

*Order Sheet***IN THE HIGH COURT OF SINDH CIRCUIT
COURT HYDERABAD**

Constitutional Petition No. D-3685 of 2017

PRESENT:**Mr. Justice Abdul Maalik Gaddi.****Mr. Justice Arshad Hussain Khan.*****SHAMSUDDIN DAL* Vs. *The DIRECTOR GENERAL NAB
SINDH***Petitioner: Through M/s. Malik Naeem Iqbal &
Saleem Khaskheli, Advocates.Respondent: Through Jangoo Khan, Special Prosecutor
NAB along with Sarwan Khoso AD/I.O
NAB (Karachi).

Date of hearing: 01.02.2018.

JUDGMENT

ARSHAD HUSSAIN KHAN, J: Through this order, we intend to dispose of present petition for grant of post arrest bail arising out of National Accountability Bureau (NAB) Reference No. 09/2017 [The State v. Allah Bachayo Khaskheli and others], which is pending before the Accountability Court No. VI at Hyderabad.

2. The allegations against the petitioner and other accused as per NAB Reference No. 09/2017 are that the Secretary Education and Literacy Department accorded approval for appointment of OT, DT, PTI and AWI in BPS-09 in District Jamshoro for the year 2012. At that time, the Government of Sindh issued general instruction and specific TORs for the recruitment process which the recruitment Committee was bound to follow. It was clarified by the department that all appointments are to be made against sanctioned and clear vacant posts of the particular cadre/post and if clear vacant post of a particular cadre/BPS is not available, then the appointment is deemed to have

been made in excess of the sanctioned strength and create a burden upon Provincial Exchequer and as such it becomes illegal. Besides, the Finance Department had also issued clear instructions that for release/disbursement of salaries of newly recruited persons, district-wise final merit list duly signed by the Administrative Secretary with official stamp on a prescribed format is required to be furnished directly to the office, any deviation in this regard would render the release of salaries as unauthorized and illegal. It has also been stated that Education & Literacy Department issued notification No. SO(S-I)/10-263/2011 dated 115th December 2011 for selection/recruitment of staff under the administrative control of respective Directorate of School Education and a committee was constituted comprising of the following members and TOR were respectively communicated to the Regional Director School Education.

- (i) Regional Director School Education, Chairman
- (ii) District Education Officer of the respective Districts, Member
- (iii) Office/Head of the Institution having vacancies, Member

It has also been stated that at the relevant time, the petitioner [Reference's Accused No.4] was Director Schools Education Hyderabad Region, Hyderabad and a Chairman of District Recruitment Committee (DCR). Whereas accused No.1 namely; Allah Bachayo Khaskhelli, District Education Officer Jamshoro, Accused No.2 namely Noor Muhammad Shah, District Education Officer (Higher Secondary) and Accused No.3 Muhammad Saffar Kachhaar, District officer (Elementary) were the members of DRC. All the officers of DRC were jointly and severally responsible for transparent and meritorious selection.

It has been further stated that DRC recruited 138 candidates in violation of instructions of the Government by declaring them eligible for appointment. No proper record of the written test and interview was maintained by DRC. Out of above 138 candidates, one was eligible whereas 108 persons had not even applied for the post but they were selected due to nepotism and in violation of recruitment procedure and instructions and as such they defeated the merit and made the entire process of recruitment illegal. Besides above appointment of 74 persons was made in excess of the actual strength, which resultantly caused loss to the national exchequer.

3. The petitioner in furtherance of his intention being Chairman of DRC got published an advertisement in the newspaper daily 'Kawish' on 04.04.2012 regarding recruitment of Drawing Teacher (BPS-9), Assistant Workshop Instructor (BPS-9) and Junior Physical Training Instructor (PET) (BPS-9) and Oriental Teacher (BPS-9) for District Jamshoro Hyderabad Region without specifying the number of vacancies against each basic scale, which is violation of Rule 11 Chapter 3 of the Sindh Civil Servant (Appointment, Promotion & Transfer) Rules, 1974. The accused persons including the present petitioner in connivance with each other misused and abused their authority in appointment of 138 persons including 74 appointments in excess to the sanctioned strength whose services were actualized and salaries were released, which resulted in loss to the National Exchequer to the tune of Rs. 110,323,296/- and as such all the accused persons committed acts of corruption and corrupt practices defined under Section 9(a) and punishable under Section 10 of National Accountability Ordinance, 1999 (NAO) which lead to NAB filing a reference against them, which is now pending before Accountability Court No.VI, at Hyderabad.

