

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Naimatullah Phulpoto
Mr. Justice Mohammed Karim Khan Agha

CONSTITUTION PETITION NO.D-3817 OF 2016

Mureed Abbas s/o Main Riaz Hussain

Vs.

The National Accountability Bureau.

CONSTITUTION PETITION NO.D-1744 OF 2016

Nazeer Ahmed Channa s/o Wahid Bux Channa

Vs.

The National Accountability Bureau.

CONSTITUTION PETITION NO.D-1963 OF 2016

Tila Mohammad s/o Zaid Mohammad Khan and Muhammed
Bashir Bismil s/o Ghulam Mehdi

Vs.

The National Accountability Bureau.

Date of hearing:	20-10-2016
Date of Order	11-11-2016
Petitioner	Through Mr. Ubaid ur Rehman Advocate for petitioner No1, Amer Raza Naqvi Advocate for petitioner No.2 and Syed Nasir Hussain Jafri Advocate for petitioners 3 and 4
Respondents:	Through Mr. Muhammad Altaf, Special Prosecutor, NAB

ORDER

Mohammed Karim Khan Agha, J. By this common order, we intend to dispose of above three petitions in respect of petitioner No.1 (Mureed Abbas) for post arrest bail and in respect of petitioner No.2 (Nazeer Ahmed Channa), petitioner No.3 (Tila Mohammad) and petitioner No.4 (Bashir Bismil) respectively for confirmation of ad interim pre arrest bail.

2. The brief facts of the case as disclosed by National Accountability Bureau (NAB) Reference No.17 of 2016 State V Abdul Razzak and others are that on receipt of information regarding the involvement of R.R Enterprises in sales tax refund fraud through fake invoices to the tune of Rs.24.68 million during the period 2004-2007, an inquiry was authorized which after uncovering sufficient evidence was later converted into an investigation on 15.05.2015.

3. That, the investigation revealed that in the year 2003 and onward, the FBR had introduced a scheme through SRO No.575(1)2002(SRO)1125(1)/2011 which enabled exporters to claim refunds on the basis of input and output of purchases of sale. Another scheme allowed the local trader on zero rated basis to claim refunds without export. During the period from 2004 to 2007 Abdul Razzak, the chief executive officer of RR Enterprises who is the main accused in the case claimed refunds through fake and flying invoices and forged documents amounting to Rs.24.68 million. He defrauded the national exchequer through tampering and forging the proof of payment. He used fake invoices which he never got from purported suppliers to show exaggerated purchases and got refunded the above huge amount through fraud in connivance with the officials of the Sales Tax Department who were then posted in refund and other allied sections of Sales Tax FBR in contravention of section 73 of the Sales Tax Act, 1990 and Rule 36 Sales Tax Refund Rules 2006 and SRO 575(1) of 2002.

4. In the instant case neither post refund audit was conducted nor claim files were sent to Post Refund Audit (PRA) through enforcement / refund officers and officials in the respective period of each sanction in year 2004-2006. In 2007 the then Deputy

✓

Commissioner had forwarded a letter to PRA, which was then knowingly missed / dumped by Tila Muhammad and Bashir Bismil (petitioners 3 and 4) as the file was not dispatched to PRA Division which led to an amount of Rs.24.68 million being illegally refunded to RR Enterprises of which the main accused Abdul Razzak was the Chief Executive officer.

5. That, investigation revealed that Tila Muhammad (petitioner No.3) in connivance with the accused Abdul Razzak was involved in this fraud by accepting, processing and maneuvering of refund claim on the basis of fake and forged proof of payments and invoices. He deliberately omitted to refer the sanctioned file to audit section for PRA. Neither he himself checked the authenticity of documents through simple verification nor he sent the files to PRA Division. He willfully obstructed applying the law through misusing/failing to exercise his authority which benefited Abdul Razzak

6. That, the investigation revealed that Nazeer Channa (petitioner No.2) and Bashir Bismil (petitioner No.4) willfully and deliberately failed to check the forgery and genuineness of refund sales tax documents provided by the accused Abdul Razzak and processed the files for onward sanctioning in disregard of the process of PRA.

