

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No. D-5548 of 2016

Present:

**Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Muhammad Humayon Khan**

Noor Muhammad ----- Petitioner

Versus

The NAB & another ----- Respondents

Date of hearing: 07.04.2017.

Date of judgment: 17.04.2017.

Petitioner: Through Mr. M. Ashraf Kazi Advocate.

**Respondents: Through Mr. Muhammad Altaf ADPG NAB
along with Mr. Shaikh Liaquat Hussain
Assistant Attorney General assisted by
Mr. Asif Raza DDO/I.O.**

ORDER

Muhammad Junaid Ghaffar, J. The Petitioner has been arrested in Reference No. 12/2015 pending before the Accountability Court No. II at Karachi. Earlier, petitioner had filed Petition bearing No.D-2876/2015 seeking post arrest bail on the ground of delay; however, the same was dismissed by a learned Division Bench of this Court vide order dated 24.08.2016. Subsequently, instant Petition has been filed and the Petitioner's claim is that earlier bail petition was only on the ground of delay, whereas, through this Petition bail is sought on the ground of hardship. On 09.01.2017 another learned Division bench of this Court passed the following order:-

“The learned Counsel for the Petitioner points out that the earlier bail application of the Petitioner bearing C.P. No. D-2876 of 2015 was heard and dismissed, vide order dated 24.08.2016 by the Bench comprising of our brothers Mr. Justice Irfan Saadat Khan and Mr. Justice Muhammad Karim Khan Agha. Since our both brother Judges are available on Principal Seat in new roster sitting, we deem it appropriate to direct the office to refer this matter to the Hon’ble Chief Justice, High Court of Sindh in view of dictum laid down in Zubair’s case (PLD 1986 SC 173).
To come up on 16.01.2017.”

2. Subsequently, office had placed the matter before Hon’ble Chief Justice and vide order dated 12.01.2017 the Hon’ble Chief Justice passed an Administrative order that since the earlier bench is not available the matter be fixed according to roster and thereafter, the Petition has been placed before this bench.

3. Learned Counsel for the Petitioner has contended that the Petitioner was arrested on 14.05.2015 whereas, charge was framed on 19.11.2015 and out of the six accused only Petitioner is under arrest and others have been granted pre-arrest bail. He has submitted that the earlier Petition was only in respect of delay, whereas, after dismissal of Petition an application was also filed under Section 152 CPC as the learned Division Bench while dismissing the Petition did not properly appreciated the delay which was attributed to the Petitioner. However, the said application was withdrawn and this fresh Petition has been filed on the ground of hardship for the reason that petitioner has a family to look after including young children and elderly parents. Learned Counsel has referred to Para “C” of the grounds taken in this Petition to substantiate his claim. He has relied upon *Muhammad Nadeem Anwar and another V. National Accountability Bureau and others (PLD 2008 SC 645)* *Ms. Laiba V. The State (SBLR 2013 SC 45)*, order dated 03.03.2017 (*Muhammad Azeem V. National Accountability Bureau & others*) passed in Civil Petition No. 3990/2016 by the Hon’ble Supreme Court, order dated 08.12.2016 (*Mureed Abbas and others V. The State and another*) passed in Civil Petition No. 811-K/2016 and order dated 03.10.2016 in

CP No 1865 of 2016 in the case of Atta Abbas Zaid v Chairman NAB & Others.

4. On the other hand, learned Special Prosecutor NAB has vehemently opposed instant Petition and has contended that all these grounds which have taken through this Petition were already available to the Petitioner and the earlier bail petition stands rejected, whereas, delay itself is a case of hardship therefore, no fresh ground is available. Learned Prosecutor NAB has relied upon *order dated 19.1.2017 passed by a Division Bench of this Court in C.P. No. D-3905 & 3906 of 2016 in the case of Syed Manzar Abbas v. The Chairman National Accountability Bureau & 2 Others* and *order dated 31.3.2017 passed by another Division Bench of this Court in C.P. No. D-5792/2016 and others in the case of Shahid Umer v. NAB.*

5. We have heard the learned Counsel as well as Prosecutor NAB and perused the record. Our findings are as under:-

- a) The first and foremost question in this matter appears to be that whether this second bail petition is maintainable before this Court on the ground of hardship, whereas, earlier also this ground was available, in view of the dicta laid down by the Hon'ble Supreme Court in the case of ***Nazir Ahmed and another V. The State and others (PLD 2014 SC 241)*** wherein, the following relevant guidelines have been laid down by the Apex Court in Para 25 which reads as under:-

"25.....

