

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

C. P No. D-1841 of 2019

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Amjad Ali Sahito

Petitioner : The State, Chairman National Accountability Bureau, Islamabad, through M/S Muhammad Zubair Malik Special Prosecutor NAB and Muhammad Mehmood Sultan Khan Yousfi, Deputy Attorney General.

Respondent: Syed Khursheed Ahmed Shah S/o Syed Zulfiqar Ali Shah, through Mr. Mukesh Kumar G. Karara Advocate

Date of hearing: 04.03.2020.

Date of Decision: 04.03.2020.

ORDER

NAIMATULLAH PHULPOTO, J. This order shall decide the impugned order dated 17.12.2019 passed by learned Judge, Accountability Court Sukkur, in Inquiry initiated by NAB against respondent No.1 and others whereby respondent No.1 Syed Khursheed Ahmed Shah was ordered to be released, on execution of PR bond in the sum of Rs.Five Million, for want of filing NAB Reference against him within the prescribed period. Through instant Constitutional Petition, Special Prosecutor NAB has called in question the order dated 17.12.2019 passed by learned Judge, Accountability Court, Sukkur. Notice was issued against respondent Syed Khursheed Ahmed Shah and learned DAG.

2. Mr. Muhammad Zubair Malik, Special Prosecutor NAB, mainly argued that National Accountability Bureau Ordinance (hereinafter

referred to as "the Ordinance") is a special law, Accountability Court had no jurisdiction to order the release of respondent No.1 on execution of PR bond. It is further argued that Section 91 Cr.P.C is not applicable in NAB cases so far as release of accused is concerned, whereas, the Reference has been filed against respondent No.1 and others before Accountability Court, Sukkur. He lastly contended that after filing of the Reference, impugned order, which was conditional one has virtually become infructuous, the same may be declared *corum- non-judice* and without any legal basis. In support of his contentions, he placed reliance upon the case of OLAS KHAN and others v. Chairman NAB through Chairman and others (PLD 2018 Supreme Court 40).

3. Mr. Mukesh Kumar G. Karara, learned advocate for respondent No.1 argued that NAB Chairman failed to file the Reference within the period of 90 days as prescribed in law, as such, learned Judge Accountability Court in the compelling circumstances has rightly ordered to release the respondent No.1 on execution of PR bond. It is further argued that detention of respondent No.1 by NAB for more than 90 days for want of Reference was illegal. It is submitted that after filing of the Reference against respondent No.1, instant Constitutional Petition has become infructuous. He further submitted that respondent No.1 has filed Constitution Petition for grant of post arrest bail which is still pending before this Court and the instant Constitutional Petition, after filing of Reference by NAB authority has become infructuous. He lastly prayed that impugned order is based upon sound reasons and the instant Constitutional Petition may be dismissed.

4. After hearing the learned counsel for the parties, we have perused the impugned order, which is reproduced for ready reference as under:

" I.O Mr. Abul Hassan Kashan, Deputy Director/SIO NAB, Sukkur filed an application U/S 344 Cr.P.C through Mr. Muhammad Zubair Malik, Special Prosecutor, NAB, Sukkur seeking extension of judicial custody remand of accused Syed Khursheed Ahmed Shah for 15 days.

2. Accused Syed Khursheed Ahmed Shah in the inquiry referred in the title was arrested by the I.O on 18-09-2019. Custody of the accused was produced before Administrative Judge, Accountability Courts, Islamabad for seeking transit remand. Transit remand of the accused was granted on 19-09-2019 with directions that he to be produced before this court on or before 21-09-2019. The accused was produced before this Court pursuant to transit remand on 21-09-2019 and his physical NAB Custody Remand was granted and extended till 09-11-2019. On 09-11-2019 the accused was sent in Judicial Custody by allowing full access to the I.O for confronting any document or witness to the accused at any time without any resistance. Since 09-11-2019 to till date the accused is under the judicial custody and the I.O was having full opportunity to conduct investigation and interrogation. 90 days remand period of the accused in the custody ended on 16-12-2019. The court keeping in view the circumstances directed the I.O vide order dated 23-11-2019 to complete the investigation at least qua the accused within 90 days of his arrest. On 07-12 2019 the I.O was directed to invoke the provisions of National Accountability Ordinance (XVIII of 1999) within 90 days of arrest of the accused. On 12-12-2019 the I.O was directed to act under the law of National Accountability Ordinance (XVIII of 1999) till next date viz. today as the remand period of the accused was going to an end. Today the I.O has not filed Reference before the court, though period of 90 days remand has been expired rather sought further extension of judicial custody for 15 days.