7. That, the investigation also revealed that petitioner No.1 Mureed Abbas authorized fake/concocted external audit report to show that purchase done by RR Enterprises as valid, which was proved otherwise. Thus, his connivance for extraneous consideration and misuse of authority has been proved.

8. That as per NAB reference, it has been established during the course of investigation that government officials being petitioner's 1 to 4 misused and or failed to exercise their authority by committing an offence of criminal breach of trust and fraud in connivance with the accused Abdul Razzak by accepting, processing maneuvering and sanctioning refund claims of Abdul Razzak which were based on forged and fake documents i.e. proof of payment and invoices and deliberately avoiding to forward the refund files for PRA and thereby caused loss to the government exchequer to the tune of Rs.24.68 million. Thus, the petitioners 1

to 4 and the accused Abdul Razzak have committed the offences of corruption and corrupt practices under section 9(a) of National Accountability Ordinance 1999 (NAO) punishable under Section 10 and Schedule thereto which lead to the filing of NAB Reference No.17 of 2016 State V Abdul Razzak and others dated 19-02-2016 before the Administrative Judge of the Accountability Courts Sindh.

9. Learned Counsel for petitioner No.1 stated that petitioner No.1 had been in custody for about 4 months and as such he was applying for post arrest bail. According to learned counsel petitioner No.1 was innocent. He further submitted that the petitioner has acted strictly in accordance with the relevant rules and procedure and did not conduct the post audit of refund claims as alleged.

10. In particular he stressed that he was not a member of the Sales Tax Department and was from the Auditor Generals Department which had been assigned certain functions under the Sales Tax regime. He submitted that no audit had been carried out and he had not signed any such audit report as alleged. He stressed that under the Sales Tax General Order No.3 of 2004 dated June 2004 the various functions of the Collectors of Sales Tax had been set out and it was clearly shown that he was responsible for audit and a separate collectorate was responsible for processing and sanctioning of refund claims filed under S.10 and 66 of the sales tax Act. He also pointed to various orders which showed that he was not even posted at the relevant department/section i.e. refund, when the alleged offense was committed. He candidly conceded that he had signed the register of sale and purchase which the prosecution was relying on but stressed that this had nothing to do with the refund of sales tax claimed by RR Enterprises. According to him his role was more of a rubber stamp and it is the role of the refund department to inquire into the validity of the documents produced and not him. He further submitted that no person had given a statement against him and that letters written by his Department to the Sales Tax Department and the FBR that the complete record of refund had never been supplied to his department to evaluate showed that he was never involved in any refund audit. The petitioner was even prepared to deposit RS 22 lacs till the reference was decided which

according to him was his share of the liability. He stressed that his department was audit which was not responsible for verification which was the obligation and responsibility of the Enforcement (Refund) Department/section. Thus, for all the above reasons learned counsel for petitioner No.1 submitted that he should be released on post arrest bail.

11. In support of his contentions he relied upon Sales Tax General Order No.3 of 2004 dated 12th of June, 2004, Sales Tax General Order No.4 of 2004 dated 4th September, 2004, the cases of **Multan Enterprises (Pvt.) vs. Director General (Intelligence & Investigation) Sales Tax, Multan and 3 others** (PTCL 2010 CL 453), **Collector of Sales Tax & Central Excise, Peshawar vs. M/s. Malik Beverages (Pvt.) Ltd., Peshawar** (PTCL 2010 CL 393), **Sharaiz Khan v. The State** (2000 SCMR 157 SC), **Nisar Ahmed Dina vs. The State** (2005 SCMR 1875 SC), **Muhammad Rashid Umar vs. The State** (SBLR 2012 SC 79), **Asim Rizwan and others vs. The State** (2014 YLR 2714 Sindh), **Order in Cr. Bail Application No.40/2003** (unreported), **Order in C.P. No.D-2797/2011** (unreported), **Order in C.P.No.D-3439 of 2014** (unreported), **Order in Cr.Bail application No. 774/2015** (unreported), **Order in Cr.Bail application No.1271/2015** (unreported) and **Order in Cr. Bail Application No. 111/2016** (unreported).

