

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Ahmed Ali M. Shaikh, C.J.
Mr. Justice Mohammad Karim Khan Agha, J.

C.P. No.D-2020 OF 2016

Petitioner: Muhammad Asif @ Asif Haroon
S/o Muhammad Haroon through
Mr. S.M. Iqbal, Advocate.

Respondent: The Chairman, National Accountability
Bureau, through Mr. Muhammad Altaf,
Special Prosecutor, NAB.

Date of Hearing: 13.09.2017

Date of Order: 26.09.2017

ORDER

Mohammed Karim Khan Agha, J:- This petition has been filed on behalf of the petitioner (Muhammed Asif) who is the nominated Accused in National Accountability Bureau (NAB) Reference No.26/2003 through his attorney Abdul Hameed, wherein he has prayed that the NAB be directed to accept the plea bargain (PB) offer which the petitioner made to the DG NAB Sindh under S. 25(b) of the National Accountability Ordinance 1999 (NAO).

2. The brief facts of the case as per NAB reference No.26 of 2003 are that the petitioner/accused was inducted in the service of United Bank Limited on 30.12.1984 as a messenger and was subsequently promoted as Assistant w.e.f. 01.01.1987. He remained in service till 18.09.1994 and then

he absented from his duty and he was paid salary/allowance till May 1996 and in 1998, he was dismissed from service on the charge of misconduct.

3. On receipt of information that the accused had indulged in acts of corruption and corrupt practices, an investigation was authorized by NAB.

4. In the investigation report, it shows that during service, the accused received an amount of Rs.3,81,430/- on account of salary/allowances etc till May, 1996, whereas during his service in June 1993, he purchased a plot, bearing No.122/1, 16th Street, Phase VI, DHA, Karachi from Mrs. Rehana Mirza for Rs.12,00,000/- and sold the same in March, 1996 to Mr. Muhammad Suhail. On 03.10.1994 accused also purchased Membership Card of Karachi Stock Exchange (KSE) for Rs.1,00,00,000/- (10 M) from Haji Abu Bakar and sold the same on 14.06.2001 to M/s Plus Securities (Pvt.) Ltd. for a consideration of Rs.19.5 million. The investigation shows that the accused had accumulated assets worth Rs.20.7 million disproportionate to his known source of income which he could not reasonably account for. Thus his act comes within the meaning of S. 9 (a) (v) of the NAO and he is liable to be punished u/s 10 of the NAO hence this Reference.

5. Learned counsel for the petitioner submitted that the Chairman NAB was bound to accept his offer of PB and as such this Court should direct him to do so. In support of his contention he placed reliance on the following authorities;
Order dated 07-04-2015 passed by learned Administrative

Judge, Accountability Court, Sindh Karachi, in Criminal Misc. Application No. 04 of 2015 State V Mohammed Zafar, **Bank of Punjab V Accountability Court No.1, Lahore and 2 others** (PLD 2014 Lahore 92), **Suo Motu Case No.18 of 2010. In the matter of (Violation of Public Procurement Rules, 2004)** (PLD 2011 SC. 927), **Foreign Exchange Bearer Certificates Rules 1985 SRO 571(I) 85 (the SRO), Muhammad Saleem v. Federation of Pakistan** (2007 SCMR 1008) and **Muhammad Ayub V State** (1991 P.Cr.LJ 2425).

6. In rebuttal, learned Special Prosecutor, NAB vehemently opposed the petition and submitted that this Court had no power to direct the Chairman NAB to accept the PB of the petitioner as the Chairman had correctly exercised his discretion under S.25 (b) NAO.

7. We have heard the learned counsel for the parties, carefully perused the material available on record and considered the relevant case law.

8. At the outset we would observe that most of the authorities relied upon by the petitioner are of little, if any, relevance to his case based on the particular facts and circumstances of his case. The **order dated 07-04-2015** (supra) relates to a case where the NAB approved the PB; since this is a case of agreeing the amount of liability of a PB reference to the SRO and the associated authorities are irrelevant in our view since this case revolves around the determination of the amount of liability of the petitioner and the Chairman NAB or his delegate accepting the PB so offered

by the petitioner. It does not concern foreign currency or the issue of the source of funds. What is at issue is a KSE membership card and its value and the petitioner's share in it and not Foreign Exchange Bearer Certificates (FEBC's). Furthermore, the petitioner in his application for PB and this petition has admitted his guilt/liability and it is only a question of correctly calculating that liability. In any event, in our view, the fact that someone owns FEBC's should not in all cases exclude/shield him from liability under the NAO especially in an assets beyond known sources of income case as the concept of allowing the purchase of FEBC's is not to promote money laundering or protect the corrupt from accountability. A person should be able to reasonably account for the funds through which he purchased such financial instruments. The case of the **Bank of Punjab** (Supra) is relevant to the extent of confirming that the Chairman NAB's decision whether or not to accept the offer of a PB and even the endorsement of such decision by the Accountability court if it approves the PB is subject to judicial review which we shall proceed to undertake later in this order.

