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IN THE HIGH COURT OF SINDH, KARACHI

Before Mr. Justice Ahmed Ali M. Shaikh, Acting CJ
Mr. Justice Muhammad Karim Khan Agha

C.P.D. No.7144/2015
Sohail Adeeb Bachani

V.

The State through NAB

C.P. No.D-7930/2015
Qazi Mushtaq Ahmed

V.

Chairman NAB

C.P. No.D-5180/2015
Allahdino Mirbahar

V.

Chairman NAB.

Date of hearing	29-02-2016
Date of Order	10-03-2016
Petitioners:	Through Mr. Shahab Sarki Advocate for petitioner in C.P. No.D-7144/2015, Mr. S.M. Iqbal Advocate for petitioner in C.P. No.D-7930/2015 and C.P. No.D- 5180/2015.
Respondents:	Through Mr. Noor Muhammad Dayo ADPG NAB. Mr. Saeed A. Memon Standing Counsel.

ORDER

Muhammad Karim Khan Agha, J. By this common order we propose to dispose of the following Constitutional Petitions C.P.D. No.7144/2015 Sohail Adeeb Bachani V. The State through National Accountability Bureau (NAB), C.P. No.D-7930/2015 Qazi Mushtaq Ahmed V. Chairman NAB and C.P. No.D-5180/2015 Allahdino Mirbahar V. Chairman NAB since all three Petitions arise out of the same NAB Reference 10/15 State V Sohail Adeeb Bachani filed before the Accountability Court No.VI at Hyderabad and all of which concern bail matters although the Petition of Sohail Adeeb Bachani also concerns the validity of a Voluntary Return (VR) which he had apparently entered into with NAB.

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2. Allahdino Mirbahar was granted ad interim pre arrest bail by order of this court dated 07.12.2013 whereas both Sohail Adeeb Bachani and Qazi Mushtaq Ahmed have sought bail after arrest.

3. The case of Sohail Adeeb Bachani will be dealt with lastly as his case also concerns the validity of a VR which he entered into with NAB so his case will largely be confined to that issue in connection with his application for bail

4. The three petitioners along with 15 others are subject to reference No.10/2015 which was filed on 27.11.2015 before the Accountability Court No.VI Sindh at Hyderabad. Out of the 18 accused 14 are absconding

5. In essence all three of the petitioners have been accused of corrupt practices in connection with a massive land scam concerning the RBOD (Right Bank Outfall Drain) Project in Jamshoro. At the time of the scam the petitioners Sohail Adeeb Bachani was the Land Acquisition Officer RBOD Project, Qazi Mushtaq Ahmed was also the Land Acquisition Officer of RBOD Project and Allahdino Mirbahar was Junior Clerk Sub-Registrar Office, Kotri.

6. The brief facts of the case as per reference are that the National Accountability Bureau (NAB) received a Source Report where it was alleged that Muhammad Saleem Baloch, Assistant Commissioner Jamshoro / LAO RBOD Project had made payment of land compensation to different persons despite ban imposed by Deputy Commissioner Jamshoro and that the recipients of the payment were not the owners of the land.

7. During the course of inquiry, it emerged that three false entries no 20 dated 03.09.1963 in favour of Shafiullah S/o Ahmedullah, 30 dated 03.09.1963 in favour of Shahadat Hussain S/o Matloob Hussain and 146 dated 05.04.1996 in favour of Moriyo S/o Sathi were arranged in Village Form-VII Deh Bhacha Taluka Manjhand.

8. In the year 1989 the then Mukhtiarkar on entries No. 29 & 30 put note that the signature of Mohammad Ismail the then Mukhtiarkar seems to be doubtful. Thereafter the then Deputy Commissioner under his order No.1796 dated 15.03.1993 restored the entries. The said entries were again cancelled by the Assistant Commissioner Kotri under his order No.1409 dated 29.6.2001 but finally the entries were restored by the then Member Land Utilization Department under his order No. Reader/MBR/LU/390 dated 16.6.2006 on technical ground that Assistant Commissioner was not an appellate authority against the order of Deputy Commissioner, hence, he set-aside the cancellation order of the Assistant Commissioner Kotri. Consequently both entries were restored under the order of the then Member Land Utilization Department.

9. Entry No.146 dated 05.04.1996 in favour of Moriyo S/o Sathi is also false and forged. A Blank paper of another Village Form-VII has been inserted / pasted in the end of the Registrar on which the said false entry is made with false signature of the then Mukhtiarkar, whose signature does not tally with signature on the last entries No.144 & 145. The Village Form-VII Deh Bhacha was scanned in the year 2012 but the disputed entry No.146 does not exist there.

