiaz, opened dollar account on 07.08.1997 by depositing US \$ 8000/- cash and according to the record there was withdrawal and subsequent increase in dollar account which was legitimate money as per State Bank Rules. **PW-31/Sohail Ali Khan**, Press Attachee, who was posted as income tax Assistant Commissioner, Islamabad, from February 1996 to June 1997. During his posting FEBC were produced for explanation which were valuing Rs.20.08 million. The appellant and his family members produced wealth tax statement and reconciliation statement as EXH.PW-16/1-24 and according to his order, the income tax statement was cleared as the source has been explained but as far as wealth tax declaration is concerned, he directed them to pay Rs. 18,00,000/- as wealth tax. He admitted that FIA initiated the case on the report in the year 1994 against the appellant and his family members. According to this witness, he examined the record pertaining to the appellant and his family members starting from 1994 i.e. when the appellant was no more in government service. He admitted that reconciliation statement from 1990 to 1997 was produced by the appellant. This witness has also admitted that assessment order was challenged in the year 1989 to 1997 which was set aside and the case was

remanded for fresh decision. **Khalid Rasool**, Inspector, FIA appeared as **PW-34** who deposed that the allegation against the appellants was that they acquired assets valuing Rs.2,65,00,000/- upon which FIR No. 10 of 1999 was registered (Exh.PS) and report under Section 173 Cr.P.C. was submitted Exh.PT. He admitted that during the investigation of above said FIR, Rs. 20.08 million FEBC encashment could not be detected. He admitted that entire allegation in FIR No. 10 of 1999 pertained to appellant Brig. (R) Imtiaz Ahmad, and his family members which included moveable as well as immovable assets. He as I.O. was required to collect the documents regarding the sale price of Rs.70,00,000/- of Unit No.8 but he did not record the statement of Qasim Hafeez, who purchased the property and Mst. Sharam Bibi, who sold the property nor the statements of Sarfraz and M. Hassan was recorded, no document was collected to show the price of House No. 286, Unit No.2, Unit No.1 and Unit No.9. No evidence was produced to show that the appellant Brig. (R) Imtiaz Ahmed, purchased the property. He did not cross-examine this witness regarding loan, over drafts and payments which were between 1995 to 1999. He did not record the statement of M. Zikria, who sold the property to alleged Benamidar. He further admitted that Rs. 30,48,000/- deposited with the Civil Court did not contain signatures of Nadeem Imtiaz. He admitted that he remained under suspension for 4

months in the year 1999. **DW-3/Mukhtar Hussain**, who purchased House No. 589, St. No. 30 in G-10/2 Sector, Islamabad from Umer Imtiaz, for a consideration of Rs. 53,00,000/- which he paid in cash. **DW-4/Rana Mehboob Ahmed**, who accompanied Nadeem Imtiaz, in the office of CDA for transfer purposes of the above said plot. **DW-8/Tahir Khan**, stated that he purchased plot No.19. St. No. 60, Sector F-11/4, Islamabad from the appellant Brig. (R) Imtiaz Ahmad, for a consideration of Rs. 55,00,000/- paid on 14.09.1998 and obtained the possession of plot whereafter the said plot was transferred in his name. There were 7 court witnesses who were government functionaries showing different transactions taken place in the account of the appellant Brig. (R) Imtiaz Ahmad.

18. The learned Accountability Court vide its impugned judgment dated 31.07.2001 forfeited the following properties in favour of the Federal Government:-

- I) House No.286, F-10/4 Sector, Islamabad.
- II) Unit No.9,1-S Plaza F-10 Markaz, Islamabad.
- III) Unit No.2, 1-S Plaza F-10 Markaz Islamabad.
- IV) House No.7, Street No.20, Sector F-7/2, Islamabad.
- V) House No.6, 9th Avenue Sector F-8/2 Islamabad.

