

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-7083 of 2016

Ch. Muhammad Ashraf Advocate High Court V. Federation of
Pakistan through Chairman NAB & others.

Ch. Muhammad Ashraf S/o Ghulam Akbar
(In person).

Counsel for the Respondents

Mr. Muhammad Altaf, Special Prosecutor, NAB

Date of hearing: 30.11.2017.

Date of Order: 14.12.2017

ORDER

Mohammad Karim Khan Agha, J: Through this petition, the petitioner has sought a declaration that Section 16 (a) of the National Accountability Ordinance 1999 (NAO) is mandatory in nature as opposed to directory.

2. The brief facts of the case are that the petitioner is nominated accused in consolidated National Accountability Bureau (NAB) Reference No.13/2015 wherein his role is narrated in the said References for an offence as defined under section 9(a) and punishable under section 10 NAO. The main grievance of the petitioner is that his trial has not proceeded on a day to day basis and that his trial has not been concluded within 30 days which is a violation of S.16 (a) NAO.

3. The instant matter was initiated on complaint referred by NAB Rawalpindi as massive unauthorized Government amount was found deposited into the accounts of non-local and low profile NGO. The inquiry followed by the 6x investigations under the provisions of NAO was authorized against the Management of Benazir Housing Cell (BHC) and Fiza Social Welfare Organization (FSWO) regarding misappropriation of low cost housing funds of District Khairpur, Larkana, Kashmore, Ghotki, Tharparkar and Sanghar. The petitioner in active connivance with accused persons of FSWO namely Muhammad Raza Khokar and Mst. Rukhsana Abbas illegally deposited the amount of public funds into their personal accounts and malafide did not construct the houses of poor persons. Thereafter NAB investigation team accompanied with Director Inspection BHS, Deputy Director Engineer BHC. Engineering team of Pak PWD visited 1497 Houses in 6 Districts and found that majority of the houses were not constructed by the petitioner and FSWO and the constructed houses were found in uninhabitable conditions. Thus the petitioner in active connivance with accused persons of the BHC had committed corruption falling within the ambit of the NAO and hence the consolidated reference was filed against him by the NAB which is now proceeding before the accountability court. The details of said reference are summarized into the following table:-

S.No.	District	Ref:#	No of House	Amount paid (Rs)	Loss Established (Rs)
1	Khairpur	13/2015	520	124,491,008	63,345,377
2	Larkana	29/2015	318	80,537,920	56,720,889
3	Kashmore	30/2015	148	35,620,114	33,677,118
4	Ghotki	39/2015	170	34,931,250	32,984,900
5	Thar Parkar	36/2016	200	56,636,850	20,600,000
6	Sanghar	37/2016	141	29,776,110	16,897,876
	Total		1,497 Houses	361,993,252	224,226,160

4. It is further submitted that the petitioner / accused No.6, Choudhary Muhammad Ashraf being the General Secretary of FSWO has made various requests for payments illegally on affidavit and submitted the cheques of personal accounts as surety which resulted into heavy loss to the government exchequer. The petitioner / accused No.6 in active connivance with accused persons of BHC and FSWO withdrew amount of beneficiaries in cash and some portion of this amount was also transferred into his personal account as well as in the accounts of accused Muhammad Raza Khokar, accused Mst. Rukhsana Abbas and accused Agha Ghulam Mohi-uddin. The petitioner / accused NO.6 in connivance with accused / officials of BHC and FSWO submitted fictitious completion certificates, although no final payment were made by the BHC neither houses were constructed and completed.

5. It is also submitted that it has been established that the petitioner in active connivance of the BHC and FSWO misappropriated Rs.224,226,160/- in above mentioned 6x

districts. Thus the accused persons have committed the offence of corruption and corrupt practices as envisaged in Section 9(a) of the NAO, 1999 and scheduled thereto punishable under section 10 of the said Ordinance. The said references are pending before Accountability Court No.III, Karachi for proper adjudication.