12. Learned counsel for the petitioner No.2 (Nazeer Ahmed Channa), argued that no role has been assigned to the petitioner No.2 which violates any provision of the NAO and NAB only had jurisdiction in large scale sales tax frauds and not matters of this nature which at best concerned an irregularity which could be dealt with by the department, that the petitioner has discharged his duties strictly in accordance with law and if any wrong doing was done it was done by the persons who processed the documents through the STARR system. He simply acted on the automated report delivered by the STARR system. In particular he pointed to the reference which showed that he only processed one of the many claims which was a part of the reference, no PW has implicated him, he may have been in the relevant department but this did not mean that he had committed any offense, he did not deal with any of the claims, he was not mentioned in the FIR 14 and 20 of 2010 as mistakenly alleged in the IR Report, he did not

166

sign anything, he is attending the court regularly and all the evidence against him is of a documentary nature which cannot be tampered with. Thus for all the above reasons he submitted that petitioner No.2's interim pre arrest bail should be confirmed.

13. In support of his contentions he placed reliance on the cases of **Khan Afsandyar Wali Khan V Federation of Pakistan** (PLD 2001 SC 607), **Syed Zafar Ali Shah V Pervez Musharaff** (PLD 2000 SC 869) **Waris Meah V State** (PLD 1557 SC 157) and **Muhammed Nadeem Anwar V National Accountability Bureau** (PLD 2008 SC 645)

14. Learned counsel for petitioner No.3 (Tila Muhammad) and petitioner No 4 (Bashir Bismil) argued that they are completely innocent and have been falsely implicated in the reference. He adopted the arguments of petitioner No.2 . He further contended that there is no allegation in the reference that the petitioners had in any manner secured any benefits through the alleged refunds or they are beneficiaries of any wrong doing, on the contrary they have promptly associated with the investigation by cooperating with the respondent and they had no authority which was supposedly misused by them. He also argued that there was no malice on the part of the petitioners and that the respondents had completely ignored their explanations during the investigation. According to him the petitioners 3 and 4 had even reported on one illegally claimed refund by RR Enterprises which showed that the petitioners were not in collusion with RR Enterprises, all the evidence against them was documentary which could not be interfered with and nothing on record had come against petitioners 3 and 4. For all the above reasons the learned counsel for the petitioners 3 and 4 submitted that their interim pre arrest bail may be confirmed.

15. In support of his contentions, he relied upon certain documents i.e. interrogation report and the case of **Abdul Aziz Khan Niazi v. State through Chairman MNAB Islamabad** (2003 PSC (Crl) 735).

16. On the other hand learned ADPGA for NAB submitted that there was sufficient evidence to prove beyond a reasonable doubt the offence against all the petitioners through S.161 statements

and other documents on record and as such the post arrest bail petition by petitioner No1 may be declined and the pre arrest bail petitions made by petitioners 2, 3 and 4 may also be declined.

17. We have considered the submissions of learned counsel for the petitioners, learned Special Prosecutor NAB, case law cited by them at the Bar and perused the record.

18. We would like to make it clear that as per settled law we have only made a tentative assessment of the material before us and that this order shall not affect the trial proceedings which shall be decided by the learned Judge on merits based on the evidence before him.

19. Turning to the case of petitioner No.1 who has applied for post arrest bail. In our view once an auditor from the AGP's office is attached to a department to carry out an audit whether of sales tax or any other matter simply because he is not a member of that department cannot exclude him from the jurisdiction of the NAO. If the auditor from the AGP's office commits an offense which falls under the ambit of the NAO then he may be proceeded against by the NAB. The Hon'ble Supreme Court has already decided in the case of **Abdul Aziz Memon V State** (PLD SC 2013 594) that the NAO applies to any persons including private person's as such this argument is not sustainable. Likewise the argument by petitioner No.2 that this matter could have been dealt with by the department in the case of an irregularity we do not find tenable. Once an offense has been committed under the NAO the NAB has jurisdiction especially if they deem the act to be a criminal one as opposed to an irregularity as in this case. In this case NAB is of the view that the act of all the petitioners are criminal in nature and not irregularities to be dealt with under departmental proceedings. Furthermore, although petitioner no.2 has raised a number of Constitutional issues we consider these to be beyond the scope of his petition which is purely related to pre arrest bail

