IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Before: Mr. Justice Mahmood A. Khan.
Mr. Justice Mohammed Karim Khan Agha.

C.P No. D-2741/2016,

Rajib Ali Shah

Vs.

Chairman NAB and others.

C.P No. D-3783/2016, C.P No. D-4718/2016,

C.P No. D-140/2017, C.P No. D-183/2017,

C.P No. D-294/2017, C.P No. D-406/2017,

C.P No. D-441/2017, C.P No. D-4946/2016

and C.P No. D-121/2017

Date of hearing:	22-02-2017 and 23-02-2017
Date of Order	08-03-2017

Mr. Dareshani Ali Haider 'Ada', advocate for the petitioners in C.P No. D-2741/2016 and C.P No. D-121/2017.

Mr. Qambar Ali Solangi, advocate for the petitioners in C.P No. D-3783/2016.

M/s Iftikhar Ali Arain and Zulifqr Ali Sangi, advocates for the petitioners in C.P No. D-4718/2016.

Mr. Zulifqar Ali Sangi, advocate for the petitioners in C.P No. D-183/2017.

Mr. Mehfooz Ahmed Awan advocate for the petitioner in C.P No. D-140/2017.

Mr. Shafqat Raheem Rajput, advocate for the petitioner in C.P No. D-294/2017.

Mr. Mumtaz Ali Jahangir Lashari, advocate for the petitioners in C.P No. D-406/2017.

Mr. Bakhshan Khan Mahar, advocate for petitioners in C.P No. D-441/2017.

Shabeer Shar, advocate for the petitioners in C.P No. D-
/2016.

Mr. Muhammad Zubair Malak, A.D.P.G.A. NAB Sukkur and Abdul Majeed Memon, Special Prosecutor Nab (Sukkur).

Mr. Nisar Ahmed G. Abro, learned D.A.G.

ORDER

Mohammed Karim Khan Agha, J. We propose to dispose of the above petitions through this common order since in essence they involve the same point of law.

2. The brief facts of the case are that the National Accountability Bureau (NAB) has filed references against the petitioners for corruption and corrupt practices under the National Accountability Ordinance1999 (NAO) and in all these cases the monetary value involved is less that RS 100M.

3. The learned counsel for the petitioners have submitted that following the Order of this Court in the case of **Amjad Hussain V Chairman NAB** (YLR 2017 1) the NAB had no authority to file references against them which were less than Rs.100M and that such references should be transferred from the Accountability Courts to other courts which are competent to hear anti corruption matters.

4. In this regard they have cited various stay orders which had been granted by different Divisional Benches of this Court which had stayed the Accountability Court from either proceeding further in the reference or from announcing final judgment in respect of the same which were granted largely on the basis of **Amjad Hussain's case**

and some orders of the Hon'ble Supreme Court after the aforesaid case which was, amongst other things, looking into the aspect of NAB's pecuniary jurisdiction and the legality of voluntary return under S.25(a) of the NAO and the manner in which NAB was applying that section of the NAO.

5. In essence they argued that based on the above authority and orders that their cases should be transferred from the Accountability Courts to other courts having jurisdiction due to the low monetary value involved in their cases.

6. On the other hand learned ADPGA for NAB submitted that the NAB was following the **Amjad Hussain case** (Supra) and even that case did not prevent it from proceeding in cases of a lesser amount than RS 100M.He also submitted that in 7 out of the 9 instant petitions the **Amjad Hussain case (Supra)** was in applicable because the references were at a very advanced stage.

7. We have heard learned counsel for the parties, considered the record and the case law cited at the bar.

8. At the outset we consider that it would be of assistance to set out the NAB SOP concerning pecuniary jurisdiction which was made a part of the Judicial order in **Amjad Hussain's Case** (Supra) (in which one of us Mohammed Karim khan Agha J was a member) which is found at Para 7 of the order which reads as under:

> "**Priority for Cognizance of Cases**: The number of complaints received at NAB is way beyond the capacity to

handle. Taking on all the complaints is rather impossible and can adversely affect the standard and quality of investigation. Therefore, it is important to sift the complaints according to the handling capacity and protect interest of state largely. To rule out misuses of discretion and standardize the selection procedure at NAB's level, the consideration for cognizance of cases is defined as under:-

i. Corruption cases against NAB officers/official/Law Officers/Experts of NAB.

ii. Cases referred by Hon'ble Supreme Court of Pakistan, High Courts and Public Accounts Committee (PAC).

iii. Cases of former/sitting legislators of National Assembly, Senate and Provincial Assemblies (including ministers/advisers etc.) and elected representatives of local bodies, where amount involved is more than Rs.100 million.