(i).....

(ii).....

(iii) Dismissal of an application for bail after attending to the merits of the case amounts to rejection of all the grounds available or in existence till the time of such dismissal whether such grounds were actually taken or urged or not and whether such grounds were expressly dealt with in the order of dismissal or not.

(iv) In case of dismissal of an earlier application for bail on the merits of the case a subsequent application for the same relief can be filed and entertained only if it is based upon a fresh ground, i.e. a ground which was

not available or in existence at the time of decision of the earlier application.

(v).....

(vi).....

- b) The ground on the basis of which this bail petition has been filed is hardship as contended by the Learned Counsel for the Petitioner. He has candidly submitted that this Petition is neither on merits of the case nor he has made any arguments to that effect. Therefore, simpliciter we have to decide that whether after dismissal of the first bail petition on the ground of delay, a subsequent bail petition on the ground of hardship is maintainable or not. In our considered view it is not. The reason being that the ground of hardship was very much available when the first bail petition was filed and in fact the subsequent ground "C" of this petition through which the Petitioner's Counsel contended that the Petitioner has to look after his family was very much available. This ground ought to have been taken in the first bail petition and if not so taken it is not a fresh ground of filing a fresh bail petition.
- c) The ground of delay on which the first bail petition was filed and dismissed included the ground of hardship and therefore, we are of the view that no fresh bail petition could be entertained by this Court on the ground of hardship as is being now contended on behalf of the Petitioner.
- d) Moreover, while dismissing the earlier bail petition the Court had come to a definite conclusion that delay in the matter had been caused by the petitioner, hence, the question of hardship, if any, vanishes away. Notwithstanding, the learned Counsel could not refer to any material as to whether further delay, if any, had caused any hardship as contended.
- e) Reliance on the case of **Atta Abbas Zaidi (Supra)** is of not much relevance, as the facts are distinguishable, inasmuch as in that case the learned Division Bench at

Para 25 has been pleased to observe that *“Thus, it appears that the petitioner has completed 14 months in jail on account of the trial not being completed due to no fault of his own”*.

- f) Subsequently, the same learned Division Bench who had passed the order in **Atta Abbas Zaidi's** case, in the case of **Syed Manzar Abbas (Supra)**, has refused to grant bail on account of delay and hardship by following the dicta laid down by the Hon'ble Supreme Court in the case of **NAB v. Bakht Zameen (CP No.1542/2016 dated 26.8.2016)**, which was not considered by the bench in the case of **Atta Abbas Zaidi** as reasons of such order was not placed before the learned Bench and only the short order was cited.
- g) The Hon'ble Supreme Court in the aforesaid case of **Bakht Zameen (Supra)** at Para 4 has been pleased to observe that *“however, in appropriate cases, the question of delay in the conclusion of trial, depending upon the facts and circumstances of each case on its own merit, has been considered by the Superior Courts on the yardstick of hardship vis-à-vis scheme of Articles 4 and 15 of the Constitution. Thus ipso facto, application of principles of grant of bail embedded in section 497, Cr.P.C, including the provision of statutory delay, is devoid of any legal force.”* Unfortunately, the petitioners plea on the ground of delay has already been rejected in the first petition, which was not challenged any further, therefore, we are afraid in the second attempt the same plea cannot be raised with a new name of hardship. It may be of relevance to observe, that in fact delay itself is a case of hardship, per-se, and once the bail petition was dismissed on such ground, then the onus on the petitioner to establish hardship on the yardstick of delay increases further. In this matter nothing new has been raised except ground “C” i.e. the family is to be supported. Thin in our view is true in the case of every accused behind bars, but it could hardly be seriously taken as a ground of hardship in every case. Otherwise every accused is to be granted bail on this ground alone.

7. In view of hereinabove facts and circumstances, we do not find any reason to entertain this second bail petition on the ground of

hardship primarily resting upon delay on which the first bail petition already stands dismissed. Accordingly, instant petition is dismissed.

Dated: __.04.2017

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