

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh.
Mr. Justice Mohammed Karim Khan Agha

Petitioners along with CPD.No's.

1. CP No.D-3985 of 2017 Ghazanfar Ali v. Chairman NAB & others.
2. CP No.D-4107 of 2017 Nadir Hussain v. Federation of Pakistan & others.
3. CP No.D-4112 of 2017 Pervaiz Ahmed Solangi v. Federation of Pakistan & others.
4. CP No.D-4106 of 2017 Ali Razaque Panhwar & others v. Chairman NAB & others.
5. CP No.D-3994 of 2017 Abdul Ghafoor v. Federation of Pakistan & others.
6. CP No.D-3988 of 2017 Muhammad Farooq v. Federation of Pakistan & others.

Counsel for the Petitioners.

1. Mr. Abdul Sattar Luhman, Advocate alongwith petitioner Ghazanfar Ali Panwhar in CP No.D-3985/2017.
2. Mr. Ghulam Shabeer Shar, Advocate alongwith Petitioner Nadir Hussain in CP No.D-4107/2017.
3. Petitioner Perwaiz Ahmed Solangi present in person in CP No.D-4122/2017.
4. Mr. Abdul Sattar Luhman, Advocate alongwith petitioners Ali Razaque, Shamsuddin and Irfan Ahmed in CP No.D-4106/2017.
5. Petitioner Abdul Ghafoor Buriro present in person in CP No.D-3994/2017.
6. Mr. Mumtaz M. Gopang, Advocate alongwith petitioner Muhammad Farooq Buriro in CP No.D-3988/2017.

Counsel for the Respondents.

Mr. Muhammad Zubair Malik, Special Prosecutor, NAB alongwith I.O. Qasim Ghurchani.

Date of hearing: 09.08.2017

Date of order: 09.08.2017

ORDER

Mohammed Karim Khan Agha, J. The above mentioned petitioners have all been granted ad interim pre arrest bail by this Court through various different orders in connection with alleged acts of corruption committed by them falling within the ambit of the National Accountability Ordinance 1999 (NAO) in connection

with various infrastructure schemes/projects which were carried out in TMA Bhiria Naushero Feroz which all the petitioners were in one way or another associated with and are currently under investigation by the National Accountability Bureau(NAB). By this composite order we propose to dispose of all the above mentioned petitions filed by the petitioners named above for confirmation of their pre arrest bail.

2. As mentioned above all the petitioners have been accused of corruption and corrupt practices under the NAO and are currently being investigated by the NAB in respect of such allegations. This Court granted all the petitioners ad interim pre arrest bail through various different orders after they received call up notices from the NAB in connection with an investigation against Bashir Ahmed Lashari (Ex TMO) Saeed Hussain Manghi (Ex TO infrastructure), Waheed Aki Lashari (Ex TO Infrastructure) of TMA Bhiria District Naushero and others

3. All the learned counsel for the petitioners contended that they were entitled to the confirmation of their pre arrest bail as they were innocent of all allegations against them and that in any event their individual liability as worked out by NAB was very minor in nature and that the investigations had been malafidely started against them by NAB in order to pressurize them into entering into plea bargains.

4. On the other hand special prosecutor for the NAB opposed the grant of bail and contended that there was sufficient material on record to connect each of the petitioners to an offense under the NAO, that there had been no malafide on the part of NAB and a reference against all the petitioners would shortly be filed in connection with their acts of corruption. Learned counsel for the

NAB however conceded that the personal liability of each of the petitioners as worked out by NAB ranged from approx. RS 20,000 to RS 80,000.

5. We have heard learned counsel for the petitioners, Special Prosecutor for the NAB and perused the record.

6. It is an admitted position that no reference has yet been filed, that most of the petitioners it appears are low level contractors whose personal liability is very minor in nature, that the petitioners are no longer required for investigation and much of the evidence is in documentary form and is in NAB's possession so it cannot be interfered with by the petitioners.

7. Although there appears to be no malafide on the part of NAB we acting in our discretionary constitutional jurisdiction are not inclined to recall the ad interim pre arrest bail granted to the petitioners when the personal liability of each petitioner is of such a minor nature keeping in view that NAB's primary objective is to investigate mega corruption cases and that the amount of surety for ad interim bail in each case is above the personal liability of each petitioner (bail has been granted to each petitioner from between 2 to 5 lacs). NAB had already been cautioned by this Court in connection with this Court confirming pre arrest bail in such low value cases even in the absence of malafide in the following terms in the unreported case of **Javed Ali V Chairman NAB and others** (CP.D 1872/2016) dated 31-03-2017 (in which one of us Mohammed Karim Khan Agha J was a member) at Para's 84-86 which are reproduced as under for ease of reference:

"84 We further express our deep dissatisfaction and grave concern that cases of this nature involving relatively petty amounts **continue to be filed as references** by the NAB. By

