

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
 C.P No. D-214 of 2016

DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of CMA No.9319/17 (151)

19.04.2017

M/s. Syed Mehmood Alam Rizvi and Obaidur Rehman, Advocates for Petitioner.

Mr. Yasir Siddique, Spl. Prosecutor NAB.

Muhammad Junaid Ghaffar J: The Petitioner was granted post arrest bail by means of a Short Order dated 01.07.2016 by a learned Division Bench of this Court in Reference No. 19/2016 in the following terms:-

“For the reasons to be recorded separately, we are of the opinion that petitioner Shoaib Warsi, in C.P No.D-1199 of 2016 and petitioner Zahir Siddiqui in C.P No.D-214 of 2016, who are behind the bars since their arrest on 26.08.2015, have made out a case for further inquiry. Accordingly, the said petitioners are admitted to bail subject to their furnishing solvent surety in the sum of Rupees two million each with PR bonds in the like amount, to the satisfaction of the Nazir of this Court. The petitioners are also directed to deposit their passports with the Nazir.

Subsequently, the reasons were recorded in this matter and the same have been reported as **PLD 2017 Sindh 243 (Shoaib Warsi and another v. Federation of Pakistan)**. This application has been filed for return of Passport enabling the Petitioner to travel abroad. Learned Counsel for the Petitioner submits that in various petitions such request has been granted by this Court as a matter of practice, whereas, the Petitioner needs his Passport to travel abroad, therefore, this application be allowed. In support he has referred to certain orders passed in C.PNo.D-4473/2016, C.P.No.5668/2016 and C.P.No.2442/2016 dated 14.10.2016, 02.11.2016, 27.03.2017, 23.01.2017 & 13.12.2016, respectively.

On the other hand, learned Special Prosecutor NAB has filed objections and has contended that the return of Passport means modification of the bail order, which is not tenable in law. He further submits that such permission would delay the proceedings before the Trial Court, whereas, the Petitioner has not sought any permission for travelling abroad from the learned Trial Court.

We have heard the learned Counsel for the Petitioner as well as learned Special Prosecutor NAB. At the very outset, learned Counsel for the Petitioner was confronted as to how any modification of Order dated 01.07.2016, whereby, the Petitioner was granted bail, could be entertained as the order has attained finality and Court while granting post arrest bail has consciously directed the accused to furnish surety and so also deposit the Passports, the learned Counsel though could not satisfactorily respond, however, submits that as per practice in various other cases such requests has been acceded to in the past by various learned Division Benches of this Court. However, we are not satisfied with such reply as in our opinion the petition has been finally disposed of by granting bail to the Petitioner in the aforesaid terms, and therefore no further orders could be passed by a subsequent Bench of this Court as admittedly such order has attained finality and the petitioner, who is though aggrieved by certain portion of the order i.e. deposit of the Passport has not impugned the same any further. In identical circumstances we have already dismissed such application in the case of **Muhammad Imran v. Federation of Pakistan** in C.PNo.D-6599/2015 and other connected petitions through a detailed order dated 07.04.2017. The relevant observation reads as under:-

7. Perusal of the Order granting interim pre-arrest bails reflects that these Petitioners were granted such bail on furnishing solvent surety in the sum of Rs.10,00,000/- with PR bond in the like amount to the satisfaction of the Nazir of this Court with further directions to deposit their original Passports and instructions to Secretary Minister of Interior, Government of Pakistan to ensure that Petitioner(s) are not issued new or duplicate Passport(s) without obtaining prior permission of this Court. When these interim bails were confirmed, the learned Division Bench was pleased to do the same in similar terms as contained in the ad-interim orders passed in respect of the Petitioners. To us the confirmation of bail on the same terms and conditions on which ad-interim pre-arrest bails were granted was a conscious and deliberate decision by not taking into consideration the amount of surety, which was ordered to be furnished to other co-accused/petitioners in C.P No.3790/2015 vide Order dated 18.12.2015. In our considered view the Court was cognizant of the fact that the conditions regarding furnishing of surety and deposit of Passport was very much there in the case of Petitioners, whereas, it had not been asked for from other co-accused in their bail orders on the basis of which the present petitioners were granted bail. In our view on subsequent application(s) like these, the said order cannot be interfered with so as to review it or otherwise modify, which has been passed by the Court after due care and by exercising its own discretion in the matter so vested in it. In our understanding the appropriate remedy to the Petitioners was to further challenge the said portion of the order by which they were aggrieved. In fact reliance placed on the order of Hon'ble Supreme Court dated 08.03.2017 as above also depicts the same factual position, wherein, the Petitioners being aggrieved by imposition of such condition had directly approached the Honorable Supreme Court by filing a Civil Petition for Leave to Appeal. By entertaining these applications subsequently, we would be either amending the order or modifying it after disposal of these petitions, which we are afraid, cannot be done through such applications.

8. A learned Division Bench of Lahore High Court in the case of *Tariq Masood v. Director General, National Accountability Bureau, Lahore and another (PLD 2012 Lahore 287)* had the occasion to decide a miscellaneous application, in a matter under the NAB Ordinance, whereby, the Petitioner was though granted bail in the sum of Rs.200,000/- with two sureties each in the like amount, however, additionally was also ordered to deposit a security of Rs. 25,00,000/- as well. The Petitioner had subsequently moved an application which was initially dismissed, whereafter it was challenged before the Honorable Supreme Court but was withdrawn. Thereafter the petitioner filed another application in respect of the condition of deposit in the bail order. The Petitioners' contention was that the condition of deposit of cash security was not in accordance with law and while referring to Sections 497 and 499 Cr.P.C reliance was placed on a number of citations as mentioned in Para-4 of the said Judgment. This application was opposed on behalf of NAB on the ground that a white collar crime by misappropriating funds was committed, and therefore, keeping in view the spirit of NAB Ordinance, the Court had rightly directed the Petitioner to deposit the cash security. The said application was dismissed by the learned Division Bench of the Lahore High Court and the relevant observation reads as under:-