6. As mentioned earlier in this order, notwithstanding the serious allegations against the petitioner in the aforesaid consolidated reference, for the purposes of this petition, the main grievance of the petitioner is that his trial has not been proceeding on a day to day basis nor has it been decided within 30 days which is a mandatory requirement of S.16 (a) NAO and as such his trial/continued detention is unlawful.

7. Learned Special Prosecutor NAB has vehemently opposed the submissions raised by the petitioner and stressed that the provisions of S.16 (a) NAO are only directory in nature and not mandatory and as such this petition be dismissed.

8. We have heard both parties, perused the material available on record and considered the various case law on the issue at hand.

9. At the outset we would like to make it clear that we are only determining whether in our view, as a matter of law, S.16 (a) NAO is mandatory or directory in nature.

10. By way of assistance Section 16 (a) NAO is set out as under:

Trial of offenses.

(a) "Notwithstanding anything contained in any other law for the time being in force an accused **shall** be prosecuted for an offence under this Ordinance in the Court and the case shall be heard from day to day and shall be disposed of within thirty days."
(bold added)

11. There is little doubt that the one of the objects of the NAO was to promote the speedy disposal of corruption cases. This can be seen through its preamble which provides as under in material part:

"An Ordinance to provide for the setting up of a National Accountability Bureau so as to eradicate corruption and corrupt practices and hold accountable all those persons accused of such practices and matters ancillary thereto;

Whereas it is expedient and necessary to provide for effective measures for the detection, investigation, prosecution **and speedy disposal of cases involving corruption, corrupt practices**, misuse or abuse of power or authority, misappropriation of property, taking of kickbacks, commission and for matters connected and ancillary or incidental thereto;(bold added)

12. The preamble is also fortified by S.16 (a) which we have reproduced earlier coupled with the right to an expeditious trial which in our view is guaranteed under Article 10 (A) of the Constitution.

13. Initially it would appear that the Supreme Court took a stringent view on the implementation of S.16 (a) NAO. For example, in the case of **Aga Jahanzeb V NAB** (2005 SCMR 1666) the Hon'ble Supreme Court observed as under at P.1167.

"When questioned that under the NAB Ordinance trial is to conclude within 30 days. Mr. M.Ibrahim Satti, Advocate Supreme Court submitted that this time period is not mandatory but directory for the time being we would refrain from expressing any opinion as to whether the timeframe is mandatory or directory, but would direct that after submission of challan in this case on 7th of May, 2003 if the trial does not commence or conclude within 30 days from the said date petitioner would automatically become entitled to the grant of bail subject to his furnishing bail bonds in the sum of Rs.five millions with one surety in the like amount to the satisfaction of the trial Court at Lahore."(bold added)

14. In the case of **Muhammed Nadeem Anwar V NAB** (PLD 2008 SC P.645) the Hon'ble Supreme Court held as under at P.649.

"The object of criminal law is to ensure availability of the accused to face trial and not to punish him for offence allegedly pending final determination by a competent Court of law. It is well settled principle of law that grant of bail cannot be withheld as punishment on accusation of non-bailable offence against an accused. **An accused is entitled to expeditious and inexpensive access to justice, which includes a right to fair and speedy trial in a transparent manner without any unreasonable delay. This intention has been re-assured in section 16 of the N.A.B. Ordinance laying down criteria for day to day trial and its conclusion within 30 days. But in the instant case such object does not appear likely to be achieved anywhere in the near future and would not constitute a bar for grant of bail to the petitioners.** The truth or otherwise of charges leveled against petitioners would only be determined at the conclusion of trial after taking into consideration the evidence adduced by both the parties. It was held by this Court in the case of *Aga Jehanzeb v. N.A.B. & others* (2005 SCMR 1666) that if trial of case is not concluded within 30 days from date of submission of challan, accused would automatically become entitled to grant of bail" (bold added)

15. However notwithstanding such an initial stringent stance we have not come across any Supreme Court authority whereby the Supreme Court has ordered the acquittal of an accused on account of the trial not proceeding on a day to day basis and not being completed within 30 days.