20. It appears that the main case of the NAB against the petitioners 2, 3 and 4 is that they failed to check the required documents and in particular deliberately with malafide intentions failed to send the authorized refunds for a post audit report in order to hide their connivance with accused Abdul Razzak in

illegally authorizing him sales tax refunds based on false and forged documents without proper verification on the part of the petitioners. However, the case against petitioner No.1 seems to be that he audited the sales tax refunds and that he deliberately cleared them knowing them to be bogus. His signature has been pointed out on two documents related to RR Enterprises and its audit which he has admitted. Furthermore, it would appear that the petitioner No.1 during most of the scam was not posted at the relevant place where the fraud was committed and thus there is no justification for his signature on the audit document, which he has completely failed to explain, which enabled the scam to take place and which in our view shows that there is sufficient evidence against him to connect him to the commission of the offense along with other Sales Tax officers (Co-accused). As such petitioner No.1's petition for post arrest bail is declined.

21. Turning to the case of petitioners 2, 3 and 4 which we consider to be on a similar footing since they have all applied for pre arrest bail and were all responsible for failing to fulfill similar functions in the sales tax refund process. In large part their defense lies on the fact that the FBR operates an automated system such as STARR and CREST and since they play no role in verification which is done through the above two systems they cannot have any liability as it is for these systems to identify any sales tax refund anomalies and not them.

22. Petitioners 2, 3 and 4 are all in the sales tax refund department and in our view are all intrinsically involved in the refund process. Furthermore, they have all been ascribed specific roles in the reference.

23. The sales Tax refund Rules 2002 at S.5 and 6 provide as under:

"5. Scrutiny of refund claim:- (1) On receipt of a refund claim, the processing officer shall assign a file or claim number and carry out necessary examination and scrutiny in order to ascertain the bona fides of otherwise of the refund claim under the law. He shall check the accuracy of declarations and calculations, etc; on the sales tax return involving the amount of refund claimed and satisfy himself that the amount so claimed as refund is properly supported by the documents as specified in these rules or otherwise prescribed by the Board to prove

169

the genuineness and admissibility of the refundable amount. The processing officer shall also satisfy himself that the refund claimed is as per input ratio, if any, duly approved by the Board or by a person authorized by the Board in this behalf.

(2) After having satisfied himself about the genuineness and admissibility of the refund claim, the processing officer shall submit a written comprehensive refund examination report within seven days of receipt of supportive documents to the concerned senior audit or superintendent who shall give his conclusive recommendations thereon and pass it on to the officer-in-charge within three days of receipt of the case from the processing officer. The officer-in-charge shall satisfy himself about the genuineness and admissibility of the claim on the basis of the said report, recommendations and supportive documents.

(3) In case the claimant is the manufacturer-cum-exporter, who is also making local supplies, in excess of 30% of his total supplies, the processing officer shall also satisfy himself that value of locally supplied goods fulfills the conditions of value of supply in terms of the provisions of clause (46) read with clause (19) of section 2 of the Act.

(4) Where the officer-in-charge is of the opinion that any further inquiry or audit is required to establish the genuineness and admissibility of the claim or otherwise, he may make or cause to be made such inquiry audit after approval from the Additional Collector under intimation to the refund claimant.

6. **Sanction and payment of refund claim (1) If, on the basis of supportive documents, refund examination report, recommendations, inquiry or audit report as the case may be, the officer-in-charge is fully satisfied about the genuineness and admissibility of the claim, he shall, subject to the provisions of sub-section (3) section 10 of the Act, sanction the claim and send the original copy of the sanction order to the treasury officer for issuance of a cheque to the claimant:**

Provided that if the claimant is liable to pay any duty or tax, additional duty or additional tax or penalty or any other amount short paid or admitted to be payable under any law administered by the Board, payment of the refundable amount shall be made only after adjustment of that unpaid outstanding amount of duty or tax or, as the case may be additional duty or additional tax and penalty or any other amount short paid or otherwise payable.

