

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh, CJ.
Mr. Justice Muhammad Karim Khan Agha J

CPD- Nos. along with petitioners.

1. C.P. No. D-4392 of 2016
Shakil Sultan S/o S.M. Sultan, petitioner No.1
2. C.P. No. D-3209 of 2016
M. Salik Nukhrich S/o Qazi Ahmed, petitioner No.2
Asadullah Abbasi S/o. Gul Muhammad, petitioner No.3

Respondents

NAB & another & Federation of Pakistan & another.

Counsel for the Petitioners

1. Mr. Faisal Siddiqui, Advocate along with petitioner in C.P. No.D-4392 of 2016.
2. Mr. Metharam Dhani, Advocate along with petitioners in C.P. No. D-3209 of 2016.

Counsel for the Respondents.

Mr. Abdullah Munshi, Advocate for Respondent No.3 in C.P. No.4392/2016
Mr. Muhammad Altaf, Special Prosecutor, NAB

Date of hearing: 21.08.2017

Date of order: 31.08.2017

ORDER

Mohammed Karim Khan Agha, J. By this common order, we propose to dispose of the above mentioned petitions submitted on behalf of the petitioners (Shakil Sultan-petitioner No.1, M. Salik Nukhrich-Petitioner No.2 and Asadullah Abbasi-petitioner No.3) respectively for quashment of proceedings in NAB Reference 03/2011 and to set-aside the separate orders both dated 15.04.2016 (the impugned orders) whereby the trial court dismissed both the separate applications of firstly petitioner No.1 and secondly the joint application of petitioners No.2 and No.3 filed under Section 265-K Cr.P.C for their acquittal.

2. The brief facts of case are that initially the National Accountability Bureau (NAB) filed Reference No.02/2010 against petitioner No.1 Shakil Sultan only for committing an offence under Section 9 of the National

Accountability Ordinance, 1999 (NAO) on account of cheating the public at large in respect of a project known as "Shehre-e-Sultan" which was allegedly illegally to be constructed on land lawfully owned by Pak Ideal Co-operative Housing Society Limited. The Reference was dated 30.05.2010. On 07.01.2011 the NAB filed Reference No. 03/2011 against Shakil Sultan and 04 others (including M. Salik Nukhrich-petitioner No.2 and Asadullah Abbasi-petitioner No.3 both of whom were former Mukhtiarkars of Malir Town and other co-accused) in effect for the official respondents (including petitioners 2 and 3) misusing their authority by tampering, forging and illegally transferring the land on which the housing scheme was to be located to petitioner No.1's front women/benamidars being his wife and other relative in order to benefit him (Shakil Sultan). Later on both these References were consolidated into a single Reference No.03/2011. Thus, as indicated above petitioner No.1 Shakil Sultan faced two separate offences under the NAO, firstly cheating the public at large and secondly being the beneficiary of manipulated land records by co-accused petitioners 1 and 2 M. Salik Nukhrich and Asadullah Abbasi. Petitioner No.1 moved a separate application and petitioners 2 and 3 moved a joint application for acquittal under Section 265-K Cr.P.C. both of which applications were dismissed by the separate impugned orders. The petitioners have now challenged both of the impugned orders in Reference No.03/2011 both of which were passed by the Accountability Court No.IV, Sindh, at Karachi.

3. Learned counsel for petitioner No.1 Shakil Sultan mainly contended that the NAB had no jurisdiction in this matter because the dispute was over the ownership of private land and that civil proceedings were already pending to determine the actual owner of the land. According to him until the civil suits had been determined and it had been decided, who actually owns the land which is the subject matter of the consolidated reference the proceedings by NAB were without jurisdiction. In support of his contentions he placed reliance on the following authorities **Rafiq Haji Usman vs. Chairman, NAB and another** (2015 SCMR 1575), **Akhlaq Hussain Kayani vs. Zafar Iqbal Kiyani and others** (2010 SCMR 1835) **Abdul Shakoor Kallodi V State** (2002 SBLR 1263) and **Muhammad Asghar vs. The State** (P.Cr.L.J 2004 201). Secondly he contended that the consolidated reference had been signed by Justice (Rtd) Deedar Hussain