Property No.1 was forfeited on the ground that the approver namely, PW-1 & PW-2 fully supported the prosecution case stating that the appellant Brig.(R) Imtiaz Ahmad purchased the said property, though not in his own name but in the name of Shamshad Ali and Abdul Ghaffar Chohan i.e. PW1 and PW2. A

reference was given to the irrevocable power of attorney in the name of appellant and pay order slip Exh.PW-12/1-6. A reference was also given to the Amnesty Scheme but the learned trial court has failed to appreciate that the property purchased in the year 1999 could hardly be forfeited for the simple reason that it was not built during the period of service of the appellant. Additionally, benefits and privileges of the Amnesty Scheme were not even disclosed to the Court. In order to prove the assets beyond means, assets must be built during the period when holder of the public office remained in the office. The entire prosecution case rests upon the statements of the approver and as already stated when the order of the Chairman, NAB that the statement of approver cannot be wholly relied on, therefore, confiscation of the said property was illegal. Property No.2, Unit No.9, 1-S Plaza F-10 Markaz, Islamabad was statedly purchased by the appellant Brig.(R)Imtiaz Ahmad from Mst.Sharam Bibi in the year, 1993 for a consideration of Rs.20,00,000/- in the name of Abdul Ghaffar Chohan as Benamidar. The said Sharam Bibi was not produced either before the Investigating Officer or before the Court. Rest of the evidence is that of approver. The learned trial court has forfeited the property only on the ground that he did not disclose his source of income of Rs.20,00,000/- out of which he purchased the property; suffice it to say, that mere possession of assets unless it has nexus with the ill-gotten

money does not mean to constitute an offence. It is also reiterated that these properties were statedly built after 1993, which means that the appellant was out of service. Property No.3, Unit No.2, 1-S Plaza F-10 Markaz, Islamabad is the property which was sold off by Muhammad Zikraya but the said vendor did not appear in the witness box to support the prosecution version. No registered sale deed was produced to show that the property was in the name of Adnan A. Khawaja and Nadeem Imtiaz. Property No.4, is a House No.7, Street No.20, Sector F-7/2, Islamabad which was statedly purchased in the year 1999, whereas his services were ended in the year 1993, which was again built during the period outside of his service. Property No.5, House No.6, 9th Avenue, Sector F-8/2, Islamabad is again the property built in the year 1999 after when he was not in service.

19. Scanning the above evidence as well as findings of the trial court, we are constrained to hold that the said properties cannot be confiscated for the simple reason that the findings were based on the statements of approvers who were not permitted to become as such by the order of the Chairman, NAB and in case of the above said properties, the vendors were not produced. Moreover, the ingredients of Benamidars transactions as held in the dictum laid down by the apex Court in Mst. ZAHIDA SATTAR and others versus FEDERATION OF PAKSITAN and others (PLD 2002 SC 408) could not be

produced. The possession of the property, the written transaction, the circumstances under which Benamidar transactions were made were required to be disclosed before the court by the prosecution.

20. As already observed, the appellant was made to discharge the burden of his innocence which is against law. The declaration for the purpose of income tax and wealth tax could not be used to ascertain the source of income to determine the assets beyond the means of the appellants by the NAB authorities. There is an iota of allegation against the appellant Brig. (R) Imtiaz Ahmad that he has misused his authority, therefore, there was no nexus of ill-gotten money for the built of the above said assets/properties.

21. Under section 27 of the Ordinance, 1999 the NAB authorities could always probe and receive information from any government departments including the Intelligence Bureau to dig out the reality of the funds which may have been utilized to purchase the properties even by its head. To receive information about the ill-gotten money in our opinion would hardly affect national interests rather it will further promote them. Undoubtedly, any act to eliminate corruption cannot by any stretch of imagination be considered as an act against national interest. We are conscious that the corruption is rampant in our society and its deadly poison has severely affect not only the common man but also the State functionaries.

22. For the above stated reasons, we allow these appeals, set aside the impugned judgment of conviction passed by the Accountability Court, Rawalpindi/Islamabad and acquit the appellants namely, Brig. (R) Imtiaz Ahmad and Adnan A. Khawaja and also release the above said five properties forthwith. The appellants are on bail and their sureties are discharged from the liabilities of bail bonds. W.P.No.20208 of 2010 is also allowed in view of our findings in the instant appeal.

(S.M. KAZIM RAZA SHAMSI)
JUDGE

(ALI BAQAR NAJAFI)
JUDGE

Approved for reporting

JUDGE

Hashmi