4. The case of the petitioner, as averred in the petition, is that he being Director School Education, Hyderabad Region, was appointed as Chairman DRC. Further the recruitment process comprises of three stages; first being receiving application against advertised posts, scrutiny of applications and short listing of candidates, second one conducting written test and viva voce and preparing final merit list and the third stage was issuing offer/appointment letter to the successful candidates. The petitioner, being Chairman DRC had only privy to second stage, i.e conduct of written test and viva voce and preparation of final merit list. During this process, neither any rule has been violated nor any misuse of any authority was occasioned. Further the petitioner has been falsely charged with the allegations regarding illegal appointments of 138 candidates, as the petitioner being the Chairman DRC after ensuring the conduct of written test and viva voce prepared the final merit list. Further stated that the Investigating Officer has misled himself by treating the final merit list as prima facie proof of appointment and since 138 candidates were recommended in final merit list as such holding all persons, including petitioners, who signed final

merit list accused of making excess appointments. In fact, final merit list only contained names of successful candidates and it was for the appointing authority to issue offer/appointment orders against the vacant posts. Further averred that all the candidates whose names appeared in the final merit list had duly applied and underwent rigorous process of written test and viva voce and were recommended on the basis of their performance in the examination. Further averred that the petitioner has fully discharged his obligation as Chairman DRC. The prosecution has falsely implicated the petitioner in the subject Reference with ulterior motives. The allegations levelled in the reference are false as the petitioner has not committed any illegality and/or any misuse of his authority and/or any benefit drawn and has no role in release of salaries to any appointee in respect of recommendation made by DRC. Prior to the present petition, the petitioner had filed CP No. D-1527/2017 for pre-arrest bail wherein he was granted ad-interim pre-arrest bail however, later on that was not confirmed by this Court and the Petition was dismissed on 14.09.2017. Thereafter, petitioner approached the Honourable Supreme Court of Pakistan vide CPLA No.3306/2017 wherein though interim pre-arrest bail was granted, however, subsequently the bail of the petitioner was not confirmed and the CPLA was also dismissed vide order 25.10.2017. Pursuant to the order of Honourable Supreme Court the petitioner filed present petition for post arrest bail.

5. Upon notice of the present case, learned Special Prosecutor, NAB, filed para-wise comments on behalf of NAB, raising preliminary legal objection in respect of the maintainability of the present petition, it has been stated that the petitioner is fully involved in the crime and his role is specific in the reference as he, being the Chairman DRC, was over all responsible for transparent fair and meritorious recruitment in which he deliberately failed. He has signed the merit list knowingly that this act is merit destructive. Furthermore, his role is specific in the NAB Reference. The petitioner alongwith other accused caused loss to the national exchequer. It is also stated that the petitioner is not entitled for any relief in the present petition and the petition is liable to be dismissed.

6. Learned counsel for the petitioner during the course of his arguments, reiterating the contents of petition, has argued that the