16. So when is a provision of law mandatory and when is it directory?

17. The use of the word "shall" does not automatically make the provision mandatory as was pointed out in the case of **Jamshed Hassan Butt V MCB Bank Ltd** (2015 CLD 1894 relevant 1896) which in essence held that there was no universal principle in determining whether a provision was mandatory in nature or hard and fast rule as set out below in the following terms:

"It is correct that the word 'shall' and 'may' are interchangeable when used in a provision of law. It is also correct that the word 'shall' when used in a statute is not mandatory as a rule of thumb; but no universal rule can be laid down to determine as to whether a provision is directory or mandatory in nature. Every enactment has to be construed on its own merit in the light of the general object intended to be secured by that legislation. Thus, while construing the provision of an enactment the entire scheme of the enactment, the nature of provision in question should be taken into consideration. We are of the considered opinion that the basic purpose of enacting Financial Institutions (Recovery of Finances) Ordinance, 2001 is to provide speedy measures for recovery of outstanding loans and finances."

18. Likewise in the case of **Messrs Wazir Khan Store V UBL** (2015 CLD 1729 at P.1736) which was another banking recovery case it was held as under:

"It is a settled principle of law that one of the essential features of the mandatory provision is not merely use of word "shall" which may be used merely to stress importance of compliance of a particular requirement. **Ordinarily where consequences of failure to comply with the direction or requirement of statute are not stated, the direction is treated as directory and not mandatory.** In the case reported in Citibank N.A. v. Judge, Banking Court-IV and 2 others [(2011 CLC 171)(Lahore)] the recovery suit of the bank was dismissed being incompetent simply on the ground that the plaint was not accompanied by the Power of Attorney but the learned Division Bench of this Court noted that though requirement of law was to file plaint along with the Power of Attorney but section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2011 had not provided that if a copy of the Power of Attorney is not filed along with the plaint, the plaint would be dismissed." (bold added)

19. As mentioned above what very often may be decisive in determining whether a provision is mandatory is if a consequence/sanction is used after the word "shall" i.e. unless something is done within a given period the following consequences will follow. For example, if S.16 (a) provided the express wording that, "unless S.16 (a) was complied with the accused would be automatically granted bail" (despite the offense under the NAO being non bailable) or "unless S.16 (a) was not complied with the accused would be automatically acquitted of the charge".

20. However no such express consequences/sanctions have been provided by the legislature in the event that S.16 (a) is not complied with which in our view tilts the balance in favour of S.16(a) being directory in nature rather than mandatory despite the words "shall" being used.

21. In the recent case of **Collector of Sales Tax Gujranwalla V Messrs Super Asia Mohammed Din and Sons** (2017 SCMR 1427) despite it being a tax matter the Hon'ble Supreme Court delved deeply into the issue of whether a provision was mandatory or directory and held as under at P.1437

"The ultimate test to determine whether a provision is mandatory or directory is that of ascertaining the legislative intent. While the use of the word 'shall' is not the sole factor which determines the mandatory or directory nature of a provision, it is certainly one of the indicators of legislative intent. Other factors include the presence of penal consequences in case of non-compliance, but perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the Court to garner the real intent of the legislature as expressed in the law itself. Reference may be made to the cases of Syed Zia Haider Rizvi and others v. Deputy Commissioner of Wealth Tax, Lahore and others (2011 SCMR 420), In Re. Presidential Election, 1974 (AIR 1974 SC 1682), Lachmi Narain v. Union of India (AIR 1976 SC 714) and Dinesh Chandra Pandey v. High Court of Madhya Pradesh and another [(2010) 11 SCC 500]." (bold added)

22. Now if we consider how heinous the Supreme Court has deemed offenses under the NAO to be could it be the intent of the legislature to have made S.16 (a) mandatory whereby its non compliance would lead to automatic bail or acquittal? For example in the case of **Abdul Aziz Memon V The State** (PLD 2013 SC 594) when discussing whether only public officials fell within the purview of the NAO the Supreme Court held as under at P.639 with respect to the heinousness of offenses under the NAO.

