

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Muhammad Iqbal Kalhor, J.

Mr. Justice Mohammed Karim Khan Agha, J.

Petition number, name of the petitioner and his counsel.

1. C.P. No.D-2911 of 2018 Abu Bakar Dawood (petitioner) V.
Federation of Pakistan & others.
Through Mr. Faisal Siddiqui, Advocate.

2. C.P. No.D-6251 of 2017 Abdul Aziz Dawood (petitioner) V.
Federation of Pakistan & others.
Through Mr. Faisal Siddiqui, Advocate

3. C.P. No.D-4028 of 2016 Ghulam Mustafa Phul (petitioner) V.
National Accountability Bureau & others
Through Mr. Shaukat Hayat, Advocate.

Counsel for the Respondents

Mr. Yasir Siddique, Special Prosecutor, NAB.

Date of hearing: 27.04.2018, 09.05.2018, 18.05.2018
25.05.2018 and 31.05.2018

Date of order: 02.06.2018

ORDER

Mohammed Karim Khan Agha, J. These petitions concern the all too common and frequent kinds of National Accountability Bureau (NAB) references filed under S.9 of the National Accountability Ordinance 1999 (NAO) for acts of corruption and corrupt practices whereby builders through either illegal usurpation of land or through illegal change in use of land in connivance and collusion with government officials concerned in revenue matters such as the Land Utilization Department, Revenue officials, Mukhtiarkars, Tapedars, etc who are supposed to protect valuable Government land through their misuse of authority and/or failure to exercise authority either by allowing usurpation or change of use in connivance with builders cause a huge loss to the national exchequer and/or unduly favour/benefit individuals/companies. Such misuse of authority and or failure to exercise authority in collusion and connivance with other concerned stake holders such as the KDA, SBICA etc has virtually in recent times destroyed the infrastructure of Karachi in terms of a lack of water, electricity, poor sanitation, lack of proper sewage, garbage collection, lack of

parks and other recreation facilities for families, traffic congestion, parking problems, etc to the detriment of its citizens by giving away government land at throwaway prices or changing its use from amenity plots or industrial to commercial/residential use hand in glove with the land mafia to benefit the land mafia at the expense of the citizens. This is such a case.

2. The brief facts of this particular case are that petitioners Abu Bakar Dawood and Abdul Aziz Dawood both of whom are directors of M/s. Fishing Aids Company (Pvt) Ltd., M/s Dairy Farm Milk Cooling and Supply Co. Ltd, M/s. Sessi Cattle Farm Slaughter House and Meat Processing Industry (Pvt) Ltd and M/s Chashma Fish Meal Oil Industrial (Pvt) Ltd, were allotted 70 acres of land in various pieces making up the total of 70 acres (including 25 acres in the name of petitioner Abdul Aziz Dawood) for industrial purpose which pieces of land were regularized on 11-03-2006 and 08-03-2006 by the land Utilization Department and then on the request of the petitioners illegally converted from Industrial to residential and commercial purposes by the petitioner Ghulam Mustafa Phul, the then Secretary Land Utilization Department, without approval from the competent authority. These lands were canceled and then again restored for the changed purpose of "Industrial" to "Residential/Commercial/Industrial" vide orders dated 10.08.2011 and 15-08-2011 by the petitioner Ghulam Mustafa Phul, Ex-Secretary Land Utilization Department, without due approval from the Chief Minister Sindh who later on again cancelled the change of purpose vide letters dated 31-08-2015 and 03-09-2015 and reverted it from commercial /residential use back to Industrial use. In the meantime the petitioners 2 and 3 who are builders who had been illegally benefited by such change of use started the process of constructing a residential project on the land which had now dramatically increased in value through the change of use from industrial to residential/commercial and thus were the beneficiaries of this illegal change of use. Once the change of use was cancelled the petitioners filed civil suits before this court in order to stay the operation of the letters canceling the change of use from Industrial to residential/commercial and as is usually the case through an ex parte order the operation of the letters canceling the change of use were stayed in 2015 (rather than the status quo being ordered to be maintained) and thereafter little progress has been made in the civil suits. On account of the stay orders the

petitioners continued to build on their project. That after a complaint from transparency international NAB opened an inquiry into the above developments which was later converted into an investigation and thereafter NAB filed reference **No.24/2017 State V Ghulam Mustafa Phul and others** on 20.09.2017 for acts of corruption and corrupt practices against the petitioners under S.9 NAO. The acts of corruption and corrupt practices mainly encompassed the misuse of authority and or failure to exercise authority by petitioner Ghulam Mustafa Phul which unduly benefited/ favoured petitioners Abu Bakar Dawood and Abdul Aziz Dawood who are the co-accused in the aforesaid reference.