10. The land of Deh Bhacha coming in the alignment of RBOD from RD-61 to RD-81 was adjoining to the Indus River and was government land. The major portion of Deh was already inundated /merged in the Indus River hence, the Sindh Government in the year 2004, through Director Survey Settlement & Land Record Office Hyderabad got re-survey of Deh and issued fresh map. According to which Deh Bhacha is comprised over 1 to 17 survey and un-survey numbers and the old survey / Deh map was discontinued. As such after 2004, there are only 17 survey numbers in Deh Bhacha. The ownership of the same was with Sindh Government. Since, there was existence of only 17 survey / un-survey numbers in the Deh, the entries of other survey numbers available in VF-VII about running grant in the name of different persons have no value in the eye of law. All those entries were illegal and false. Despite that under the grab of order passed in the year 2006, the Member Land Utilization BOR Sindh restored false entries No.29 in favour of Shafiullah and 30 in favour of Shahadat Hussain.

11. The RBOD project was launched in the year 2002. The XEN RBOD furnished Deh wise / S.No. wise list alongwith rough map of area for acquisition. The LAO RBOD issued notification under section 4 of Land Acquisition Act, but when they verified their record and found that area of Deh Bhacha coming in the alignment of RBOD was government land they did not issue notification under section 6 of the Land Acquisition Act. Accordingly the Survey Department neither measured the said area nor issued B-Form. However, in the year 2003, to determine area of Deh Bhacha RBOD was measured but its revised sketch and Ghat-wadh Form was not issued. Hence, it has no concern with payment of land compensation made in the year 2012 & 2013.

12. On the other hand fake land owner named Shafiullah executed General Power of Attorney in favour of (i) Muslim Khan (ii) Punhoon & (iii) Mukhtiar Ali. Another fake owner Shahadat Hussain executed General Power of Attorney in favour of Mohammad Hussain who executed three Special Power of Attorneys in favour of (i) Nabi Bux (ii) Abdul Wahid & (iii) Mohammad Sadiq. The third fake land owner Moriyo executed GPA in favour of (i) Tasawer Iqbal (ii) Fida Hussain (iii) Abdul Qayoom & (iv) Mazhar Hussain. These power of attorneys were issued by the Junior Clerk named Allahdino Mirbahar, who exercised the powers of the Sub-registrar without any lawful authority to do so.

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13. Learned Counsel for Petitioner Mumtaz Qazi who was Ex Land Acquisition Officer of RBOD submitted that the Petitioner was entirely innocent and had no role to play in the scam. His main submission was that he only implemented the awards which had already been made by his predecessors and it was not his job to check whether awards by his predecessors had been correctly made as he had no power to overturn or set aside such awards. His role was confined to complying with the orders already passed by his predecessors which he complied with and made the already approved payments. In this respect he placed reliance on the case of **Assistant Commissioner, Mianwali V Muhammed Amir** (1987 CLC (Lahore) 2095)
14. He further submitted that a number of accused who had passed the award or been beneficiaries of the award had applied for plea bargain (PB) or Voluntary Return (VR) under the National Accountability Ordinance 1999 (NAO) and had therefore admitted their guilt which therefore absolved him of any responsibility especially as some of the loss was being made good and as such he was entitled to be released on post arrest bail.
15. With regard to Petitioner Allahdino Mirbahar who was ex Junior Clerk learned counsel submitted that he was completely innocent of any wrong doing. He was a very junior officer who allowed the registration of the power of attorneys in the name of fake land owners and contended that the primary responsibility rested with his senior officer Abdul Hafeez.
16. He also submitted that it was a hardship case and had been dragging on for too long and as such he was also entitled to bail on this count. In this respect he placed reliance on the case of **Chandi Ram V Chairman NAB** (2008 P.Cr.LJ 1172). He submitted that the Petitioner was entitled to the confirmation of his ad interim pre arrest bail
17. On the other hand learned ADPGA on behalf of NAB refuted the above submissions of both the Petitioners. He submitted that they were both very much involved in the land scam and the Prosecution had more than enough evidence to prove their guilt beyond a reasonable doubt. He therefore objected to the grant of bail to either of the Petitioners.
18. We have perused the record and carefully considered the relevant law and submissions of learned Counsel and the case law cited by them.
19. As this is a bail matter we would emphasize that we have reached a decision after only a very tentative assessment of the material placed before us.

