

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Ahmed Ali M. Shaikh, C.J.

Mr. Justice Mohammad Karim Khan Agha, J.

Petition number, name of the petitioner and his counsel.

C.P. No.D-6642 of 2016 Eshan Ullaha Sirazi & another V.
Director General (Karachi), NAB,
Eshan Ullaha Sirazi S/o Mir Wali Ullaha Sirazi
Syed Azhar Hussain Sirazi S/o Mir Wali Ullah Sirazi
Through Mr. Khalid Mahmood Awan, Advocate.

Counsel for the Respondents

Mr. Mohammed Altaf, Special Prosecutor, NAB.

Date of hearing: 23.01.2018 and 07.02.2018

Date of order: 13.02.2018

ORDER

Mohammad Karim Khan Agha, J:

The petitioners

through this petition under Article 199 of the Constitution R/W section 561-A Cr.PC have approached this court in order to set aside the order dated 24.11.2017, passed by learned Accountability Court No.II Sindh at Karachi in NAB Reference No.24/2015 whereby the respective applications u/s 12 of National Accountability Ordinance 1999 (NAO) filed initially by the National Accountability Bureau (NAB) and thereafter the complainant for freezing of properties of the petitioners was allowed.

2. The brief facts of the case are that the petitioners along with others were being investigated by the NAB for the offense of cheating the public at large under S.9 NAO to the tune of RS151 million and as such in order to secure a part of the amount allegedly cheated from the public the Chairman NAB passed a freezing order dated 06-08-2015 against both moveable and immoveable properties owned by the accused and directed the Deputy Prosecutor General Accountability to file an application before the concerned accountability court for the confirmation of the aforesaid order. Such an application was made to the court on 08-08-2015 and notice was give to the accused. Thereafter on 12-08-15 the National Accountability Bureau filed **Reference No.24/15 State V Ehsanulah Shah and others** against the petitioners and other co-accused before the accountability court in Karachi. On 10-09-2016 the complainant made an application under S.12 NAO for freezing the properties of the accused. By consolidated order dated 24-11-2016 the accountability court allowed NAB's freezing application (the impugned order) which the petitioners through his petition and application under S.561 (A) have prayed this court to set aside.

3. At the very outset the petitioner was put on notice to satisfy this court as to the maintainability of this petition. His basic stance was that the impugned order had been passed

by the court after a lapse of more than 15 days since NAB had filed its application for confirmation of its freezing order and as such since the freezing order was made in violation of S.12 (iv) NAO it was not sustainable in law. He also submitted that under the NAO the complainant could not apply for a freezing order. In support of his contentions he placed reliance on **Shuja Khan Baluch vs. Capital Development Authority** (PLD 2011 Islamabad 25), **Dr. Muhammad Azam Kasi vs. The State** (2012 P.Cr.L.J 1950) **The State v Babar Ali Kharal** (PLD 2008 Lahore 347) and **Major (R) Nadir Ali vs. The State** (PLD 2003 Quetta 77).

4. On the other hand learned counsel for NAB maintained that the impugned order had been validly passed even if 15 days had expired after the passing of the impugned order. In support of his contention he placed reliance on **Mrs Shagufta Shaheen V State** (2012 P.Cr.LJ 1317)

5. We have considered the submissions of the parties and the relevant law.

6. It is true that this petition has been filed under Article 199 of the constitution R/W S.561 (A) Cr.PC and the proper means of appealing a freezing order which has been granted under S.12 NAO by the accountability court is through S.13 (c) NAO which provides as under;

“13. (c) The accused or any aggrieved party, whose claim or objection against freezing of property has been dismissed by the court, may, within 10 days **file an appeal** against such order before the High Court”

7. However in order to do complete justice in this case based on its particular facts and circumstances since this petition was filed within this 10 day period under our discretionary constitutional jurisdiction we hereby convert this petition into an appeal and as such it is maintainable. In this respect reliance is placed on **Mian Asghar Ali V Government of Punjab** (2017 SCMR 118)

