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IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Ahmed Ali M. Shaikh.
Mr. Justice Muhammad Karim Khan Agha

C.P. No.D-6459/2015
Syed Muzaffar Ali

V

The Chairman NAB & others

C.P. No.D-6698/2015
Shaikh Muhammad Yousuf

V

The Federation of Pakistan & others

Date of hearing:	24.02.2016
Date of Order	29.02.2016
Petitioners :	Through Mr. Javed Haleem, Advocate Mr. Aamir Mansoob Qureshi, Advocate
Respondents :	Through Mr. Noor Muhammad Dayo, ADPG NAB

ORDER

Muhammad Karim Khan Agha, J. By this common order, we propose to dispose of 2 post arrest bail applications which stem from National Accountability Bureau (NAB) Reference 45/2015 State v. Sheikh Mohammed Yousaf and Syed Muzaffar Ali which is pending before Accountability Court in Karachi.

2. The brief facts of the case are that Syed Muzaffar Ali of Syfan Marketing Agency (Petitioner No.2) and Sheikh Muhammad Yousuf (Petitioner No.1) planned to develop a housing project to be known as Fatima Garden and entered into an agreement/partnership whereby Petitioner No.2 would be entitled to 25% of the profits and Petitioner No.1 would be entitled to 75% of the profits arising from the completion of the project.

3. The Petitioner No.1, who was the owner of the land situated at Survey No.714 and 715 Deh Thano, Tapo Malir, District Malir Karachi where the project was to be developed, was primarily to ensure the construction of the infrastructure and buildings which formed a part of the project whilst Petitioner No.2 was to market the project and collect bookings and payments from proposed buyers

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4. Petitioner No.2 made a complaint to NAB regarding Petitioner No.1 which also received a complaint from 8 members of the action committee of allottees of Fatima Garden Project against the Petitioner No.1 alleging that neither development work was carried out on the project nor possession of the plots was handed-over to the allottees despite them making payment. An inquiry was authorized by NAB, which was subsequently converted into an investigation on 28 July 2015 by the Director General National Accountability Bureau Karachi.

5. The investigation revealed that the Petitioner No.1 was owner of Eden Builders and in connivance with Petitioner No.2 deceitfully and fraudulently launched an illegal scheme namely Fatima Garden Housing Scheme on Survey No.714 and 715, Deh Thano, Tapo Malir, District Malir Karachi on 4.0 acres in the year 2005 without obtaining NOC for approval of the lay-out plan from Malir Development Authority and subsequent NOC for advertisement and sale form Sindh Building Control Authority (SBCA).

6. The investigation also revealed that the brochures used for marketing of the illegal housing scheme claimed to have NOC from the concerned regulatory authority to lure innocent public to book plots in the scheme. The allottees who booked their plots deposited total amount of Rs. 19.1 million with the Petitioner No.1.

7. That the investigation further revealed that the Petitioner No.2 was marketer of the project and working partner of 25% share. He abetted Petitioner No.1 in illegally selling the plots to innocent allottees without approval of regulatory authorities and also collected funds from the allottees on behalf of Petitioner No.1.

8. That the Petitioners No.1 and 2 in connivance with each other cheated the public at large and embezzled an amount of Rs. 10 million approximately out of total deposit of Rs. 19.1 million belonging to innocent allottees on account of 123 residential plots of 80 Sq. Yd. each and 23 Commercial Plots of 56 Sq. Yd. each, which they deposited through installments as per terms and conditions of the booking on account of cost of land, development works and other heads.

9. That Petitioner No.1 partially carried-out drainage, water supply and internal road works and embezzled an amount of Rs. 10 million on account of development works. He failed to hand-over possession of plots to the allottees. Thus the Petitioner 1 and 2 committed the offence of corruption and corrupt practices as envisaged under section 9(a) (ix) of NAO 1999, punishable u/s 10 and schedule thereto, namely cheating the public at large which lead to NAB filing

Reference 45/2015 State v. Sheikh Mohammed Yousaf and Syed Muzaffar Ali which is pending before an Accountability Court in Karachi.

10. Both of the Petitioners are currently in custody and sought bail after arrest.

11. Both of the Petitioners claimed that they were innocent however without arguing the merits of the case Petitioner No.1 agreed to deposit the full amount claimed by NAB in its reference of RS 19.1 million with the Nazir of the Court pending adjudication of the trial. By doing this he submitted that NAB's claimed amount for the affecttees would be secured if the Petitioner was convicted. He submitted where such an approach in similar cases had been adopted the Petitioner had been granted post arrest bail.

12. In this respect he relied on **Shamraiz Khan V State** (2000 SCMR 157), **Mohammed Rashid Umar V State** (SBLR 2012 SC 78) and an unreported Order of this Court in the case of **Mohammed Tariq Mirza V NAB and others** dated 7-7-2015.

13. Petitioner No.2 submitted that if the complete amount claimed by NAB had already been secured then there would be no loss and as such he should also be entitled to bail especially as his role in the scam was lesser than that of Petitioner No1 and there was no likelihood of the trial completing in the near future.