3. Learned counsel for petitioner Abu Bakar Dawood submitted that NAB had no jurisdiction in this case under the NAO as no loss had been caused to the exchequer and that there had been no wrong doing on the part of the petitioners who were the lawful owners of the land. He also submitted that this matter was a civil matter and not a criminal matter and since civil suits were also pending before the High Court, the NAB could not initiate any criminal proceedings; that it was a case which fell under the doctrine of indoor management. The malafide of the NAB is clear from the filing of a reference in a matter in which they had no lawful jurisdiction under the NAO. As such he submitted that both the petitioners' ad interim pre arrest bail should be confirmed. In support of his contentions he placed reliance on **Mansur-ul-Haque v. Government of Pakistan** (PLD 2008 SC 166), **Zahid Ali Noor v. NAB and others** (2017 P Cr. L J 147), **The State through Chairman NAB v. Hanif Hyder and another** (2016 SCMR 2031) and **Rauf Bakhsh Kadir v. The State** (2003 MLD 777) an unreported order of this court dated 27-03-2018 in the case of **Aftab Ahmed Memon and others v. The Chairman NAB, Muhammad Asif v. Muhammad Akhtar and others** (2016 SCMR 2035), **Rizwan Ahmed v. NAB through Chairman and 4 others** (PLD 2008 Lahore 381), **Pervez Zaki v. The State through NAB Balochistan, Quetta** (2017 P Cr. LJ 747), **Amjad Hussain v. NAB through Chairman and another** (2017 Y L R 1 Sindh), **The State and others v. M. Idress Ghauri and others** (2008 SCMR 1118), **Abdul Majeed v. NAB through Chairman and 3 others** (2016 P Cr. LJ 1874), **Mir Munawar Ali Talpur v. State through Chief Ehtesab Commissioner, Islamabad and 2 others** (PLD 2003 S.C. 46), **Remesh Udeshi v. The State** (PLD 2004 Karachi 224), **Rafiq**

Haji Usman v. Chairman, NAB and another (2015 SCMR 1575) **Abdul Shakoor Kaloodi & another v. The State** (SBLR 2002 Sindh 1263), **Ch. Tanveer Khan v. Chairman, National Accountability Bureau and other** (P L D 2002 S.C. 572) and **Messrs Al-Ahram Builders Limited v. Pakistan Defence Officers' Housing Authority through Secretary/Managing Director** (P L D 2015 Sindh 261).

4. Learned counsel for petitioner Ghulam Mustafa Phul who was the then secretary Land Utilization Department who changed the use from Industrial to residential and commercial submitted that although he had illegally issued the corrigendum changing the use but this was a mistake on his part which he rectified as soon as he became aware of his error; that he was acting based on other precedents whereby other Secretaries of the LUD had allowed change of use on the basis of the Chief Ministers blanket approval; that no loss was caused to the exchequer; that he made no personal gain; that he committed an irregularity as opposed to an illegality and for all the above reasons the petitioner was entitled to the confirmation of his pre arrest bail. In support of his contentions he placed reliance on **Rana Muhammad Arshad v. Muhammad Rafique** (PLD 2009 SC 427), **Lal Mohammad Kalhoro v. The State** (2007 SCMR 843), **Zaigham Ashraf v. The State** (2016 SCMR 18), **Muhammad Saeed Mehdi v. The State** (2002 SCMR 282), **Saeed Ahmed v. The State** (1996 SCMR 1132), **Mansur-ul-Haque v. Government of Pakistan** (PLD 2008 SC 166), **The Engineer in Chief Branch (the State) V. Jalaluddin** (PLD 1992 SC 207) **Abdul Jabbar V. The State** (2015 YLR 108), an unreported order of this court dated 27-03-2018 in the case of **Aftab Ahmed Memon and others v. The Chairman NAB** and another unreported order of this court dated 30.01.2018 in the case of **Mustafa Jamal Kazi V NAB**

5. Learned counsel for the NAB opposed the confirmation of pre arrest bail to all the petitioners. He submitted that there was sufficient material on record to connect all the petitioners to the offenses for which they had been charged in the reference and in this respect took the court through various documents. He also submitted that there had been no malafide on the part of the NAB and as such the pre arrest bail granted to all the petitioners should be recalled with immediate effect.