petitioner is innocent and has been falsely implicated in the case and the charges against the petitioner are motivated with mala fide intention of the NAB authorities. It is also argued that the petitioner, being the Chairman of DRC has only role of ensuring conduct of written test and viva voce and then preparation of final merit list, which was done in accordance with law and in this respect no rule has been violated as alleged. Furthermore, Rule 11 of Sindh Civil Servant (Appointment, Promotion and Transfer) Rules 1974 do not envisage any requirement for specifying number of vacancies in advertisement, hence non-mentioning the specific number of post in the advertisement issued by the petitioner was neither illegal nor with malafide intention as alleged. Learned counsel in this regard also relied upon various newspaper advertisements annexed with the memo of petition wherein no specific number of posts are mentioned. It is also argued that all over Pakistan, Public Service Commission or Departmental Selection Committee, as the case may be, only recommends candidates, in order of merit, for appointment and it is for appointing authority to issue offer/appointment letter according to available vacancies, however, in case of excess, members of commission or committee cannot be made responsible of excess appointment. It is also argued that prosecution has miserably failed to bring on record any evidence to show that the petitioner has acted in violation of any rule or any benefit has been drawn by him out of any recommendation made by DRC. Further the petitioner cannot be kept behind the bars merely on the basis of bald allegations and unsubstantiated fact, which are yet to be proved by the prosecution during trial. Learned counsel also argued that as per prosecution, out of 138 appointments 31 appointments are in accordance with law, whereas, rest of the appointments, which though were through the same process, are illegal. Per learned counsel, the process adopted for the subject appointments could either be legal or illegal but it cannot be said that amongst the aforesaid appointments few of them are legal, because all the 138 appointments were made through the same process. Further argued that the alleged loss shown in the reference is the payment of salaries to the appointees, whereas, the appointees are still working and are being paid against the services rendered by them as such amount of salaries could not be considered as a loss to public exchequer and could not be used as an excuse to keep the petitioner behind bars for indefinite period. There is no *mensrea*

which can be attributed towards the petitioner as during the investigation nothing has been recovered, which could reflect that the petitioner either accumulated wealth and/or gained any monetary benefit from the recommendation of the subject appointments. It is also argued that the petitioner and his family members are facing hardship due to imprisonment of the petitioner. It is also argued that the parameters for pre-arrest bail are different from the parameters of bail after arrest. The provisions of the bail after arrest are fully attracted to the petitioner as none of the PWs, in their statements recorded u/s 161 Cr.P.C has deposed against the petitioner. Lastly, learned counsel argued that all the allegations against the petitioner in the NAB Reference are without substance, and there is no likelihood that he would get any conviction in the case as such the petitioner has a fit case for grant of bail after arrest in the present case. Learned counsel in support of his stance in the case, has relied upon the following case law:

- (i) ***PLD 2002 Karachi 24M. SIDDIQUE-UL-FAROOQUE v. The STATE***
- (ii) ***2008 SCMR 1118 The STATE and Others V. M. IDREES GHOURI and others***

7. Conversely, learned Special Prosecutor, NAB, argued that there is sufficient evidence against all the accused persons including the present petitioner to prove that they have committed the offence for which they have been charged in NAB Reference beyond a reasonable doubt and furthermore, this Court as well as the Honourable Supreme Court have already dismissed pre-arrest bail of the petitioner. Furthermore, though the evidence in the case has not been started yet the PWs in their statements recorded u/s 161 Cr.P.C. have fully supported the case of Prosecution and as such the petitioner is also not entitled to post arrest bail. Lastly argued that the petitioner is also facing prosecution case in another Reference in which evidence is being recorded.

8. We have considered the contentions raised by learned counsel for the parties, perused the record as well as the law on the point.

9. It is now well settled that the NAB cases being white collar crime are generally of an intricate nature and the whole transaction and each component part of the scam needs to be viewed in a holistic manner

and not in isolation. This is because in most cases the offence could not be committed without the active involvement of all the accused in the chain of events, which lead to the commission of offence. However, notwithstanding this observation, it is also settled law that in cases of bail each of the accused needs in some way to be connected with the alleged offence and in the case of non bailable offences such as the present case there are reasonable grounds for believing that the accused is connected with the offence charged. Reliance in this regard can be placed on the case of MOHAMMAD AZAM BROHI and others v. The STATE through Chairman, National Accountability Bureau and others 2016 P Cr. L J 1417[Sindh].

10. From the perusal of the NAB Reference 09 of 2017/H, it appears that the present petitioner has been given specific role. The relevant portions of the NAB Reference showing role of the petitioner, for the sake of ready reference are reproduced as under:

“7. That the investigation revealed that the accused No.4 Shamasuddin Dal the then Director Schools Education Hyderabad Region Hyderabad (Chairman DRC) got published an advertisement in newspaper daily “Kawish” on 04.04.2012 regarding recruitment of Drawing Teachers (BPS-9), Assistant Workshop Instructor (BPS-9), and Junior Physical Training Instructor (PET) (BPS-9) and Oriental Teacher (BPS-9) for District Jamshoro Hyderabad Region without specifying the number of vacancies against each basic scale which is violation of Rule 11 Chapter 3 of the Sindh Civil Servant (Appointment, Promotion & Transfer) Rules, 1974.”