14. When confronted with this position the learned ADPGA for NAB conceded that he had no objection to the grant of bail provided that the full amount claimed by NAB was paid to the Chairman NAB.

15. We have perused the record and considered the submissions of learned counsel and the authorities cited by them at the bar.

16. In our view the primary purpose of the National Accountability Ordinance 1999 (NAO) as set out in its preamble and its use of unique provisions such as voluntary return and plea bargain is the recovery of ill gotten gain. However we are also mindful of the fact that for those convicted without plea bargain under the NAO sentences of imprisonment are likely to follow hence the penal aspects of the offense cannot be ignored.

17. Thus, although in this case the full loss would have been secured and recovered if the Petitioners are convicted they would still face a penal sentence. Thus, the offer to pay the full amount claimed by NAB into Court or to the Chairman NAB would not itself alone be the sole factor in determining whether or not to grant bail. Other factors such as the risk of absconsion, the Petitioners interfering with witnesses, whether other Petitioners were on bail etc would also

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need to be considered. These considerations were made clear in the case of **Mohammed Rashid Umar V State** (SBLR 2012 SC 78) as cited by the Petitioners where it was held at P.7 as under:

"7. Admittedly there is no allegation against petitioner Muhammad Rasheed Umar that he misappropriated any specific amount. It is not denied that during investigation petitioner had taken the plea that 133 bills subject matter of the reference bore his fake signatures and that matter be sent to handwriting expert which request was not acceded to. It is further admitted on Court query that the preparation, clearance and final approval of the bills has to follow a procedure i.e. initial balance sheet is given to the claimant by the Accounts office; then the bill is prepared by the Drawing & Disbursing Officer whereafter it is referred to the accountant and after his clearance the bill goes to the senior auditor for comparison with the relevant ledger and it is at fourth and final stage that the bill is presented before the Deputy Accounts Officer. There is nothing on record to indicate that in the three stages prior to the submission of the bill to Deputy Accounts Officer / petitioner, the latter asked any of his officials to prepare the false bills. **11 of the co-accused have already been allowed pre-arrest bail by the High Court and respondent NAB has not filed any petition for cancellation of their bail. The Trial Court is not functioning for the last more than two months and the learned DPG is not in a position to state as to when the said post would be filed and further that how long would the trial take to conclude as there is a long list of witnesses and the documents to be tendered in evidence. So far as petitioner Hazoor Bux Sheikh, Assistant Accounts Officer is concerned, since he himself has volunteered to deposit a sum of Rs. 1,36,000/- out of total Rs. 6,80,000/- relatable to the bills signed by petitioner and three others and for the reasons given in the precedent paragraph with regard to the non commencement of trial and that it may take considerable long time to conclude and as both petitioners are appearing before the Trial Court for the last two years, we are inclined to allow both these petitions but in case of Hazoor Bux Sheikh it would be subject to deposit of Rs. 1,36,000/- in the name of Chairman NAB, Islamabad.** Needless to observe this amount would be deposited by NAB in some profit bearing scheme and if the petitioner is ultimately acquitted, the amount shall be returned to him." (bold and italics added)

18. We thus make it clear that payment of the entire loss to be held by the Court or the Chairman NAB pending determination of the reference is not the sole consideration in granting bail in such cases. Such deposit will not automatically lead to the grant of bail. The particular facts and circumstances of each case will also need to be considered before a decision is granted whether or not to grant bail on the basis of an offer by a Petitioner to deposit the full amount claimed by NAB in the Reference.

19. Based on the particular facts and circumstances of this case where the trial is likely to be lengthy, there have been no allegations that the Petitioners would abscond or interfere with witnesses and the no objection by NAB to the grant of bail in our considered view Petitioner No.1 is entitled to be enlarged on bail on account of him depositing RS 19.1 million with the Chairman NAB which amount would be deposited by NAB in some profit bearing scheme subject to the outcome of the Reference. Petitioner No.2 is also entitled to be enlarged on bail

since the loss would have been secured and his further detention in jail would not serve any purpose

20. However the bail granted to each of the Petitioners in NAB Reference 45/2015 State v. Sheikh Mohammed Yousaf and Syed Muzaffar Ali shall be subject to:

- (a) deposit of RS 19.1 Million with the Chairman NAB by Petitioner No.1
- (b) each of the Petitioners depositing a solvent security of RS 500,000 (five lacs) each with PR Bond of like amount to the satisfaction of the Nazir of this Court and
- (c) each of the Petitioners depositing all original valid passports in their name with the Nazir of this Court and
- (d) not leaving the Country without the permission of the Accountability Court which is hearing the Reference against the Petitioners.

21. It is clarified that this order is tentative in nature and shall not effect the merits of the case. The deposit of RS 19.1 Million shall be without prejudice to the Petitioners right of defense at trial.

22. The Petitions are disposed of accordingly

Dated: 26-02-2016