6. We have heard the parties and have carefully gone through the documents on record and the various authorities relied upon by the parties in the light of the particular facts and circumstances of this case.

7. We would also like to make it clear that the findings in this order are only based on a tentative assessment of the material available on record as opposed to a deep appreciation of the same and shall have no bearing on the trial which shall be decided on merits based on the evidence placed before the trial court.

8. For offenses of corruption charged under the NAO (white collar crimes), the Hon'ble Supreme Court in the 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 and as such we have followed this approach.

9. It is now well settled law that pre arrest bail is an extraordinary relief and is only available in cases where there has been malafide on the part of the complainant or the investigating agency. In this regard reference may be made to the case of **Rana Mohammed Arshad V Muhammed Rafique** (PLD 2009 SC 427) and the more recent Supreme Court case of **Mukhtar Ahmad v. The State and others** (2016 SCMR 2064, relevant page 2066). We have found no such malafide on the part of NAB based on the material placed before us and the facts and circumstances of this case.

10. The main argument by petitioners Abu Bakar Dawood and Abdul Aziz Dawood is that since there has been no loss to the state NAB does not have jurisdiction and even otherwise that amount is petty. We find that we cannot agree with this contention based on the particular facts and circumstances of this case. S.9 (a) (vi) NAO reads as under:

9. Corruption and Corrupt Practices:-- (a) **A holder of a public office, or any other person,** is said to commit or to have committed the offence of corruption and corrupt practices:-

- (i).....
- (ii).....
- (iii).....

(iv).....

(v).....

(vi) **[If he] misuses his authority so as to gain any benefit or favour for himself or any other person, or renders or attempts to render to do so, [or wilfully fails to exercise his authority to prevent grant, or rendition of any undue benefit or favour which he could have prevented by exercising his authority]** (bold added)

11. It is clear from the above subsection that that the misuse of authority **includes** gaining any benefit or favour for any other person or such failure to exercise his authority includes the grant of an undue benefit or favour to any other person through another person's (in this case petitioner/co-accused Ghulam Mustafa Phul's) misuse of authority or failure to exercise authority.

12. Based on the particular facts and circumstances of this case the misuse of authority by petitioner/co-accused Ghulam Mustafa Phul has massively benefited and favoured petitioners Abu Bakar Dawood and Abdul Aziz Dawood in that it has dramatically increased the value of their land through change of usage. The value of the land is now worth crores of rupees as opposed to a far lesser amount if it had been left for industrial purposes only, as confirmed by the IO in court, hence the petitioners Abu Bakar Dawood and Abdul Aziz Dawood resolute efforts to ensure that the land is not reverted back to such use and to press on with their construction project as quickly as possible so that they can sell on the same for massive profits to buyers who may be impacted adversely if their stay orders are lifted and their civil suits are ultimately decided against them resulting in a virtual fait accompli in favour of the petitioners.

13. The existence of civil suits in the field in our view would not debar the NAB from inquiring into this case as the NAO is a special law which due to S.3 NAO has an overriding effect over the Code of Civil Procedure (CPC) which is a general law under which the suits have been filed. In this respect reference is made to the case of **Syed Mushahid Shah V FIA** (2017 SCMR 1218).

14. **Rafiq Haji Usman v. Chairman, NAB and another** (2015 SCMR 1575) is also distinguishable as in our view this is mainly a

criminal case which falls squarely under S.9(vi) NAO as set out above above.