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20. With regard to Petitioner Mumtaz Qazi who was Ex Land Acquisition Officer of RBOD a specific role has been attributed to him in Para's 8 and 9 of the reference as under:

"Para 8. That, during the course of investigation, it has been established that final payment of Rs. 83,100,000/- to accused No.6 Mukhtiar Ali, accused No.7 Muslim Khan, accused No.8 Punhoon, accused No.10 Abdul Wahid, accused No.11 Muhammad Sadiq and accused No.12 Nabi Bux, were made by accused No.2 Qazi Mushtaq Ahmed after taking over as Land Acquisition Officer RBOD Project.

Para 9. That the investigation reveals that the accused No.2 Qazi Mushtaq Ahmed being Land Acquisition Officer RBOD Project without issuance of Notification U/s 4 & 6 of Land Acquisition Act passed award and made payment of Rs. 16,500,000/- to accused No.14 Mazhar Hussain Khaskheli, accused No.15 Tasawar Iqbal, accused No.16 Fida Hussain and accused No.17 Abdul Qayyum through payment vouchers No.36, 37, 38 and 39 dated 05.04.2013."

21. As regards to Para 8 the Petitioner has already admitted that he made the payments. He primarily takes issue with Para 9 that it was not his job to check whether the Notification U/s 4 & 6 of Land Acquisition Act had been made before the award was passed by another officer because the award was final and could not be set aside by him as alluded to in the case of **Assistant Commissioner, Mianwali V Muhammed Amir** (1987 CLC (Lahore) 2095. This case has been passed by the Lahore High Court and thus is of only persuasive value even otherwise we consider that it is distinguishable as it held that the award could not be changed or set aside by the concerned officer which was not the only option open to the Petitioner in this case.

22. In this case we are of the view that the Petitioner was under an obligation to at least scan the file to ensure that all the relevant formalities had been carried out and if there was an obvious omission to act accordingly. This did not mean that he had to set aside or change the award. He was not however completely powerless or without recourse as suggested by the **Assistant Commissioner** case (Supra).

23. Under the circumstances to a man of his seniority and experience it ought to have been obvious that his predecessors had violated the law by not issuing the required Notification U/s 4 & 6 of Land Acquisition Act before making the award. Under these circumstances he could have simply marked the omission on the file and sent it back down the chain whereupon the omission could have been rectified. Instead he blindly made the payments and is a part of the chain of criminality. We consider it implausible that a man of the Petitioner's seniority and experience would not have known that the award was illegal and in sanctioning it he either misused or failed to exercise his authority. The question of his criminal intent in so doing will be determined at the time of trial.

24. We are of the considered view that a public functionary when dealing with a file that is passed to him either up or down the bureaucratic chain does have an obligation to briefly scan the file and point out any obvious irregularities/illegalities which may have already taken place and return the file for necessary action otherwise he may expose himself to criminal liability if in effect he is sanctioning an obvious irregularity/illegality e.g. violation of the PPRA Rules.

25. This cursory review (not detailed) of the file (looking for obvious irregularities/illegalities) in our view would not consume much time and would also amount to good practice as it would protect an officer who had mistakenly in good faith made a decision which was contrary to law. The alleged violation could be pointed out to him and he would be given a chance to rectify the same. It would also prevent officers who had deliberately acted in an illegal and malefide manner from achieving their illegal designs.

26. As such we find that the Petitioner Mumtaz Qazi is connected to the crime through his role as mentioned in para's 8 and 9 of the reference and that there is reasonable grounds to believe that he has nexus with the offense and as such his petition for bail after arrest is dismissed.

27. With regard to Petitioner Allahdino Mirbahar who was Ex Junior Clerk at the time of registering the Power of attorney's a specific role has been attributed to him in Para's 10 and 11 of the reference as under:

"Para 10. That, during the course of investigation, it has been established that accused No.8 Allah Dino Mirbahar, was Junior Clerk in the Office of Sub-Registrar Kotri. The accused No.3 registered three General Power of Attorney of accused No.5 Shafiullah in favour of accused No.6 Mukhtiar Ali, accused No.7 Muslim and accused No.8 Punhoon who on the basis of these power of attorneys received illegal payment of Rs. 31,578,396/- as compensation against the government land. Accused No.3 also registered three Special Power of Attorneys of deceased accused Muhammad Hasan in favour of accused No.10 Abdul Wahid, accused No.11 Muhammad Sadiq and accused No.12 Nabi Bux, who on the basis of these power of attorneys received illegal payment of Rs. 56,521,604/- as compensation against the government land.

Para 11. That the investigation further reveals that accused No.3 Allah Dino Mirbahar as Junior Clerk, while posted in the office of Sub-Registrar Kotri registered Power of Attorneys of accused No.13 Moriyo in favor of accused No.14 Mazhar Hussain Khaskheli, accused No.15 Tasawar Iqbal, accused No.16 Fida Hussain and accused No.17 Abdul Qayyum on the basis of old attested copy of fake entry No.146 of Deh Bachani without obtaining No Objection Certificate (NOC) of Mukhtiarkar. Consequently, the attorneys of accused No.13 Moriyo received illegal payment of land compensation amounting to Rs.16,500,000/-."