Shah in his capacity as Chairman, NAB and since Justice (Rtd) Deedar Hussain Shah had been removed as Chairman NAB by the Hon'ble Supreme Court and his appointment held to be void the references signed by him, including the consolidated reference, would automatically fall as he had no legal authority to sign such references. In this respect he placed reliance on the cases of **Ch. Nisar Ali Khan vs. Federation of Pakistan and others** (PLD 2013 SC 568) and **The State through Chairman NAB vs. Fazal Ahmed Jat and others** (2014 P.Cr. L J 758). He then argued that the amount involved was very minor in nature and as such did not fall within the pecuniary jurisdiction of NAB which was meant only to deal with mega corruption cases. Finally he argued that the impugned order was not a speaking order and for all the above reasons it should be set aside and petitioner No.1 Shakil Sultan be acquitted.

4. Learned counsel for petitioner No.2 M. Salik Nukhrich and petitioner No.3 Asadullah Abbasi adopted the arguments of petitioner No.1 and further submitted that at the time when the alleged fake/forged/tampered entries were made they were only lowly government functionaries being Assistant Mukhtiarkar and Mukhtiarkar for Malir Town, Karachi respectively and there is no material on record that they forged/tampered with any records and that they strictly followed the relevant government circulars and the Land Revenue Act, 1967 and as such the impugned order dismissing their joint application for acquittal should be set aside and they should also be acquitted. In support of his contention he placed reliance on **Mst. Aisha Bibi vs. Nazir Ahmed** (NLR 1994 Revenue 161)

5. On the other hand learned Senior Prosecutor for the NAB contended that this was a criminal case and the presence of civil suits did not bar NAB's jurisdiction under the NAO. He further submitted that in consolidated reference the government officials (petitioners 2 and 3 M. Salik Nukhrich and Asadullah Abbasi) have misused their authority in order to benefit petitioner No.1 Shakil Sultan along with other co-accused by illegally tampering with the land records in order to illegally put the land in the name of petitioner No.1's front women/benamidars in place of M/s. Pak Ideal Cooperative Housing Society Limited. He further submitted that the reference had been legally filed by the then Chairman NAB Justice

(Rtd) Deedar Hussain Shah and both the impugned orders under challenge by the petitioners were fully speaking orders which have dealt with the points raised by the petitioners at the time of oral arguments and did not require any interference and as such both petitions should be dismissed.

6. Learned counsel for Respondent No.3 (M/s. Pak Ideal Cooperative Housing Society Limited) in CPD No. 4392/2016 adopted the arguments of Senior Prosecutor NAB and also submitted that the land which is the subject matter of the reference belonged to the Housing Society and not petitioner No.1 Shakil Sultan through his front women/benamidars who had illegally usurped the same in connivance with the official co-accused through their misuse of authority. In support of his contentions he placed reliance on a number of documents on record which prima facie show that the land which is the subject matter of this reference is lawfully owned by the Housing society and not petitioner No.1 or his front women or benamidars. He also placed reliance on the following authorities. **The State vs. Raja Abdul Rehman** (2005 SCMR 1544) **Bashir Ahmad Vs. Zafar ul Islam** (PLD 2004 SC 298) and **Muhammad Sharif vs. The State and another** (PLD 1999 SC 1063).

7. We have considered the submissions of learned counsel for the parties, perused the record and taken into consideration the authorities cited by the parties at the bar.

8. In our view the main issue appears to be whether the NAB had jurisdiction to file a reference under the NAO in respect of cheating the public at large and the illegal allotment of land when the issue as to who is the actual legal owner of the land which is the subject matter of the reference is yet to be determined by the civil courts.

9. We find **Abdul Shakoore Kallodi's case** (Supra) of little assistance to the petitioner No.1 as this case concerned willful default. It is true that not all civil cases will have an element of criminal liability and will not come within the ambit of NAO as set out in **Haji Rafique Usman case** (Supra) which although dealing with a bail matter as opposed to an acquittal set out this general principle in NAB cases. As such there can be no cavil with the proposition that in some civil cases, for example,