(2) The treasury officer, before issuing **cross cheque** to the claimant, shall personally ensure that cheque of only such amount is issued to the claimant as is specified and sanctioned in the sanction order or worked out after deduction of amount as per proviso to sub-rule (1):

Provided that refund cheque shall be cross cheque to be deposited in the declared bank account of the

✓✓

registered person-cum-claimant and shall be issued to the claimant only through courier service on claimant expense, or through urgent mail service with due acknowledgment;

Provided further that the treasury officer shall maintain all the records and registers, etc; prescribed under the treasury or financial laws for the purpose of keeping account of payment of Federal revenue refunds and feed the particulars of each refund cheque in the computer besides mentioning the same in the relevant file for record purposes.

(3) The duplicate copy of the sanction order shall be retained in the Refund Division in the relevant file.

24. In our view it is quite clear from the above S.5 and 6 of the Sales Tax Rules that the role of the petitioners 2, 3 and 4 is to scrutinize claims notwithstanding the STARR and CREST system. They are not rubber stamps and play a meaningful role in determining the veracity of the claim for refund which in this case they completely failed to do by failing to exercise their authority and misusing their authority in favour of accused Abdul Razzak.

25. Furthermore, the submission by petitioner No.2 that he was only involved in one of the many claims made by RR Enterprises is totally belied by the table in typed Page 5 of the Investigation Report which shows that out of 15 claims made by RR Enterprises amounting to RS 24.68M petitioner No.2 was auditor on 9 separate occasions, petitioner No.3 was senior auditor on 8 separate occasions and petitioner No.4 was auditor on 7 separate occasions. On 6 occasions petitioners 2 and 3 were together during the audit of the claim and on 3 occasions petitioners 2, 3, and 4 all worked on the audit of the claim which tends to show a clear pattern of not putting up the refund claim for post audit report where their connivance with accused Abdul Razzak may have been uncovered on account of them deliberately failing to verify the correctness of the claim.

26. In addition, the S.161 statements of the proprietors of M/S ACME Industries and M/S I & S Industries, clearly show that the claim in respect of RR Enterprises were based on fake documents which were not checked by the petitioners 2,3, and 4. The S.161 Statement of Mr. Iqbal Azeem auditor Sales Tax FBR clearly implicates petitioners No.3 and 4 in deliberately ensuring that post

49

audit was not carried out in respect of RR Enterprise refunds with the involvement of DC Jahangir Ahmed, S.161 statement of Mr. Ashfaq Ahmed Senior Auditor FBR also fully implicates petitioners 2,3 and 4 in the scam through their deliberate failure to check and verify the genuineness, correctness and authenticity of documents submitted by the claimant Abdul Razzak for sales tax refund and failing to submit such claims for post audit of the claims which petitioners 2, 3 and 4 failed to do. S.161 statements of Muhammed Bilal Siddique, Business Development officer bank Al Falah and Muhammed Faisal of Bank Al Falah and Muhammed Ayub Khan of Bank Al Falah also reveal that payments were made to/from RR Enterprise in cash instead of crossed cheque and that a number of checks were forged by RR Enterprises in names of suppliers who did not exist. This should have been checked by the petitioners 2, 3, and 4.

27. In our view it is the obligation and responsibility of petitioners 2, 3, and 4 to verify and check such claims before authorizing refunds of Sales Tax. To simply ^{rely} on the STARR system as a defense in our view would be to make the role of the petitioners redundant which cannot be the purpose of the Sales Tax Rules/Order.

28. Furthermore, S.36 of the Sales Tax Rules 2006 specifically provides as under:

"Post-Sanction audit of refund claims

1. After disposing of the refund claim, the officer-in-charge **shall** forward the relevant file to the Post Refund Audit Division for post-sanction audit and scrutiny, which shall, inter alia, include verification of input tax payment by respective suppliers and compliance of section 73 of the Act.
2. The officer-in-charge of Post Refund Audit Division shall send his findings to the concerned Refund Division for further necessary action, as required under the law."