"This court had also found that such provisions of the National Accountability Ordinance, 1999 were quite justified in view of the gravity of the menace of rampant

corruption the said Ordinance was meant to tackle. Dealing with such stringent provisions of the Control of Narcotic Substances Act, 1997 and their interpretation one of us (Asif Saeed. Khan Khoso, J) had observed as a Judge of the Lahore High Court in the case of Nazir Hussain v. The State (2002 PCr.LJ 440) as under:-

"7. The learned counsel for the petitioner is quite right in pointing out that in the case of Ghani-ur-Rehman v. The State 1996 PCr.LJ 347, Muhammad Afzal v. The State 1998 PCr.LJ 955 and Naveed Ahmed Khan v. The State 1999 PCr.LJ 63 it had been held that if the allegation leveled against an accused person attracts the provisions of section 9(b) of the Control of Narcotic Substances Act, 1997 as well as the provisions of Article 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979 then in such a case of two penal provisions attracted to the same allegation against an accused person that penal provision is to be applied which carried a lesser punishment or attracts lesser rigours of the law, i.e. Article 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979. However, we have noticed in this context that in all the abovementioned cases the provisions of section 76 of the Control of Narcotic Substances Act, 1997 had not been brought to the notice of the Honourable Judges deciding those cases. Section 76 of the said Act of 1997 **provides for giving an overriding effect to the provisions of the Control of Narcotic Substances Act, 1997 over anything contained in any other law for the time being in force.** The provisions of section 74 of the said Act may also be advantageously referred to in this context. The overriding effect of section 76 of the Act of 1997 was clearly noticed and expressly referred to in the case of Khalil-ur-Rehman v. The State 1998 PCr.LJ 1625 for brushing aside an argument that the case of the accused person in that case may be considered to be one under Article 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979 and not to be that under section 9 of the Control of Narcotic Substances Act, 1997, for the purposes of the said accused person's bail. We respectfully subscribe the view expressed in this regard in this precedent case.

11. We are conscious that some of the views expressed by us above and some of

the interpretations advanced by us vis-à-vis different provisions of the Control of Narcotic Substances Act, 1997 may appear to some to be somewhat harsh or stringent but we maintain that the same are in consonance with the spirit of the said law. The said law is not an ordinary law as the menace that it purports to curb is not commonplace and the criminals who indulge in it are not of the normal type. The mischief sought to be suppressed by this law is not just a crime against a human being but a crime against the humanity and, therefore, a response to the same has to be aggressive and punitive rather than benign and curative. It may be true that an individual subjected to the rigours of this law may sometimes suffer disproportionately but the greater good of the society emerging from stringent application of this law may make this approach worth its while.

The perils of corruption in a society are far greater than the hazards of narcotics and, thus, the observations made above in the context of the Control of Narcotic Substances Act, 1997 are attracted with a greater force in the context of the National Accountability Ordinance, 1999. It may not be forgotten that by virtue of section 3 of the National Accountability Ordinance, 1999 the provisions of the said Ordinance are to have an overriding effect over any other law for the time being in force." (bold and underlining added)

23. Crimes of corruption under the NAO are not ordinary crimes. They are crimes against society as a whole. For offenses of corruption charged under the NAO (white collar crimes) the Hon'ble Supreme Court in the recent case of **Rai Mohammed Khan V NAB** (2017 SCMR P.1152) has emphasized that the **grant of bail in such cases must be construed strictly and rigidly** even if, as in that case referred to above, the amount involved was on the lesser side being only approx RS 12M in the following terms at P.1154 para 7;