3. Mr. Muhammad Zubair Malik, learned Special Prosecutor, NAB argued that remand of the accused is extendable even after 90 days of arrest as no penal consequences in section 24 (d) of National Accountability Ordinance (XVIII of 1991 have been given. He further added that investigation in the case has been completed and considerable time for evaluation of the investigation report and evidence before signing the Reference is required.

4. Mr. Mian Raza Rabbani, learned counsel for the accused argued that section 24 (d) of National Accountability Ordinance (XVIII of 1999) does not allow detention of the accused beyond 90 days when there is no Reference pending before the Court.

5. Having listened to learned counsel for the respective parties, available record has been perused.

6. Both the counsel have relied upon section 24(d) of National Accountability Ordinance (XVIII of 1999) and no case law on the subject point has been produced.

7. For the sake of convenience sub-section (d) of section 24 Accountability Ordinance (XVIII of 1999) is reproduced hereunder:

(d)Notwithstanding anything contained in Code, where the holder of a public office or any other person accused of an offence is arrested by NAB under this Ordinance, NAB shall, as soon as may be, inform him of the grounds and substance on the basis of which he has been arrested and produce him before the court within a period of 24 hours of arrest excluding the time necessary for the journey from the place of arrest to the court and such person shall, having regard to the facts and circumstances of the case, be liable to be detained in the custody of NAB for the purpose of inquiry and investigation for a period not exceeding 90 days and the court may remand an accused person to custody not exceeding 15 days at a time and for every subsequent remand the court shall record reasons in writing copy of which shall be sent to High Court."

8. Prior to dilating upon the observation in the instant case, I would like to reproduce the order dated 27-09-2007 passed by Administrative Judge, Accountability Courts, Sindh, Karachi in Reference No. NIL of 2007, which is now pending before this Court for adjudication as Reference 33/2010 & 1/2015:

" Record shows that accused (1) Ghulam Rabbani Mahar Slo Ghulam Qadir Mahar (2) Zulfiqar Ali Sheikh S/O Late Mumtaz Ali were arrested by NAB police on 30-06-2007, they were produced before this Court and were remanded to NAB custody upto 13-07-2007 Subsequently accused(1) Ashfaque Ahmed Sheikh Slo Khan Muhammad (2) Noor Muhammad Ujjan S/O Muhammad

Punjal (3) Zahid Hussain Bhutto S/O Manzoor Ahmed (4) Irshad Ahmed Mughul S/O Nazeer Muhammad (5) Abdul Fattah Jamro S/O Muhammad Bux Jamro and (6) Jalaluddin Bhutto S/O Inayatullah were also arrested and they were also remanded to NAB Custody in the first instance and thereafter to judicial custody in Central Prison, Karachi. Accused Abdul Waheem Shaikh S/O Deedar Ali Shaikh and Aijaz Ahmed Memon S/O Late Ghulam Mustafa Memon were already in custody in Central Prison, Karachi in some other Reference, whose arrest was effected in Jail, in this Reference by the I.O after getting permission from this Court.

Prosecution has been repeatedly making requests for time to submit Reference in the matter. It is also being given in writing since long that the Reference has been sent to Islamabad for signature of the Chairman, NAB but the same has not been submitted before this Court till today.

Since the accused Ghulam Rabbani Mahar and Zulifqar Sheikh were arrested on 30-06-2007, in the first instance, therefore, (90) days maximum remand period permissible under the NA Ordinance, has expired today i.e. 27-09-2007.

In the above circumstance, accused cannot be kept behind bar for indefinite period, when there is no material (Reference) is before the Court against them. Accordingly this Court orders for the release of the accused in the above matter, forthwith, if they are not required in any other case, on executing a P.R Bond of Rs. 500,000/- and whenever a Reference is brought before this Court, NBWs be issued against above named accused for their arrest."

9. After the accused were released, accused Zulfiqar Ali Shaikh vide Constitutional Petition No-D- 2110 of 2007 applied for pre-arrest bail, which was granted vide order dated 08-10-2007, wherein the facts above said have been stated. However, the said bail was recalled vide order dated 12-11-2008 but the point is that the NAB neither challenged the order of release dated 27-09-2007 nor took the said contention in the bail of accused Zulifqar Sheikh.