29. It is apparent from the S.161 Statements and the actions of petitioners 2, 3 and 4 that in the case of RR Enterprises they deliberately failed to comply with S.36 of the Sales Tax Rules 2006 (which is a mandatory requirement) by deliberately and with malafide intent not sending the claims of RR Enterprises for post sanction audit in order to favour RR Enterprises through their

(172)

misuse of authority/failure to exercise authority which would have been uncovered on a post sanction audit.

30. Furthermore, in their interrogation reports petitioners 2, 3 and 4 admit their role in the scam and the modus operandi of the Sales Tax Refund department in enabling illegal repayment of sales tax against fake invoices.

31. As is well known the conditions for the grant of pre arrest and post arrest bail are quite distinct and were well set out in the case of **Rana Mohammed Arshad V Muhammed Rafique** (PLD 2009 SC 427). In this case at P. 431 the following conditions need to be satisfied before pre arrest bail can be granted as set out below:

"9. Even since then, the said interpretation so made, the said powers so found and the parameters so prescribed, have been regularly and repeatedly coming up for scrutiny by the Superior Courts including this Court. But each time the matter was re-examined, the same was only re-affirmed. The said concept as it was initially propounded; as it developed and as the same stands today, may be summarized for the benefit of us all as under:--

- (a) grant of bail before arrest is an extraordinary relief to be granted only in extraordinary situations **to protect innocent persons against victimization through abuse of law for ulterior motives;**
- (b) **pre-arrest bail is not to be used as a substitute or as an alternative for post-arrest bail;**
- (c) **bail before arrest can not be granted unless the person seeking it satisfies the conditions specified subsection (2) of section 497 of Code of Criminal Procedure** i.e. unless he establishes the existence of reasonable grounds leading to a belief that he was not guilty of the offence alleged against him and that there were, in fact, sufficient grounds warranting further inquiry into his guilt;
- (d) **not just this but in addition thereto, he must also show that his arrest was being sought for ulterior motive, particularly on the part of the police; to cause irreparable humiliation to him and to disagree and dishonour him;**
- (e) such a petitioner should further establish that he had not done or suffered any act which would disentitle him to a discretionary relief in equity e.g. he had no past criminal record or that he had not been a fugitive at law; and finally that;

173

(f) in the absence of a reasonable and a justifiable cause, a person desiring his admission to bail before arrest, must, in the first instance approach the Court of first instance i.e. the Court of Session, before petitioning the High Court for the purpose."(bold added)

32. In this case we have not found there to be any ulterior motive or malafide on the part of NAB in filing the reference against petitioners 2, 3 and 4 and as such prima facie their petitions do not qualify for the grant of pre arrest bail.

33. Even otherwise, in our view, as discussed above the material placed before us on a tentative assessment is sufficient to show that there are ^{prima facie} reasonable grounds to connect all 3 petitioners 2, 3 and 4 to the commission of the crime charged in the reference and as such the pre arrest bail granted to petitioners 2, 3 and 4 is hereby recalled.

34. **In summary**

- (a) Petitioner No.1's (Mureed Abbas) petition for post arrest bail is declined.
- (b) The ad interim pre arrest bail granted to petitioner No.2 (Nazeer Ahmed Channa) by order of this Court dated 28.03.2016 is hereby recalled.
- (c) The ad interim pre arrest bail granted to petitioner No.3 (Tila Mohammed) by order of this Court is hereby recalled.
- (d) The ad interim pre arrest bail granted to petitioner No.4 (Muhammed Bashir Bismil) by order of this Court is hereby recalled.
- (e) The Accountability Court hearing this Reference is directed to complete the same within 6 months of the date of receipt of this order and in the event that the concerned Accountability Court is vacant the Administrative Judge of the Accountability Courts in Sindh is hereby directed to either hear the case himself or transfer it to an up and running Accountability Court in Karachi to decide the same within 6 months of the date of this order.
- (f) The office shall immediately send a copy of this order to the Administrative Judge, Accountability Courts Sindh and for compliance.

Dated: 11-11-2016