“14. That the investigation revealed that the accused No.4 Shamsuddin Dal being the Director Schools Education Hyderabad was over all responsible for transport, fair and meritorious recruitment which he deliberately failed. He has signed the merit list knowingly that his act is merit destructive. Thus he consciously misused the authority to gain benefit or favour for any other person/illegible persons.”

“19. That in view of the above it has been established through documents evidence that the Officers of Education Department Jamshoro of Hyderabad Region (accused No.1 to 4) in connivance with each other misused and abused their authority in appointment of 138x persons including 174x appointment in excess to the sanctioned strength whose services were actualized and salary was released by the accused through misuse and abuse of authority. The accused thereby caused loss to the tune of Rs.110,323,296/- to Government Exchequer. Thus, the accused persons have committed the offence of corruption and corrupt practices as defined under section 9(a) and punishable under section 10 of the National Accountability Ordinance, 1999 and schedule thereto.”

11. From perusal of the Reference, it also appears that the petitioner being the Chairman DRC, was over all responsible for transparent fair and meritorious recruitment and without his participation it was not possible. His participation being head of the DRC alongwith other co-accused in committing crime is apparent, which caused a huge loss to the National Exchequer. He was part of the joint criminal enterprise with all co-accused, all of whose active participation was necessary in order to commit the offence, mentioned in the charge. Thus, keeping in view the fact and the sufficient material before us there are reasonable grounds to connect the petitioner with the offence for which he has been charged along with the other co-accused in the instant NAB Reference of corruption under Section 9(a), NAO, punishable under section 10, NAO.

12. From the record, it also appears that this Court through a common order dated 14.09.2017, passed in different Constitutional Petitions, filed by the accused persons involved in the NAB Reference 09 of 2017, rejected the pre-arrest bail to the accused persons, including the present petitioner in CP No.D-1527/2017. Relevant portion of the said order, for the sake of ready reference, is reproduced as under:

“15. If all the facts, record and circumstances are viewed jointly, prima facie it appears that all the petitioners / accused did participate in the offence either by active participation or choosing to remain silent at relevant time which too against commitments of their job requirements. It is a case wherein process of appointment was tinted with malpractice, personal gain and nepotism, which not only has caused considerable loss to the national exchequer at the cost of the future of our children but did impinge upon statutory rights of the citizens. Those, involved, regardless of their pleaded small or big roles, would deserve no mercy. The upshot of the above discussion is that the petitioners who have applied for the anticipatory bail as well as post-arrest bail are not entitled to any relief, as such all the petitions are dismissed. The ad interim relief given to those petitioners is hereby recalled and the bail plea raised by for petitioner Masroor Ahmed is declined.”

13. In the present case, the petitioner is charged with the offence acted in violation of rules, procedure and even specific criterion while making appointment(s). Furthermore, the petitioner has never established a *mala fide* on the part of investigation authorities in involving them in the case falsely. Conversely, it is prima facie evident that the petitioner has not been able to deny the facts, brought on record

regarding subject appointments which were not only in excess of sanctioned strength but also included appointments for those who never applied and also those who were ineligible. Further the petitioner being the Chairman of DRC, while acting as competent authority would ultimately be directly responsible for the misuse of authority and would not escape from the criminal liability on the pretext that the irregularity if any was due to the fault of other members of DRC and or his subordinates. Since, the petitioner legally cannot take an exception to his legal obligations to ensure fair and transparent appointment process which always, required to forward every single case after due examination, scrutiny as well verification, therefore, said glaring illegalities prima facie have no justification at all. More so, the petitioner has also not claimed any relaxation of rule and / or criterion, so set for recruitment process.