10. Taking the guidance from the aforesaid material, I am of the view that many a times directives were

issued to the I.O to complete the investigation qua the accused within 90 days of his arrest but the same were avoided to be complied with. Admittedly, there is no Reference pending adjudication before the Court against the accused, hence the accused cannot be kept behind bar for indefinite period. Therefore, the accused is ordered to be released in the matter forthwith, if he is not required in any other case, on executing P.R Bond of Rs.5 Million and whenever Reference is brought before the Court, NBWs will be issued against him for his arrest.

5. The only question before this Court is whether the Accountability Court had any lawful authority/jurisdiction to pass impugned order for the release of respondent No. 1 in NAB case, for want of filing of Reference, within the prescribed period?

6. National Accountability Bureau Ordinance, 1999 is a special law. Accountability Court has no powers / jurisdiction to grant either pre-arrest and / or post arrest bail and / or to order the release of an accused before or after filing of Reference on execution of PR bond in the cases under the Ordinance in view of non-obstinate provisions of section 9(b) of the Ordinance. However, position as regards this Court is concerned, it is altogether different. Superior Courts extract jurisdiction under Article-199 and 184 of the Constitution of the Islamic Republic of Pakistan, 1973 respectively to consider and grant bail or otherwise, in the cases under the Ordinance and not under section 9(b) and 17(c) the Ordinance. It is settled law that merely citing or relying upon wrong provision of law to assume jurisdiction over a *lis* is of no consequence, provided the Court otherwise has jurisdiction under the Constitution, Statute or any other Provision of law to pass order. This Court in the case of Iqbal Z. Ahmed and others v. National Accountability Bureau through Chairman in C.P Nos. D-1982 of 2016 and others (2018 P.Cr.L.J 1694) has held that Accountability Court has no powers to grant bail or direct release of

accused on execution of PR bond. Para Nos.50, 51 and 52 of order are reproduced as under:

50. In our view an attempt to ask for executing a bond under S.91, Cr.P.C instead of applying for pre arrest bail before the High Court at the time when the reference is filed is a classic example of the violation of the settled principle of law that what cannot be done directly through the law cannot be done indirectly through other means. Namely, the taking of a bond under S.91 when the intent of S.9(b) N.A.O is that in order to avoid arrest at the time when the reference is filed or even during inquiry and investigation of the offence under the N.A.O the accused must seek pre-arrest bail.

51. Thus, for the reasons discussed above, as a matter of legal interpretation we find no room for an accountability Court under the NAO and the common law to summon an accused other than by way of a NBW once a reference is filed before the accountability court by the NAB under the N.A.O and S.91 Cr.P.C is inapplicable to NAB reference filed under the NAO so far as an accused is concerned.

52. The office shall immediately transmit a copy of this order to all Accountability Courts in Sindh for information and compliance.

7. In view of Section 9 xii (b) of the Ordinance, 1999 no Court, shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance and only the High Court has jurisdiction Under Article-199 of the Constitution of Islamic Republic of Pakistan, 1973 to entertain pre-arrest or post-arrest bail petitions, then it is out of sense that Accountability Court has power to release accused on execution of PR bond. This would also seem to be completely against the legislative intent of making NAB cases non-bailable. The National Accountability Ordinance, 1999, is a special law and Section 91 Cr.P.C is not applicable in NAB cases so far as release of accused is concerned.

8. The impugned order for release of respondent No.1 Syed Khursheed Ahmed Shah was passed by the trial Court on 17.12.2019 for want of filing Reference within ninety (90) days of the arrest but after passing of such orders, Reference has been filed before the Accountability Court, Sukkur against respondent No.1. Moreover, respondent No.1 has filed a Constitution Petition before this Court for post arrest bail and it is pending. Learned counsel for respondent No.1 admitted that in the view of above development impugned order has now become infructuous. Even then, we have examined the impugned order to satisfy about the jurisdiction / powers of the Accountability Court. We hold that Accountability Court has no power to take bond from accused in terms of Section 91 Cr.P.C.

9. For the above stated reasons, the instant Constitution Petition is allowed. Consequently, impugned order dated 17.12.2019 passed by learned Judge Accountability Court Sukkur is set aside. The trial Court is directed to proceed with the Reference expeditiously, in accordance with law. Office is directed to transmit copy of the order through Registrar of this Court to Mr. Ameer Ali Mahesar Judge, Accountability Court Sukkur for compliance and future guidance.

10. We clarify that the present order shall not be construed as the expression of any opinion on the merits of the case at trial. These are the reasons of short order announced by us on 04.03.2020.

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