involving purely contractual disputes between parties NAB may have no jurisdiction where no criminality is involved. It appears to us that the question is whether by merely filing a civil suit any potential or current criminal proceeding under the NAO are debarred, quashed or come to a grinding halt in such cases. In our view if there is an element of criminality in a case which would bring it within the purview of the NAO this would **not** debar the NAB from proceeding with the case notwithstanding the existence of, or later filed, civil suits. In this case prima facie there does appear to be an element of criminality involved in the transfer of the land which is the subject matter of this reference in view of the alleged illegal involvement/actions of the government officials (petitioners 2 and 3 and other co-accused) in tampering with the land records in order to favor petitioner No.1 and as such prima facie this matter has both a civil and a criminal element and in this respect **Akhlaq Hussain Kayani's case** (Supra) as decided by the Hon'ble Supreme Court is distinguished based on the particular facts and circumstances of this instant case. In our view, based on the particular facts and circumstances of the instant case and **for the reasons set out in paragraph 13 of this order** the courts need to adopt a dynamic approach in NAB/corruption cases in order to prevent the deliberate delaying and other tactics which are used in such cases bearing in mind that corruption seems to be a fast spreading cancer which effects are eroding the very fabric of society and its continued social and economic development, the Supreme Court case of **Haji Sardar Khalid Saleem V Muhammed Ashraf** ((2006 SCMR 1192) which held as under at P.1195 regarding criminal proceedings not being debarred by the existence of civil proceedings is the more applicable authority to be followed especially as it was accepted that in **Akhlaq Hussain Kayani's case** (Supra) that no hard and fast rule was laid down in this matter which concerned the exercise of discretion;

"It is also settled law that criminal proceedings are not barred in presence of civil proceedings and that civil and criminal proceedings can be proceeded simultaneously. Reference can be made to the following cases:-

Talab Hussain v. Anar Gul Khan and 4 others 1993 SCMR 2177 and Deputy Inspector-General of Police v. Anees-ur-Rehman Khan PLD 1985 SC 134.

It is also settled law that if, prima facie, an offence had been committed, the ordinary course of trial before the Court should not

to be allowed to be deflected by resorting constitutional jurisdiction of High Court. By accepting the constitutional petition the High Court erred in law to short circuit the normal procedure of law as provided by law while exercising equitable jurisdiction which is not in consonance with the law laid down by this Court in *Habib Ahmed v. M.K.G Scott Christian* PLD 1992 SC 353” (bold added)

10. Furthermore, in a similar case as the instant case, concerning cheating the public at large and fraud under the NAO by following similar authorities this court held as under in the case of **Sikander A.Kareem and another V State** (SBLR 2010 P.1663 Relevant P.1672) again in effect emphasizing that in NAB cases under the NAO such cases may proceed notwithstanding the existence of civil proceedings if elements of criminality as set out in the NAO were attracted as set out below;

“The contentions of the learned counsel for the petitioners that the dispute of the matter with regard to the purchase of certain properties by the petitioners is of civil nature, having not an iota to imagine that the petitioners are involved in any kind of criminal activities is not correct. **Special role is assigned to the petitioners by the NAB Authorities in the reference which falls within the definition of forgery, cheating, deceiving public at large through corruption and corrupt practices** as the properties which are the subject matter of the Reference and the subject properties were under liquidation by the order of this Court and the Official Assignee was the Official Liquidator. Who intervened the Court decision and got stop the further deals. Such material allegations attract the provisions of Section 9 of the NAB Ordinance, 1999. In the cases of (1) *Col. Shah Sadiq vs. Muhammad Ashiq and other* 2006 SCMR 276, (2) *Ahmed Saeed vs. The State and another* 1996 SCMR 186, (3) *Haji Sardar Khalid Saleem vs. Muhammad Ashraf and others* 2006 SCMR 1192, (4) *Talib Hussain vs. Anar Gul Khan and 4 others* 1993 SCMR 2177 and (5) *The Deputy Inspector General of Police, Lahore and others vs. Anir-ur-Rehman Khan* PLD 1985 SC 134 it has been held by the Hon’ble Supreme Court of Pakistan that continuance of criminal proceedings are not barred even if civil proceedings in respect of same subject are pending in Court and both such proceedings can proceed simultaneously. (bold added).