"Under the principle of law and justice, each bail petition is to be decided on its own merits and the law applicable thereto, however, this Court cannot remain oblivious of the undeniable fact that the tendency of corruption in every field, has become a threatening danger to the State economy, striking on its roots. The public money, allocated for social sector and economic well being of the poor people, is consistently embezzled / misappropriated at a large scale and why the majority of the population is deprived of essential daily utilities, like pure drinking water, health care and education facilities, etc. **It has become the foremost obligation of each and every institution, including the Judicator, to arrest this monster at this stage, before it goes out of proportion, posing threat to the very survival of the State and State economy, therefore, the Courts shall apply the Anti-Corruption laws somewhat rigidly, once on fact the case is made out, at bail stage, against the accused person. Distinction, however, is to be drawn between the ordinary criminal cases and of corruption on the above analysis and grounds, while dealing with bail matter to an accused person, charged for such like crimes and also at the time of conviction, once the case is proved against him then, Courts are not supposed to show any mercy by taking a lenient view in the matter of sentence.**" (bold added)

24. Thus, even for the grant of bail in NAB cases this must be considered on a stringent and rigid plane due to the nature of the crime. **The reason for citing this NAB bail case is to show how stringently the law of bail is applied to NAB cases by the supreme court and thus if the grant of bail is to be construed so strictly and rigidly how can it be expected that parliament intended that S.16 (a) be mandatory in nature and the accused be granted automatic bail or even be acquitted if S.16 (a) was not complied with?** It would in our view in effect render the **Asfandiyar Wali Khan case (PLD 2001 SC 607)** on the ability

of the High Courts to grant bail in their constitutional jurisdiction almost redundant (along with section 9(b) NAO) which in itself entitled accused under the NABO for the first time to be granted bail which was against the original intention of the legislature which was in essence found to be unconstitutional. This is because if S.16 (a) NAO was mandatory in nature then there would be little, if any, need for an accused to apply for bail as such accused would stand acquitted if his trial was not completed in 30 days.

25. Once again when we consider mandatory and directory provisions it is worth considering the Control of Narcotic Substances (Analysts) Rules 2001 whereby Rule 4 provides as under:

4. Dispatch of sample for test or analysis. (1) Reasonable quantity of samples from the narcotic drugs, psychotropic substances or the controlled substances seized, shall be drawn on the spot of recovery and dispatched to the officer-in-charge of nearest Federal Narcotic Testing Laboratory, depending upon the availability for test facilities, either by insured post or through special messenger duly authorized for the purpose.

(2) Samples may be dispatched for analysis under the cover of a Test Memorandum specified in Form-I at the earliest, **but not later than seventy-two hours of the seizure.** The envelope should be sealed and marked "Secret Drug Sample/Test Memorandum." (bold added)

26. When determining whether this 72 hour period as provided in Rule 4 (2) (supra) was mandatory or directory in nature the Hon'ble Supreme Court in the case of **Tariq Mehmood v. The State** (PLD 2009 SC 39) held such time period to be directory in nature since in effect to hold otherwise may lead to the defeat of the purpose of the legislature which was to combat the menace and the social evils of the drug trade.

27. In our considered view therefore, following the case of **Collector of Sales Tax Gujranwalla** (Supra) whereby the object and purpose of the NAO through its legislative intent is to combat the menace of corruption we find S.16 (a) of the NAO to be directory in nature and **not** mandatory and the fact that a trial does not proceed on a day to day basis or is not decided within 30 days will be of no consequence.

28. We are further fortified in our finding by the fact that cases under the NAO are non bailable and that the Hon'ble Supreme Court has, so far as we are aware, never granted bail or acquitted an accused under the NAO for non compliance with S.16 (a) NAO. On the contrary there is a plethora of Supreme Court case law to show that bail will not even be granted on hardship grounds unless there has been a considerable delay in concluding the trial (well beyond 30 days, being many months if not a few years), that the delay is not caused by the accused or his counsel and the completion of the trial is no where in sight in the foreseeable future. In many cases the superior courts have even give directions to complete the trial within a given period whilst rejecting bail e.g. within 3 months which tends to show that the courts do not regard S.16(a) NAO as mandatory but rather directory in nature. Logic, common sense and whether a matter appeals to reason would in our view also support this conclusion as hardly any NAB cases are heard on a day to day basis or completed within 30 days and as such in our view it cannot have been the intention of the legislature that in offenses of