9. It would appear that the petitioner was charged by NAB under S.9 NAO for having assets disproportionate to his known sources of income which he could not reasonably account for and hence NAB filed reference No.26/2003 against the petitioner on 1st October 2003 mentioning the petitioners liability as RS20.7 M in para 3 of the reference.

10. The petitioner absconded and was declared a proclaimed offender by the trial court, which was hearing the reference and vide application dated 12-10-2015 through his attorney, as the petitioner having absconded is now residing in the USA, made an application to the DG NAB Sindh for a PB under S. 25(b) NAO in order to settle his liability.

11. According to the reference the liability of the petitioner is RS 20.7M. In his PB application the petitioner has offered no particular sum and has in essence simply requested that his liability be recalculated and decreased by NAB as according to him he was only a part owner in a membership card of the KSE when the NAB in determining his liability had treated him as the full owner and as such his liability should be decreased accordingly and when this was done he would enter into a PB with the NAB payable in three installments.

12. By report dated 17-11-2015 to the administrative judge in the aforesaid reference it is stated that NAB in its regional board meeting had declined to recalculate the liability of the petitioner mentioned in the reference and has rejected the petitioners application for PB because not only was he an absconder who had not surrendered before the court but also as per Para 4 of the report;

“the claim of the accused that he was shareholder of 16.66% membership card cannot be accepted as oral and documentary evidence suggest that he had purchased the card himself in his own name”

13. It appears from the record that when the petitioner's aforesaid application for PB was rejected by the NAB he made another application this time directly to the Accountability

Court No.2 on 11-12-2015 on the same lines as his earlier application to NAB praying that the Accountability Court fix the amount of his liability and direct the NAB to settle the reference on such determined liability through PB. In response to the petitioner's application NAB through a report dated 11-01-2016 to the Accountability Court prayed that the petitioner's application be rejected for the reasons set out below;

"6. The accused Asif Haroon has **again** submitted an application dated 11 Dec. 2015 before this Hon'ble Court praying to fix the amount of reference according to liability of the accused **again** claiming that he was a partner of 16.66% shares in Karachi Stock Exchange.

7. The application of the accused **was again examined in detail** and the evidence collected during the course of investigation was reviewed. The following facts have revealed:-

- a. The Stock Exchange Card was registered in the name of Asif Haroon with Karachi Stock Exchange.
- b. The accused had himself declared before Income Tax Authority that he had purchased Stock Exchange Card for 10 Million through encashment of FEBC. During investigation, MCB Bank also confirmed encashment of FEBC by Asif Haroon to the tune of Rs. 10 Million.
- c. The seller of Stock Exchange Card namely Haji Abu Bakar and his statement under section 161 Cr.PC also confirmed that he sold the card for Rs. 10 Million to Asif Haroon.
- d. Khuwaja Adil Razzak who had purchased the card from Asif Haroon also confirmed that he had purchased the card from Asif Haroon".
(bold added)

14. By order dated 26-01-2016 the Accountability Court No.II Karachi in Reference No.26 of 2003 dismissed the petitioner's application in the following terms:

"8. I have gone through the contents of the application and the case law annexed by advocate for accused Muhammad Asif and also the report on application submitted by the I/O NAB. In my humble view, **NAO, 1999 is a special law and there is no provision in NAO, 1999 for accused to enter into Plea Bargain through his attorney as the accused has already been declared proclaimed offender by this Court and until and unless he appears before this Court and joins the proceedings before the Court the said application cannot be entertained. Moreover the Court has only the power to approve the Plea Bargain and for release/discharge of accused.**

9. As per law the Chairman NAB would be the competent authority to accept the offer and determine the amount and offer made by accused to return the corruption money **and chairman NAB is the only authority to accept such offer made by the accused. After the acceptance of Plea Bargain the matter is forwarded to the Court only for the acceptance and discharge of the accused.**

10. Plea Bargain is the offer and confession of the accused that he has received corrupted money by corruption and corrupt practices and he is entitled to be convicted for disqualification for a period of 10 years u/s 15 of NAO, 1999 and there was no special provision for issuance of the show cause notice for disqualification of accused persons. Accused persons who availed the benefit of Plea Bargain would automatically be deemed to have been convicted for the said offence under this Ordinance. Offer made by accused to return ill-gotten money, would be deemed to be the confession of accused for committing corruption/corrupt practices and being convicted person would have to face legal consequences as provided in Section 15 of NAO, 1999. **In the case of present application the conviction of Section 15 of NAO, 1999 cannot be imposed on a person who is an attorney of absconding accused, therefore, the application in hand is hereby dismissed. Application disposed of accordingly".** (bold added).