8. Since this appeal in effect revolves around the application/interpretation of S.12 NAO we set out the relevant parts of S.12 NAO for assistance below:

“12. Power to freeze property.—(a) The Chairman NAB or the Court trying [an accused] for any offence as specified under this Ordinance, may at any time, if there appear reasonable grounds for believing that the accused has committed such an offence, **order the freezing of his property, [***] or part thereof, whether in his possession or in the possession of any relative, associate or person on his behalf:**

(b) If the property ordered to be frozen under sub-section (a) is a debt or other moveable property, the freezing may be made,--

- (i) by seizure; or
- (ii) by appointment of receiver; or
- (iii) by prohibiting the delivery of such property to the accused or to anyone on his behalf; or
- (iv) **by all or any such or other methods as the Court or the Chairman NAB as the case may be, deem fit;**

(c) If the property ordered to be frozen is immoveable, the freezing shall, in the case of land paying revenue, be made through the Collector of the district in which the land is situated, and in all other cases,---

- (i) by taking possession; or
- (ii) by appointment of receiver; or
- (iii) by prohibiting the payment of rent or delivery of property to the accused or to any other person on his behalf; or
- (iv) by all or any such methods as the Chairman NAB or the Court may deem fit;

Provided that any Order of seizure, freezing, attachment or any prohibitory order mentioned above by the Chairman NAB, shall remain in force for a period not exceeding [fifteen] days unless confirmed by the Court, where the Reference under this Order shall be sent by Chairman NAB.

Provided further that notwithstanding [anything to the contrary contained therein] the Order of Chairman NAB or the Court shall be effective from the time of passing thereof or proclamation thereof in a Newspaper, widely circulated and dispatch at the last known address of the accused [either by registered post A.D or courier service or [****] electronic media as the Court may deem proper having regard to the facts and circumstances of the case.] (bold added)

9. The first aspect of this matter which we would like to clarify is that in our considered opinion the complainant has no locus standi to file any application under S.12 NAO for a freezing order. The wording in S.12 (a) NAO is abundantly clear. Namely that it is only the Chairman NAB or the concerned accountability court which has the power to freeze property of the accused or his associates subject to the

limitations of S.12. The complainant in a NAB case may be able to assist the NAB prosecutors if so allowed by the accountability court or this court but such assistance does not extend to filing applications in their own name. As such the accountability court had no power to either entertain or adjudicate upon an application by the complainant under S.12 NAO.

10. This now leaves the chairman NAB's application for freezing which was filed in the accountability court on 08-08-2015. The impugned order dated 14-11-2016 has been passed one year and 3 months after NAB's confirmation application. Although the special prosecutor NAB has conceded that the impugned order was passed more than 15 days after NAB's reconfirmation application he has attempted to justify this delay by relying on the case of **Mrs Shagufta Shaheen** (Supra) which in relevant part, as reproduced from the impugned order, provides as under:

"Ss.12 & 13 (c)---Power to freeze property---Contention of accused was that freezing order of NAB ceased to exist after 15 days and Accountability Court had misinterpreted Section 12(f) of National Accountability Ordinance, 1999 and freezing order had to be confirmed within 15 days----- validity---Case record showed that prosecution had submitted the application for confirmation of freezing order by NAB under S.12 of the National Accountability Ordinance, 1999, before Accountability Court, within stipulated period of 15 days-----**Order-sheets of case indicated that due to one or other reason matter was not finally disposed of and the**

delay/lapse could not only be attributed to the prosecution rather same was an act of accused as well as of the court---Objection of accused was overruled---Appeal was disposed of, accordingly.” (bold added)

11.. As mentioned above the proviso to S.12 clearly states that a freezing order passed by the chairman NAB **shall remain in force for a period not exceeding [fifteen] days unless confirmed by the Court.**