such a heinous and serious nature involving corruption that if S.16 (a) NAO was not complied with all the accused would be granted bail (in this non bailable offense) or acquitted which in effect would mean that all the accused in NAB cases under the NAO would stand acquitted which would completely defeat the object and purpose of the entire legislation; namely to bring the corrupt to book or even render such legislation redundant in practice.

29. In making this finding we would like to emphasize that it in no way detracts from the NAB and the accountability courts obligation to complete the trial of the accused under the NAO as expeditiously as possible and that in appropriate cases of delay bail may be granted.

30. We would also observe that since hardly any NAB trial proceeds on a day to day basis or is completed within 30 days in order to give effect to the intent and spirit of the NAO which specifically provides for expeditious trials it is incumbent upon the Federal Government to establish sufficient accountability courts in each province to ensure that such NAB trials are completed within the shortest possible time rather than be left to drag on for years on end, which is very often the case in trials under the NAO, due to a lack of accountability courts and judges especially as statutory bail on the grounds of delay are not available in such cases.

31. We accept that such delay is caused by a number of factors such as the criminal justice system itself whereby if an absconder is later arrested the charge has to be reframed and all the evidence again recorded from scratch which leads to inordinate delay; the prosecution not producing PW's or documents in a timely manner and adding too many accused in the reference and too many PW's and documents which makes the trial almost unmanageable and unnecessarily long especially as each of the accused will have a separate right of cross examination of each PW through a different counsel. (In this respect in some cases under the NAO as many as 50 accused have been placed in the reference and the average appears to be at least 10 to 15) and the defense counsel seeking adjournments on account of seniors being busy before superior courts, counsel on general adjournments, lawyers strikes, illness, deaths in the family, absence of accused etc. However, the accused should not be made to suffer and rot in jail for years on end due to such short comings/failures which are often not caused by him. Ultimately, it is the obligation of the state as envisaged under the NAO to provide an expeditious trial to the accused

32. As such the Federal Law Secretary is hereby **directed** to establish **within 3 months** of the date of this order **three more** fully functioning accountability courts in Karachi complete with office space, judges, all other ancillary staff and necessary equipment so that the back log of accountability cases in Sindh can be reduced and meaningful efforts made

to complete such trials expeditiously so that accused do not languish in jails for years on end which was not contemplated under the NAO which provides for speedy trials.

33. With regard to the delay in the disposal of the petitioner's case it would appear from a report received from the trial court dated 06-12-2017 that some of the co-accused including the petitioner have moved a criminal transfer application before this court and since then have deliberately not been proceeding with the reference **despite their being no stay on the proceedings** and as such any delay in the completion of the petitioner's trial lies at the door of the petitioner and his co-accused. An extract of the aforesaid report is set out below for ease of reference;

"On 14.06.2017 counsel for co-accused namely Agha Zubair misbehaved with the Presiding Officer in open court, therefore; on account of his contemptuous conduct the matter was adjourned after summer vacation thereafter accused persons filed transfer application No.50/2017, which is pending before Hon'ble High Court of Sindh Karachi. **Prior to filing transfer application reference were proceeded daily, but after filing transfer application by accused persons their senior counsel are not appearing in court and their junior counsel intimated on each date of hearing about pendency of transfer application. Now the matter is fixed on 09.12.2017.**"

34. The office shall immediately transmit a copy of this order to the Federal Law Secretary, Government of Pakistan, Islamabad for information and compliance in respect of para 32 of this order. MIT II shall also after 2 months of the date of this order put up a compliance report with regard to the progress made by the Federal Government

in establishing the three additional accountability courts in Karachi as per para 32 of this order.

35. This petition stands dismissed in the above terms.