“A bare perusal of the aforementioned provision of law would reveal that sections 497, 498 and 561-A, Cr.P.C, or any other provision of the Code, or any other law for the time being in force, are not applicable to the offences falling under National Accountability Ordinance, 1999. Even otherwise, according to section 3, the provisions of the National Accountability Ordinance, 1999, have an over-riding effect notwithstanding anything contained in any other law for the time being in force. However, High Court, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has the

jurisdiction to grant bail to an accused facing prosecution for an offence under the National Accountability Ordinance, 1999. In the case of **Abdul Aziz Khan Niazi v The State through Chairman, NAB, Islamabad** (PLD 2003 Supreme Court 668), it was pronounced that High Court has the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497, Cr.P.C. Needless to observe that ouster of jurisdiction of High Court to grant bail in scheduled offences has been done away by amendment in section 9(b) of National Accountability Ordinance, 1999, after omission of the word "including the High Court". The High Court, while considering the question of bail in its Constitutional jurisdiction, in the interest of safe administration of justice, can examine the nature of allegations on the basis of tentative assessment of the evidence in hands of prosecution to ascertain, prima facie, the question of guilt or innocence of an accused for the purpose of grant or refusal of bail and without expressing any opinion on merits of the case, lest it should prejudice the accused or prosecution. The rule of departure from the provisions of section 497 Cr.P.C. in presence of the special enactment is enunciated in the case of **Chaudhry Shujat Hussain v. The State** (1995 SCMR 1249), wherein, it has been observed that in case of conflict between the provisions of the Offences in Respect of Banks (Special Courts) Ordinance of 1984, and the provisions of the Code of Criminal Procedure regarding scheduled offences, the Ordinance, 1984, being a special law, would prevail. Therefore, the provisions of sections 497 and 499, Cr.P.C. will not stricto sensu apply to the cases falling under the National Accountability Ordinance, 1999, in view of sections 3 and 9(b) of the Ordinance ibid. In the case of **The State v. Muhammad Hasham Babar** (PLD 1997 Lahore 605), ***it was held that the area of asking security from the accused, who is allowed bail, is vacant and the Court is not enjoined under the law to mathematically follow the system of securities, provided in the Code of Criminal Procedure. In the case supra, it was laid down that under the new dispensation, i.e. Ehtesab Ordinance (XX of 1997), which was an earlier enactment on the subject of accountability, the Court has ample power to ask for cash security in appropriate cases.***” (**Emphasis supplied**)

9. It may also be observed that the amount of surety along with deposit of Passport is not a conditional bail, which admittedly per settled law is not valid. However, securing Passports is in fact itself a surety, and neither a conditional bail, nor a condition required to be incorporated in the bail bond itself. It is just like having 2 (two) sureties instead of 1 (one), which is a normal practice otherwise, keeping in view the peculiar facts of the case. Therefore, in this matter the question that whether it is a conditional bail or not does not arise. In the circumstances, as already observed the procedure as well as the case law regarding procurement of a bail bond and putting any other condition as provided under Section 499 Cr.P.C would also not apply.

10. It is also of pivotal importance to note that the idea behind seeking surety while granting a bail is to secure the attendance of the accused before the Trial Court. Now what is that will ensure such attendance is for the Court granting bail to decide keeping in view the peculiar facts and circumstances of each case independently. Once such security or surety of whatsoever nature has been incorporated in the bail granting order, no further deviation is permissible for another Division Bench of the same Court to take on a subsequently filed miscellaneous application. If this is permitted as a routine and barring exceptions, then it will disturb the entire spirit, procedure and process of the Court and will never put an end to these proceedings which specially in these matters pertaining to NAB Ordinance, are only confined to the grant of Bail or otherwise. This Court is not the trial Court which normally grants bail and ensures the attendance of the accused. This difference has to be kept in mind while entertaining any such application. In

our considered view when bail was granted to the petitioners, it was felt necessary by the Court to procure passports, as the Court while granting bail is duty bound to prescribe the type of surety it needs for securing the attendance of the accused. Even a routine bail order contains certain conditions between the lines. In this matter in our view the order for surrendering passports was done as a practice and routine being followed in bails pertaining to NAB matters and we do not find any illegality otherwise so as to upset it, as it would be an impediment in the proper administration of justice which the learned Division Bench thought it to be fit and just in fact and law. Courts are not required to pass mechanical orders; rather it has to take into consideration the status of sureties, their validity as well as circumstances which would provide satisfaction to the Court that the order of concession of bail would not be misused.

Reliance was also placed on the case of **MUHAMMAD AYUB Versus Mst. NASIM AKHTAR AND ANOTHER (1984 P Cr. L J 160)** wherein the the Hon'ble Supreme Court of the Azad Jammu & Kashmir had the occasion of examining the conditions attached to a bail granting order. Similarly in the case of **Hakim Ali Zardari v The State (PLD 1998 SC 1)**, the order of learned Lahore High Court whereby while granting bail a condition for furnishing deposit of Rs.10 Million and surrender of *passport* was made in a case emanating from the Ehtesab Act, 1997 (predecessor law of NAB Ordinance), was maintained by the Hon'ble Supreme Court in appeal by a majority decision of two is to one.

In view of hereinabove facts and circumstances of the case, in our considered opinion the application is misconceived, therefore, by means of a short order in the earlier part of the day, same was dismissed by us and above are the reasons thereof.

Judge

Judge

Ayaz P.S.