28. We have observed that the Petitioner has signed the general power of Attorney from Saifullah Khan to Mr. Punhoon appointing him as his attorney in his capacity as sub Registrar Kotri. He has not disputed his signature. The Petitioner was not sub Registrar at Kotri and knew full well that he had neither the power or authority to sign the power of attorney which enabled the beneficiaries to receive payment and therefore his act was an intricate part in the fulfillment of the scam. Without his signature it is unlikely that the scam could have taken place.

29. The fact that he was only a junior officer is no defense although it may serve to mitigate any sentence which may be handed down to him at trial if he is convicted. We are of the view that his contention that this is a hardship case on account of undue delay has no substance in his case especially as he has been on ad interim pre arrest bail up till now.

30. As such we find that the Petitioner Allahdino Mirbahar is connected to the crime through his role as mentioned in para's 10 and 11 of the reference and that there is reasonable grounds to believe that he has nexus with the offense and as such the order dated 7-12-2103 granting the Petitioner Allahdino Mirbahar ad interim pre arrest bail is recalled.

31. Now turning to the case of Petitioner Sohail Adeeb Bachani. His grant of bail after arrest is linked to the issue of whether his voluntary Return (VR) ought to have been cancelled by NAB as such we will not go into the allegations against him in the reference and shall confine ourselves to the aspect of VR.

32. S.25 (a) NAO provides as under:

25. Voluntary return and plea bargain:-

(a) Notwithstanding anything contained in section 15 or in any other law for the time being in force, where a holder of public office or any other person, **prior to the authorization of investigation against him**, voluntarily comes forward and offers to return the assets or gains acquired or made by him in the course, or as the consequence, of any offence under this Ordinance, the Chairman NAB may accept such offer and after determination of the amount due from such person and its deposit with the NAB discharge such person from all his liability in respect of the matter or transaction in issue;(bold added)

Provided that the matter is not *sub judice* in any court of law.

33. It is pertinent to note that the option of VR under S.25 (a) lapses once the inquiry is converted into an investigation and only the option of plea bargain remains which carries adverse legal consequences as opposed to a VR.e.g under a

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PB an accused will be deemed convicted for the offense charged whilst he will not be convicted under a VR.

34. At this point in time the inquiry has been converted into an investigation and a reference has been filed by NAB against Petitioner Sohail Adeeb Bachani and as such ordinarily the option of VR would now not be open to the Petitioner

35. Learned counsel for the Petitioner submitted that the Petitioner had applied to NAB to pay an amount of RS 2 Crore 56 lacs and 25,500 to NAB in 3 equal installments by way of VR which was accepted by NAB on 26-2-15. Accordingly, as agreed he paid an immediate down payment of 84 lacs 56,415.

36. The next installment was due on 26-3-15. The Petitioner however fell into some difficulties in arranging the second installment and requested NAB to grant him some extra time for payment on 9-4-2015. At this juncture the Petitioner had come to know that NAB had already upgraded the inquiry against him into an investigation on 17-3-15. NAB did not reply to his application for extra time to fulfill his VR and he was taken into custody by NAB on 4-11-15. Learned counsel for the Petitioner submitted that the Petitioner was ready to fulfill his VR commitments as agreed by NAB and had already deposited the second installment into court since NAB were not accepting the same since in their view his VR had been cancelled as he had defaulted on the payment schedule under it as such he could only enter into a PB at this stage or face trial.

37. Learned ADPGA for NAB submitted that a VR had been entered into and confirmed that the inquiry had been converted into an investigation on 17-3-15 and the VR had been cancelled as the Petitioner had defaulted on the second installment and as such only a PB was now open to him

38. We have perused the record, considered the relevant law and the submissions of learned counsel at the bar.

39. In our view the primary object of the NAO is the recovery of ill gotten gain as reflected in its preamble and the novel provisions of VR and PB which are not found in any other legislation. The NAO is penal in nature however so this must also be borne in mind.

40. S.25 (a) NAO has created a statutory right of VR which may be availed by a person under inquiry by NAB at the inquiry stage. In this case the Petitioner availed himself of this statutory right at the inquiry stage which was agreed to by NAB as per an agreed schedule of repayment.