11. In this respect the three member bench decision by the Supreme Court in the case of **Zahida Sattar V Federation of Pakistan** (PLD 2002 SC 408) may also be of assistance which in effect held that with regard to the existence of civil suits in NAB cases the NAO had overriding effect by virtue of S.3 NAO and the presence of civil suits would not de bar NAB’s jurisdiction or proceedings if the case fell within the ambit of the NAO which is a criminal law.

12. Thus in our view because of the criminal element involved in this case which falls within the purview of the NAO NAB does have the jurisdiction to file a reference (now consolidated) in this case and proceed with the same notwithstanding the existence of the civil suits.

13. Furthermore, in our view, it would be both impractical, would amount to frustrating the role of the NAB under the NAO and the purpose of the NAO and would certainly not meet the ends of justice if an inquiry/investigation or reference could be quashed or pended simply because a civil suit was pending in the matter. In a majority of NAB cases which have come before us which invariably involve the illegal acquisition of land civil suits have been filed. To pend or quash a NAB inquiry, investigation or reference simply because a civil suit is also pending in our view would defeat the purpose of the NAO which amongst other things aims to achieve a speedy disposal of cases concerning corruption. As admitted by learned counsel for petitioner No.1 at the bar in this land dispute 04 separate suits are pending and it would take at least a year to finalize those suits without taking into account any potential appeals arising from those decisions. To adopt such an approach, i.e. quash or pend the reference until the civil suits have reached finality, as submitted by learned counsel for petitioner No.1 would in effect give any accused under the NAO or against whom an inquiry was initiated by NAB in respect of a land scam the opportunity of having their inquiries, investigations or references quashed or pended on account of filing civil suits in order to avoid their criminal liability for years on end as it is regrettably well known that such civil suits take many years if not decades to be decided and as such would completely frustrate the NAB in carrying out its functions under the NAO and frustrate one of the purposes of the NAO in speedily disposing of corruption cases (or being able to dispose of them at all). In addition by virtue of S.3 NAO the NAO is a special law which has overriding effect over other laws including suits filed under the CPC which is a general law. In our view once an element of criminality which falls within the purview of the NAO, as is in this case, is prima facie present then there is no bar in NAB proceeding with the matter under the NAO notwithstanding the pendency of the civil suits which may continue in parallel. Thus we find that NAB has the jurisdiction to proceed with this case as it falls within ambit of the NAO.

14. With regard to the reference falling since the Chairman, NAB was removed we find this argument to be of no substance. The reference had been signed by the Chairman, NAB in accordance with law **before** his removal from office by the Hon'ble Supreme Court. His removal was from the date of the order of the Supreme Court i.e. **with immediate effect** as set out in the short order dated 28-5-2013 in **Ch. Nisar Ali Khan's case** (Supra) relevant P.593 and was not retrospective in effect.

15. The question of pecuniary jurisdiction of the NAB is currently subjudice before the Hon'ble Supreme Court and as such we do not intend to dilate on that issue.

16. With regard to both the impugned orders we find that there are no legal infirmities in either of those orders both of which are fully speaking orders.

17. In this connection it is worth reproducing Section 265-K Cr. P.C under which the applications were moved by the petitioners which is set out as under:-

"265-K. Power of Court to acquit accused at any stage. Nothing in this Chapter shall be deemed to prevent a Court from acquitting an accused at any stage of the case, if after hearing the prosecutor and the accused and for reasons to be recorded, it considers that there is no probability of the accused being convicted of any offence."

18. It is apparent from the language of Section 265-K that such an application can be made at any stage of the proceeding. However, in our view, the most important component of that Section is that the court must consider that **there is no probability of the accused being convicted of any offence**. In this case out of 16 PWs, according to NAB, only 06 remain to be examined and based on the evidence recorded so far the court through the impugned orders, which are both fully speaking orders, found that none of the petitioners 1, 2 and 3 could meet the requirements of Section 265-K Cr.PC i.e that there was no probability of them being convicted and as such in our view it quite rightly rejected the applications of the petitioners under S.265 K Cr.PC through the impugned orders. The court under these circumstances should now be permitted to hear the

remainder of the evidence from all the concerned parties before reaching a final decision on merits.

19. Thus for all the reasons mentioned above, both the petitions are dismissed, and the trial court is directed to complete the trial of the consolidated reference within 03 months of the date of this order. A copy of this order shall be sent to the concerned trial court for compliance.