12. As such in our view the chairman NAB's freezing order would cease to have effect on 23-08-2015 being 15 days after the application was filed **unless** it was confirmed by the court. In this case it was not confirmed by the court until 23-08-2016. The word “shall” in the proviso to S.12 makes it in our view prima facie mandatory rather than directory and therefore this 15 day period needed to be strictly followed. Even if the case of **Mrs Shagufta Shaheen** (Supra) could be relied upon, which with due deference and respect to the Peshawar High Court we do not consider it applicable, it is still distinguishable from the present case. This is because in the case of **Mrs Shagufta Shaheen** (Supra) the delay was not on account of the prosecution but also on account of the accused and the court. In the instant case we have received a report dated 07-02-2018 from the accountability court which in material part reads as under:

“the subject application for freezing of properties of accused persons u/s 12 NAO, 1999 was moved by Special Prosecutor, NAB during remand proceedings before the Administrative Judge Accountability Courts Karachi on 08.08.2015 and the Administrative Judge Accountability Courts fixed the same application for hearing on 10.08.2015 but the same was not decided by the Administrative Judge, Accountability Courts Karachi. Thereafter NAB filed Reference bearing No.24/2015 (The State V/s Ehsan Ullah Shah & others) on 13.08.2015 and the same was transferred to this court alongwith the said application on 15.08.2015. **Thereafter, the application kept pending as Special Prosecutor, NAB did not press the instant application** and another application u/s 12 NAO, 1999 was filed by advocate for complainant.” (bold added)

13. Thus, it would appear that the failure to proceed with the application lay at the door of the NAB prosecutors rather than the court or the defense. It was the duty of the NAB prosecutors to pursue its application diligently and expeditiously within the given time limits which it failed to do for reasons best known to itself and as such based on these circumstances NAB cannot claim any reasonable delay. Furthermore, the application (which should have been decided within 15 days) remained pending for one year and 3 months which was an inordinate and unexplained delay on the part of NAB and it appears that NAB only sprang into action once the complainant filed his application under S.12 which we have already found in this order to be without lawful authority.

14. It may be that NAB had moved its application prior to the reference being filed but this is no excuse for NAB not both diligently and expeditiously pursuing it. Even after the application had not be heard within 15 days and thereafter lapsed there was nothing, in our view, which prevented the Chairman NAB from making another freezing order and/or making another freezing application before the accountability court and ensuring that it was heard and decided within 15 days.

15. In respect of our finding we are fortified by a decision of the Lahore High Court in the case of **The State V Barkar Ali Kharal** (PLD 2008 Lah 347. Relevant P.350) which after a detailed analysis of S.12 held as under after setting out S.12;

“The above said provisions would show that same are self-sufficient and exhaustive provisions of law which confer powers to the NAB Authorities for the purpose of freezing/seizing, attachment etc., of property of an accused or any part thereof, whether in his possession or in possession of his relative, associate or person on his behalf **but at the same time, provision of section 12 ibid place certain obligations on the authorities to keep a check and balance to avoid misuse of authority. It is mandatory that if any property is frozen/seized by the NAB authorities the order has to be passed by the Chairman, NAB for freezing/seizure of the same, which is non-existent in the present case. Secondly, even if an order of seizure/frozen, attachment or prohibition is passed by the Chairman NAB that shall remain in force for a period not exceeding 15 days unless confirmed by the Court where the reference against the accused was sent but there is no confirmation by the Court concerned regarding the above claim/seizure by the**

NAB authorities, so there retaining property of respondent No.1 is absolute violation of proviso to section 12 (iv) of National Accountability Ordinance, 1999. We observe here that it cannot be left at the discretion of NAB authorities that they may choose according to their wishes any provision of law and can apply the same for their own benefit or justify their illegal actions to deprive an individual from his property and keep with them as impending sword for the purpose of blackmailing. Rather they should being a statutory Agency of the State must be more careful in process of accountability while using their powers and any departure from law would pollute the whole system which may shake the confidence of public at large.”
(bold added)

16. Thus, the instant petition is allowed, the impugned order is set aside and the properties which are the subject matter of that order stand defrozen. S.23 NAO shall continue to apply to these properties.

17. The petition stands disposed of in the above terms.