15. It is to be observed that the petitioner concealed the fact that he also approached the trial court for similar relief as set out above, after his offer was rejected by NAB, which was

rejected by the trial court, and as such it appears that the petitioner has not come to this court with clean hands. This is more so since he is an absconder and it is questionable whether he can even act in criminal cases through an attorney. In this respect it was observed from the record that on 15-06-2015 through criminal Misc Appln 151/2015 the petitioner made an application under S.561-A Cr.PC R/W S.17 NAO for cancellation of non bailable warrant and proclamation under S.87/88 Cr.PC which by order dated 17-08-2015 of this court the application was converted into one of protective bail to enable the petitioner to return from the USA and surrender before the trial court so that he could enter into a PB. Despite this order of protective bail the petitioner did not turn up either to enter into a PB or face the proceedings against him which again in our view reflects poorly on him.

16. Even if for the sake of argument an absconding accused could enter into a PB through his attorney the question arises as to what are the requirements of S.25 (b) NAO which deals with cases of PB. For ease of reference S.25 (b) NAO is set out below.

“25 (b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequences, of any offence under this Ordinance, **the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB,**

shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused”.

17. S.25 (b) NAO makes it absolutely clear that only if the Chairman NAB approves the PB can the matter be referred to the court for approval. Thus, the application of the petitioner to the Accountability Court to fix the liability was not maintainable in the first place. The trial court has no power to fix the liability and direct the chairman NAB to accept it. Fixing of the amount of liability is in the discretion of the Chairman NAB and the trial court has no role in this respect.

18. In this regard the petitioner's authority of **Suo Motu Case No.18 of 2010.** (Supra) is relevant which at P.994 para 37 held as under,

“37. It is well settled principle of law that where a procedure has been provided for doing a thing in a particular manner that thing should be done in that manner and in no other way or it should not be done at all, indeed it impliedly prohibits doing of thing---in any other manner, the compliance for such thing in no way could be either ignored or dispensed with. Reference in this behalf may be made to the cases of E.A. Evans v. Muhammad Ashraf (PLD 1964 SC 536), Atta Muhammad Qureshi v. The Settlement Commissioner (PLD 1971 SC 61), Muhammad Yousaf Khan v. Muhammad Ayub (PLD 1972 Peshawar 151), and Dost Muhammad v. Government of Balochistan (PLD 1980 Quetta) (bold added)

19. Even if the Chairman NAB approves the PB then it must be approved (or not approved) by the trial court through a speaking order.

20. In our view if the Chairman NAB or his delegate the DG of the concerned regional NAB reject the offer of the PB then the accused offering the PB may move this Court to judicially review the Chairman NAB's decision to reject his offer of PB since under S.25 (b) the Chairman in considering the PB must do so whilst exercising **his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary.**

21. It is well settled law that in the exercise of discretion the person endowed with such discretion must act reasonably and not in an arbitrary or whimsical manner and must give reasons for his decision as per S.24(A) of the General Clauses Act as was held in **Suo Motu Case No.18 of 2010. (Supra)** in the following terms at P.954;

"There are certain norms for exercise of discretion. We are not challenging the discretionary powers of the executive but the same have to be exercised judicially and in reasonable manner as held in the case of Tariq Aziz-ud-Din; in re (2010 SCMR 1301). The authorities cannot be allowed to exercise discretion at their whims, sweet will or in an arbitrary manner; rather they are bound to act fairly, evenly and justly. Reference may be made to the cases of Abid Hussain v. PIAC (2005 PLC (CS) 11171, Abu Bakar Siddique v. Collector of Customs (2006 SCMR 705), Walayat Ali v. PIAC (1995 SCMR 650)". (bold added)

22. Thus, we shall judicially review NAB's decision to reject the petitioner's PB. In our view on both occasions when the offer of PB was made directly to the NAB and then by application to the Accountability Court NAB, in our

considered view, gave good solid reasons backed up with material to support the rejection of the petitioner's offer of PB (as reproduced earlier in this order). Thus, in our view the Chairman NAB/DG NAB properly exercised his discretion in rejecting the petitioner's application for a PB as the decision of the NAB as gleaned from both its reports filed before the Accountability Court were neither arbitrary, whimsical or without reason.

23. As such this petition stands dismissed. The petitioner may however, if so advised, in accordance with law make another revised offer of PB to NAB and NAB shall, if such offer is made, consider such a new offer whilst balancing the chances of the petitioner ever returning to Pakistan to face trial and with recovery of at least some of the ill gotten gains which is one of the main objectives of the NAB under the NAO whilst under S.25 (b) taking into account the particular circumstances of this case.