Amjad Hussain's case (Supra) NAB's SOP on pecuniary jurisdiction was made a judicial order. As per the learned Prosecutor General of NAB that SOP came into effect on 01-01-2016 (and according to him the SOP was being strictly complied with **after** this date) **Amjad Hussain's case** (Supra) was decided on 27-04-2016. The SOP/judicial order in effect limited NAB to not filing references below RS 100 M (10 crore) except in exception circumstances as set out in the SOP/Judicial order. Yet we find that the instant reference 07/2016 has been filed before the Accountability Court Sukkur on 28-10-2016 (10 months **after** the date when the SOP became effective and 6 months after the **Amjad Hussain's case** (Supra) whereby the SOP was converted into a judicial order). In the instant reference in total the loss to the national exchequer was approx. 2.7 crores i.e about 25% of the amount set out in the SOP and judicial order (divided between approximately 24 persons) with individual liability in some cases being as low as 2 lacs 77,000, 1 lac 11,000, 4 lacs 52,000, 8 lacs 99,000, 5 lacs 54,000, 2 lacs 81,000, 6 lacs 45,000 etc. It is difficult to see how **prima facie** such amounts fall within the pecuniary jurisdiction of the NAB when the primary mandate of NAB as set out in the Supreme court case of **Asfandiyar Wali Khan** (PLD 2001 SC 607), and later High Court cases of **Rauf Bux Kadri** (MLD 2003 777) and **Amjad Hussain** (Supra) was held to be to deal with large scale/mega corruption cases and was recently re enforced by NAB's own SOP which was made a judicial order in **Amjad Hussain's case** (Supra). The Hon'ble Supreme Court has even recently observed by order dated 24-10-2016 in Suo Moto Case No.17 of 2016 (unreported) that **the NAO should only be used in cases of mega scams rather than petty cases**. The aforementioned order in material part observed as under:

"This Court on 02.09.2016, during hearing of Civil Appeal No.82-K of 2015, noticed abuse of authority by the NAB while taking cognizance of petty matters in terms of Section 9 of the National Accountability Ordinance, 1999 (hereinafter referred to as the Ordinance). The Ordinance was primarily legislated to counter the cases of mega scandals and initiate proceedings against the accused persons who are involved in scandals of

mega corruption and corrupt practices." (bold, italics and underlining added)

85. It is true that the consideration of PB may be taken into account but in our view this aspect appears to have been misunderstood/misinterpreted by the NAB. Yes, we agree that PB is a relevant factor in deciding whether or not to file a reference but in our view **it is only a secondary factor linked to the large scale corruption element or if the amount involved falls slightly under the RS100M pecuniary jurisdiction and in any event resort to PB must be in the national interest.** One of the intentions in our view of the NAO was to recover ill-gotten gains through Voluntary Return or PB but this was in our view relatable to large scale amounts and not to proceed against persons who owed RS10 or 20 lacs with the hope that they would enter into voluntary return or PB before trial was fully alluded to in Para 28 and 30 in terms of PB in the national interest in **Rauf Bux Kadri's** case (Supra) where recoveries of PB of minor amounts of 10 to 20 lacs **is unlikely to be in the national interest.** In our view a case such as the current one should perhaps have been transferred to another investigating agency at the inquiry stage. **In this case however since the reference is at an advanced stage and nearing a decision by the Accountability Court we are not inclined to interfere with the conduct of the reference before the accountability court as it would in our view at this belated stage achieve no useful purpose** although under the circumstances we find it both troubling and painful to decline pre arrest bail in NAB cases where such minor amounts are involved which pursuit prima facie appears to be contrary to the primary object of the NAO which is for the NAB to pursue mega corruption cases.

86. However, it is made clear that if such relatively minor matters in terms of value falling well below NAB's SOP and Judicial order on pecuniary jurisdiction as set out in **Amjad Hussain's case** (Supra) **continue** to form part of NAB references this Court may well consider striking down the same (or refer the references to other courts as per Para 32 of the **Rauf Bux Kadri case** (Supra)) on the basis that as

indicated above such cases are against the letter, spirit, purpose and intent of the NAO, the above cited judgments including that of the Supreme Court in **Asfandyar Wali Khan case** (Supra), this Court in **Rauf Bux Kadri's case** (Supra) and the **Amjad Hussain case** (Supra) and as the Supreme Court has very recently indicated above **the filing of such references may amount to a misuse of authority** and as such **may** be struck down by the court acting in its constitutional jurisdiction to ensure that the law is neither misused or abused. Even the concept of seemingly attempting to tie up accused in relatively low value cases with prima facie the main intention appearing to be to squeeze a voluntary return or PB out of them with the threat of trial hanging over their head otherwise **may, depending on the particular facts and circumstances of the case, in future even render such cognizance as potentially malafide** and thus bring the institution into disrepute. Even otherwise it is the duty of the court to do complete justice in its constitutional discretionary jurisdiction which may potentially allow it in such cases to consider pressing into service the principles laid down in **Shamraiz Khan V State** (2000 SCMR 157) (rather than keeping persons locked up in jail where relatively minor amounts are involved in NAB cases) as was recently done by a Divisional Bench of this Court in CPD 5122/2016 **Athar Ali Abbasi v State** (unreported) dated 24-01-2017 (although that case concerned post arrest bail) since after all the people expect justice and fair play from both the prosecuting authority in terms of complying with their primary mandate as set out under the law and the courts especially when a person's liberty is at stake. Indeed, as was held in the recent Supreme Court case of **Ziagham Ashraf V State** (2016 SCMR 18) when considering the issue of granting or refusing an accused bail such matters must not be taken lightly but rather cautiously as a person's liberty is at stake".

8. In addition in our view it would serve no useful purpose in recalling the petitioner's ad interim pre arrest bail and sending them to jail since in our view almost certainly they would be

granted post arrest bail by this court due to the relatively minor amounts involved in a NAB case.

9. Thus, for all the above reasons, and in particular the relatively petty amount of liability of each of the petitioners as determined by NAB in respect of their alleged involvement in corruption bearing in mind that the primary objective of the NAO is to investigate and prosecute mega corruption cases which caused a huge loss to the exchequer or gave a huge benefit to an accused as opposed to relatively petty matters, the ad interim pre arrest bail granted to each of the above mentioned petitioners through the various orders of this court are hereby confirmed on the same terms and conditions.