IN THE HIGH COURT OF SINDH AT KARACHI

Present: Ahmed Ali M. Shaikh, CJ & Omar Sial, J

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Constitution Petition No. D – 6191 of 2019

Petitioner	:	Shafiq-un-Nabi through Syed Junaid Alam, Advocate
Respondent	:	Director General NAB through Mr. Zahid Hussain Baladi, Special Prosecutor NAB

ORDER

Omar Sial, J.: The petitioner Shafiq-un-Nabi was arrested by NAB on 21-8-2019 in a case pertaining to the Pakistan Navy (Civilian and Non-Gazetted Employees) Co-operative Housing Society. While he was in NAB's remand he made an application for tender of pardon under section 26 of the NAO 1999, which application was duly approved by the DG, NAB (Karachi) on 19-9-2019. Subsequently, according to NAB, the petitioner made a full and complete disclosure by recording a statement under section 164 Cr.P.C. before a Magistrate. The petitioner however has not to date recorded his testimony in Court as a witness because a Reference in the matter has still not been filed. The petitioner moved an application before the learned Administrative Judge, Accountability Courts, Karachi in which he prayed that as he had become an approver, he be released from custody. The learned Administrative Judge vide his order dated 25-9-2019 dismissed the application primarily on the ground that section 337(3) of the Code barred the release of an approver until termination of the trial. It is this order that has been impugned in this petition.

2.   We have heard the learned counsel for the petitioner as well as the learned Special Prosecutor, NAB. The learned Special Prosecutor in categorical terms recorded his no objection to the release of the petitioner and also submitted that the continued incarceration of the petitioner is causing hurdles in NAB's case.

3.   Chairman, NAB is empowered under section 26(a) of the NAO 1999, to tender a full or conditional pardon to an accused at the inquiry or investigation stage provided such a proposed approver makes a full and complete disclosure of the circumstances in his knowledge relating to the offence in question. Section 26(b) provides that the person whose pardon is accepted will have to record his statement before a magistrate as well as in trial as a witness. Section 26(d) empowers the Chairman, NAB to recall the pardon

tendered to an accused if he is satisfied that the accused did not make a full disclosure, and in such an eventuality the approver concerned will be tried for the same offence.

4.   On the other hand section 337(3) of the Code (which addresses tender of pardon to an accomplice) stipulates that a person who is not on bail when he is given a tender of pardon may not be released until the termination of trial. Indeed it is this provision of law which has been relied upon by the learned Administrative Judge in declining the petitioner's prayer for release from custody.

5.   Section 17(a) of the NAO 1999 provides that "Notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the provisions to this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1989), shall mutatis mutandis, apply to the proceedings under this Ordinance." In other words, the Code will apply to NAB cases unless and until NAO 1999 in itself deviates from the provisions of the Code. Further, section 17(c) of the NAO 1999 empowers the Court "for reasons to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case."

6.   NAO 1999 is a special law dealing primarily with complex cases of corruption and corrupt practices, which at times require a departure from the provisions of the Code to meet the object for which it has been enacted. Indeed, this acknowledgment is made by the legislature itself when it deemed the inclusion of section 17 in the NAO 1999. In other words the provisions of section 17 of the NAO 1999 shall have an overriding effect over the Code. Often, evidence in NAB cases is buried under loads of debris and there are situations when the testimony of an approver is necessary to unearth the true facts and circumstances as well as the identity of the players involved in the scam. One tool for this purpose which the legislature appears to have given to the Chairman, NAB in the shape of his power to tender a pardon to a proposed approver if he is of the considered opinion that such a pardon will lead to a successful prosecution. Therefore, if an accused wanting to be an approver by seeking pardon knows that he will not avail the benefit of such a pardon till the termination of the trial while the other accused may be released on bail, in our opinion, will defeat the very intent of section 17 of the NAO 1999. No person will be willing to become an approver in such a situation.

7.   We are also of the view that the fact that section 26 of the NAO 1999 begins with the words "Notwithstanding anything contained in the Code…….." in itself is sufficient enough to oust the applicability of section 337 of the Code in the event they are in conflict with the provisions of the NAO 1999.

8.   While passing the impugned order the learned NAB Court has given an overriding effect to the provisions of section 337 of the Code as against the provisions of section 26 of the NAO 199 where the Chairman, NAB is empowered to pardon a proposed accused without referring the matter to a magistrate and/or the trial court. We are mindful of the fact that powers of such a nature have not been entrusted to the executive by the provisions of the Code but for the purposes of the present proceedings we have not examined the vires of section 26 of the NAO 1999 which authorizes the Chairman, NAB to exercise powers of such a nature.

9.   In view of the above, the impugned order is set aside and the petitioner is ordered to be released subject to the conditions imposed by the learned Chairman, NAB in his order of tendering pardon to the petitioner as the provisions of section 26 of the NAO 1999 have clearly fixed this responsibility on the authority granting pardon.

JUDGE

CHIEF JUSTICE