iv. Cases involving interest of members of public at large where the numbers of defrauded person are more than 50 persons and amount involved is not less than Rs.100 million.

v. Cases against public servants, whether serving or retired, Bankers, Businessmen and Contractors where amount involved is more than Rs.100 million.

vi. Cases of willful loan default, loss to financial institutions as referred by State Bank of Pakistan (SBP).

vii. Matters covered u/s 31 (a) of National Accountability Ordinance (NAO), 1999.

viii. Cases of money laundering referred by FMU.

ix. Any other case falling within the purview of NAB, irrespective of the amount involved and status of accused person, with prior approval of the Chairman"

9. The primary object behind the order in **Amjad Hussain's Case** (Supra) was to stop the NAB from getting bogged down in cases of a relatively minor monetary nature and ensure that it utilized its resources in effectively pursuing high level cases of mega corruption which was the main purpose of the NAO. i.e. to concentrate on mega

cases as was more particularly set out in para 45 of **Amjad Hussain's case** (Supra).

10. The judicial order of the SOP in **Amjad Hussain's case** (Supra) as set out earlier set the value at RS 100M for most cases however there was a specific saving clause at para (ix) of the judicial order which is reproduced below for ease of reference:

> "(ix) Any other case falling within the purview of NAB, irrespective of the amount involved and status of accused person, with prior approval of the Chairman"

11. Thus, the case did **not** place an absolute bar on the Chairman NAB filing cases of less than RS100M.

12. The rationale for this can be found at Para 41 of **Amjad Hussain's case** (Supra) which is set out below:

> "This is because there may be cases falling below RS 100M which cannot be prosecuted by any other agency and as such rather than letting the culprit off scott free he/it should be prosecuted by NAB at the discretion of the Chairman.........."

13. In particular this aspect of the case was referring to inquiries and investigations which could be transferred under S.24 (d) NAO.

14. With regard to references which had already been filed this was dealt with at para 44 of the **Amjad Hussain case** (Supra) which is set out below:

> 44. "Likewise, **if it is legally permissible**, we also direct the Chairman NAB to consider, transferring those references that have already been filed in Accountability Courts

which fall below the threshold of the SOP to other relevant courts **provided that there is no prospect of a PB and the reference is not in the advanced stages** as indicated in Para 32 of **Rauf Bakhsh Kadri's Case (Supra)** as reproduced in Para 38 of this order" (bold added).

15. It is to be noted in para 44 as cited above the transfer of a reference to another relevant court depends on "it being legally permissible". Learned counsel for the petitioners have not been able to point out any provision in the NAO which makes such transfer legally permissible. Nor have we been able to find such a provision. Although under S.16 (A) NAO the Chairman NAB has the power to transfer other cases pending before other Courts to Accountability Courts if they fall within the jurisdiction of the NAO he appears to have no such power to transfer references already filed to other courts which would presumably have to reframe the charge since the case would now be proceeding under a different law and recall any witnesses already examined. Thus, it is doubtful whether this is legally permissible under the NAO and perhaps the option open in this respect to the Chairman NAB, on the advice of the PGA, is to consider transferring one such test case to another court and see what the legal consequences of this may be. Furthermore, the petitioners were not able to point out to us any Anti Corruption legislation that can specifically proceed against private persons and/or benamidars (as opposed to public office holders) as can be done in NAB cases as was held by the Hon'ble Supreme Court in the case of **Abdul Aziz Memon V NAB** (PLD SC 2013 594)

16. Even otherwise Para 44 of **Amjad Hussain's case** (Supra) is only a direction to the Chairman NAB to **consider** transferring those references that have already been filed in Accountability Courts which

threshold of the judicial order to other relevant courts. It is not a direction to transfer such cases. It is up to the Chairman NAB to apply his mind and to decide whether to transfer the reference to another Court or not subject to it being legally permissible and an appropriate case to justify a transfer.

17. It is also notable that the judicial order as per para 44 does **not** apply if there is a prospect of a plea bargain and the reference is in the advanced stages. As such since 7 of the 9 petitions before us are in the advanced stage they would be inapplicable for transfer to another Court under the **Amjad Hussain case** (Supra) and should proceed before the Accountability Court where thy are currently pending.