14. The stance of the petitioner regarding allegation against him for misuse of authority in the discharge of his official duty is not sustainable on the basis of evidence in the hand of the Prosecution, cannot be answered without the detailed scrutiny of evidence and such exercise cannot be gone into while hearing the petition for a prayer of grant of bail, only tentative assessment of evidence collected by the prosecution is to be made, and that detailed scrutiny thereof cannot be done. Perusal of the material available on record, prima facie, reflects that there are reasonable grounds to believe that the accused is guilty of offence with which he is charged. The motivation for an act of corruption or corrupt practice may either be with intention to supplement income, to extend status or power, create future career opportunities, or to confirm to the expectations of those whose patronage they seek yet none of them would ever be an excuse nor shall lessen the gravity thereof, therefore, prima facie the petitioner is guilty of the offence with which he is charged. Furthermore, there is no cavil with the Proposition that the corruption and nepotism are obnoxious for the society in general but the same are intolerable in the field of education, as it is a question of our future generation. It is now well established that the officers working in education department are not only gatekeepers of the educational system, but in fact they are custodians of our future generation. As education is widely viewed as access to life opportunity, higher lifetime earnings and great value. It is unbearable that corrupt practice could thrive in the education sectors.

The Honourable supreme court in the case of RAI MUHAMMAD KHAN v. NAB through Chairman 2017 SCMR 1152, while dilating upon the issue of corruption has observed as under:

“7. Under the principle of law and justice, each bail petition is to be decided on its own merits and the law applicable thereto, however, this Court cannot remain oblivious of the undeniable fact that the tendency of corruption in every field, has become a threatening danger to the State economy, striking on its roots. The public money, allocated for social sector and economic well being of the poor people, is consistently embezzled/misappropriated at a large scale and why the majority of the population is deprived of essential daily utilities, like pure drinking water, health care and education facilities, etc. It has become the foremost obligation of each and every institution, including the Judicator, to arrest this monster at this stage, before it goes out of proportion, posing threat to the very survival of the State and State economy, therefore, the Courts shall apply the Anti-Corruption laws somewhat rigidly, once on fact the case is made out, at bail stage, against the accused person. Distinction, however, is to be drawn between the ordinary criminal cases and is of corruption on the above analysis and grounds, while dealing with bail matter to an accused person, charged for such like crimes and also at the time of conviction, once the case is proved against him then, Courts are not supposed to show any mercy by taking a lenient view in the matter of sentence.”

15. It is also settled that this Court has the jurisdiction to grant bail to the petitioners while exercising constitutional jurisdiction but while doing so we cannot stretch the provisions of Criminal Procedure Code just to facilitate the petitioners to get themselves released on bail as the provisions of the said Code have specifically been ousted in the NAB Ordinance. Even otherwise, the provisions of a special law override the general law.

16. The case law cited by the learned counsel for the petitioner has been perused and considered by us but did not find applicable to the facts of the present case.

17. As a necessary corollary to the discussion made in the foregoing paragraphs, we are of the view that there is sufficient material before us to conclude that there are reasonable grounds to connect the petitioner with the offence for which he has been charged and he is involved in the commission of crime which ultimately deprived the National Exchequer from millions of rupees. Further, the petitioner has miserably failed to establish that his case falls within the ambit of further inquiry justifying exercise of constitutional jurisdiction by this Court for

grant of post arrest bail to the petitioner. Consequently, we see no merits in this petition, which is hereby dismissed.

18. From the record, it appears that out of eight (8) prosecution witnesses only one witness has been examined. In order to prevent any undue delay in the trial, the Accountability Court hearing this matter is directed to conclude the trial as early as possible preferably within a period of four months and no un-necessary adjournment should be granted to either side. The office is directed to send a copy of this order to the Accountability Court hearing the reference, for compliance which shall also submit fortnightly progress reports to this Court through Additional Registrar of this Court.

19. Before parting with this order we would like to make it clear that our findings are based only on a tentative review of the material before us and shall not prejudice the case of either party at trial, which will be decided by the Accountability Court on merits based on the evidence before it.

JUDGE

JUDGE

Hyderabad
Dated: 22.02.2018.