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41. In this case 3 equal installments were to be made under a set time frame for the return of the agreed liability. The Petitioner paid the first installment as required on entering into the VR. His second installment was due on 26-3-15. However his case was converted into an investigation on 17-3-2015 (which is not disputed by either learned ADPA or the I.O who is also present) before the second installment was due which had the effect of extinguishing the VR agreement despite at this stage no default being made by the Petitioner. After the second installment was due the Petitioner requested NAB on 9-4-15 for some more time to pay the second installment. However it appears that his VR had been extinguished before he had even approached NAB for an extension in the time for him to make the second installment. Apparently the Petitioner had not even been informed about the upgrading of his inquiry into investigation

42. In our view NAB had no right to in effect cancel the VR in respect of the Petitioner when it converted the inquiry into investigation **before** the Petitioner had defaulted on his obligations under the VR. NAB could have converted the inquiry into investigation against the other accused who had not entered into VR but not against the Petitioner until such time as he had defaulted and on intimation to him. The status of the Petitioner had to remain under VR until he defaulted. NAB could not arbitrarily deprive him of his statutory right to VR once he had offered NAB to enter in to VR and NAB had accepted the same subject to certain terms and conditions which at the time of conversion of inquiry into investigation had not yet been breached.

43. As of today the Petitioner has paid the second installment into Court and is ready to deposit the 3rd and final installment of RS 84,56,415 within 4 weeks after his release from custody.

44. Based on NAB illegally terminating the VR and thereby depriving the Petitioner of his statutory right to VR and taking into account the primary purpose of the NAO as the recovery of ill gotten gains we hereby order that the Petitioners VR be revived on the following terms and conditions. (a) That the second installment which has been paid into the Court by the Petitioner be treated as the second installment of the VR and be handed over to the NAB immediately by the concerned Court (b) That the third and final installment of RS 84,56,415 be paid by the Petitioner to NAB within 4 weeks after the Petitioners release from custody on bail pursuant to this order (c) in the event that (b) of this paragraph is complied with the status of the Petitioner will be treated as the same as a person who fulfilled his VR obligations. **It is made clear** however that if the Petitioner fails to fulfill (b) of this paragraph i.e. pay third and final installment of RS 84,56,415/- to the NAB within 4 weeks after his release from custody on bail pursuant to this order then the VR shall stand cancelled, the Petitioner shall remain in the

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reference and thereafter the only options open to him would be PB or to face trial and his bail would stand automatically cancelled.

45. As such Petitioner Sohail Adeeb Bachani is granted post arrest bail subject to furnishing solvent surety in the sum of Rs 500,000 (5 Lacs) with PR bond in like amount to the satisfaction of the Nazir of this Court.

46. Before parting with this order we would observe that under S.25 (a) NAO a person who is subject to a NAB inquiry (prior to its conversion into an investigation) has a statutory right to voluntarily come forward and offer to return the assets or gains acquired or made by him in the course, or as the consequence, of any offence under the NAO. His offer may or may not be accepted by the Chairman NAB but his right to voluntarily come forward and offer a VR remains.

47. This position in order to avoid discrimination in our view ought to apply to all cases which are proceeded with under the NAO before the accountability Courts. We have observed however that under S.16(A) (a) notwithstanding anything contained in any other law for the time being in force, the Chairman NAB may apply to any court of law or tribunal that any case involving any offence under this Ordinance pending before such court or tribunal **shall be transferred to a Court established under this Ordinance, then such other Court or Tribunal shall transfer the said case to any Court established under this Ordinance and it shall be deemed to be a reference under section 18 of the Ordinance, and it shall not be necessary for the Court to recall any witness or again to record any evidence that may have been recorded.**

48. It would therefore seem that some persons whose cases are transferred under S.16 (A) (a) NAO may be deprived of their statutory right to come forward and offer a voluntary return since such cases are most likely beyond the inquiry stage at the time of transfer. Although, whilst hearing this bail Petition, it is not the appropriate occasion to consider this constitutional issue concerning at least Article 4 and Article 25 of the Constitution we feel duty bound as Judges to raise this issue as we are under Oath to uphold the Constitution. It is hoped that this issue may be resolved if and when agitated by an aggrieved party bearing in mind our view that the primary purpose of the NAO is to the recovery of ill gotten gains and the option of VR should be open to all persons who are proceeded with under the NAO.

49. It is made clear that in deciding these bail applications we have only made a tentatively assessment of the material which was before us and this decision shall not prejudice any party at trial.

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50. The Accountability Court Judge who is hearing this Reference is directed to proceed with the trial expeditiously and complete the same within three months of the date of this order and provide fortnightly progress reports to this Court through MIT II

51. These are the reasons for our short order dated 29-02-2016.

Dated: 10-3-2016