15. With regard to the question of NAB's pecuniary jurisdiction this court in the case of **Amjad Hussain V NAB** (YLR 2017 1) after considering in detail the relevant law including **Rauf Bakhsh Kadri's case** (Supra) and NAB's own SOP on pecuniary jurisdiction in effect held that NAB according to its own SOP should not be filing references of less than RS100M however it was **not** debarred from so doing with the permission of the Chairman NAB. This position was clarified in the case of **Rajid Ali Shah V NAB** (in CP.D 2741/2016) dated 08-03-2017 which essentially interpreted **Amjad Hussain's case** (Supra) on this point of pecuniary jurisdiction and was upheld by the Hon'ble Supreme Court in the case of **Waqar Ali Awan V Federation of Pakistan in CP. D.No.1303 of 2017** (unreported dated 03-05-2017) which was subsequently followed by this court in the case **CP.D 1532/2016 (unreported) vide order dated 19.12.2017**. As such in the final analysis to date it is for the Chairman NAB to determine the amount of loss which will lead to him exercising his discretion whether or not to file a reference under the NAO. In any event we understand that this issue of NAB's pecuniary jurisdiction still remains subjudice before the Hon'ble Supreme Court. Even other wise reliance is placed on an unreported order of the Supreme Court dated 09.06.2017 in Civil Petition No.1876 of 2017 **Karamuddin Panhyar V Federation of Pakistan** where it was held in a NAB case for post arrest bail that, "No loss to the State is **not a ground alone** on the basis of which concession of bail is to be extended to an accused". This in our view is entirely logical and in accordance with the legislative intent whereby S.9(a) (xii) NAO made even an "attempt" to commit an offense under S.9(a)(i) to (xi) a separate offense under S.9 NAO. In cases of "attempt" often no loss is caused however Parliament appreciating this situation deliberately and consciously made "attempt" a separate offense under S.9 NAO.

16. In any event in our view the petitioners Abu Bakar Dawood and Abdul Aziz Dawood have been hugely benefited/favoured by the change of land use from industrial to residential and commercial through the misuse of authority by petitioner Ghualm Mustafa Phul the then Secretary of the land Utilization Department

who changed the use of the land on the request of the petitioners without the approval of the competent authority which caused a loss to the Government exchequer. The land now being transformed from industrial use to residential/commercial use is now worth far more and has unduly favoured/benefited the petitioners Abu Bakar Dawood and Abdul Aziz Dawood who seem to have been working hand in glove with petitioner Ghulam Mustafa Phul.

17. With regard to petitioner Ghulam Mustafa Phul the then Secretary Land Utilization Department it is quite apparent from the documents on record that he misused his authority in illegally changing the use of the land without the approval of the competent authority (as admitted by himself) which unduly favoured/benefited the petitioners Abu Bakar Dawood and Abdul Aziz Dawood. His excuse that he changed the use back once he realized his "mistake" in our view was simply to camouflage his illegal action because in the meanwhile the status of the land had already been changed with the start of a housing scheme. Firstly it incredibly took him over a year to realize his "mistake" and secondly, rather "conveniently" during this period petitioners Abu Bakar Dawood and Abdul Aziz Dawood seized this window of opportunity, most probably it can be inferred in connivance with petitioner Phul, and commenced their construction project which is continuing in full swing as petitioner Mr. Phul's cancellation letter has now been stayed in a civil suit and as such they have been greatly benefited by this illegal change of use as they will be able to sell on their project making millions of rupees in profit which would not have been possible but for petitioner Phul's illegal misuse of authority in order to benefit/favour them.

18. The upshot of the above discussion is that since there has been no malafide on the part of NAB and in our view there is sufficient material on record to connect all the petitioners to the offense for which they have been charged pre arrest bail is recalled with immediate effect with respect to petitioners Abu Bakar Dawood, Abdul Aziz Dawood and Ghulam Mustafa Phul.

19. These are the reasons for our short order dated 31.05.2018 which reads as under:

"We have heard learned counsel for petitioners and Special Prosecutor, NAB in petitions mentioned below.

"For the reasons to be recorded later, in CP No.D-4028 of 2016 interim pre arrest bail in respect of Mr. Ghulam Mustafa Phul is hereby recalled with immediate effect. In CP No.D-6251 of 2017 interim pre arrest bail in respect of Abdul Aziz Dawood is hereby recalled with immediate effect. In CP No.D-2911 of 2018 interim pre arrest bail in respect of Abu Bakr Dawood is hereby recalled with immediate effect. The petitions are dismissed alongwith pending applications."