18. With regard to the issue of the orders passed by the Hon'ble Supreme Court. It would appear that a 2 member bench of the Hon'ble Supreme Court vide order dated 02-09-2016 expressed its extreme concern that some of the NAB inquiries, investigations and references were in respect of relatively minor amounts keeping in view the mandate of the NAB to pursue mega corruption cases and the manner it which NAB was interpreting S.25 (a) of the NAO in terms of voluntary return and had recommended that the matter be placed before the Chief Justice of Pakistan for passing appropriate orders to fix this matter as a Suo Moto petition under A.184(3) of the Constitution. It appears that this matter was treated as Suo Moto Case 17 of 2016 and on 24-10-2016 it was taken up by a three member bench of the Hon'ble Supreme Court headed by the then Chief Justice Anwar Zaheer Jamali whereby the NAB was restrained from accepting any offer for voluntary return under S.25(a) NAO.

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On the basis of the Supreme Court taking up this issue and with the expectation that it would shortly pass a final ruling on the pecuniary jurisdiction of NAB after considering **Amjad Hussain's case** (Supra), the relevant law and other relevant cases a number of stay orders were passed by this Court in respect of NAB inquiries, investigations and references initiated or filed by NAB in the interests of justice based on the view that a definitive order on the issue of NAB's pecuniary jurisdiction by the Supreme Court was imminent and we did not want to prejudice any party.

20. However not withstanding the passage of approximately six months since the Hon'ble Supreme Court first took up this issue of NAB's pecuniary jurisdiction we have been specifically informed by the NAB which has been admitted by the petitioners that the matter has not been reserved for final orders and with the bench now being broken following the retirement of the then chief justice who was heading the bench it would appear that a final order on NAB's pecuniary jurisdiction is perhaps no longer imminent.

21. None of the petitioners before us have been able to produce a stay order from the Hon'ble Supreme Court preventing the Accountability Courts from proceeding further with any reference of less than RS100M. It may well be that some of the accused in these references remain behind bars and may remain so for a long time since statutory bail is not available in NAB cases on account of the reference being stayed.

22. In the above circumstances, since no Supreme Court stay order has been produced before us preventing the accountability courts from proceeding with the NAB references filed before them, that the decision of the Supreme Court on this issue does not now appear to be so imminent, that accused may be behind bars while their cases are stayed, the requirement of the preamble of the NAO and especially S.16(a) NAO to provide for expeditious trials under the NAO and the fact that many trials before the Accountability Courts have come to a grinding halt in the Accountability Courts which is not serving the interests of justice **we hereby order that any interim restraining/stay order in connection with any of the proceedings related to the above mentioned petitions hereby stands lifted/withdrawn with immediate effect and these proceedings shall continue as per law and as such the retraining/stay orders in any such proceedings, including the hearing of final arguments and announcement of judgments are also hereby lifted in this respect and the Accountability Courts hearing the same are** *hereby directed* **to continue to immediately proceed with any such references pending before them which shall for the avoidance of any doubt include without limitation the hearing of final arguments and announcing Judgments.**

23. The petitions are disposed of in the above terms.

24. The Chairman NAB however is also directed to file before this Court within one month a list of all references which have been filed before the Accountability Courts in the province of Sindh after 01-01-2016 and in particular after 27-04-2016 where the monetary value is

less than RS100M along with reasons why such references have been filed.

25. The Additional Registrar of this Court shall immediately transmit a copy of this Order to all Accountability Court Judges in Sindh for compliance, the Registrar of the High Court of Sindh for distribution amongst all the brother Judges of the Sindh High Court (based at the principal seat, benches at Hyderabad, Sukkur and Larkana), the Chairman NAB, Prosecutor General Accountability NAB, DG NAB (Karachi) DG NAB (Sukkur) and DPGA NAB Karachi and ADPGA NAB Sukkur for compliance and information as the case may be.

26. Before parting with this order we are of the view that it is not contrary to the case of **Multiline Associates V Ardeshir Cowasjee** (PLD 1995 SC 423) since in this case all the orders which have been passed are short orders of an interim nature and the main question in this case concerns the interpretation of **Amjad Hussain's case** (Supra) which was passed by a bench in which one of us was a member and the orders referred to by the Hon'ble Supreme Court. In addition this order is a final order as opposed to being an interim order.

27. The office is ordered to refix this matter for hearing on Tuesday 11th April 2017 as per Roster to consider NAB's reply as alluded to in para 24 of this order.

Sd/-
MOHAMMAD KARIM KHAN AGHA,
JUDGE.

Sd/-
MAHMOOD A.KHAN,
JUDGE.

Sukkur
Dated: 08-03-2017

CERTIFIED TO BE TRUE COPY

TYPED BY
COMPARED BY
READ BY
ASSISTANT REGISTRAR
08/3/17