

HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-3682 of 2011 &

Constitutional Petition No.D-2176 of 2012

Present: **Sajjad Ali Shah, J.**

Naimatullah Phuploto, J.

Petitioner: Syed Sohail Hassan through Mr. Rasheed A. Rizvi, Advocate (C.P. No.D-3682/2011)

Petitioner: Muhammad Ibrahim Noor, through Mr. Khawaja Shamsul Islam, Advocate (C.P.No.D-2176/2012)

Respondent: The State/National Accountability Bureau through Mr. Noor Muhammad Dayo, Additional Deputy Prosecutor General.

07.03.2013

ORDER

Naimatullah Phulpoto, J.— By this single order we intend to dispose of Constitutional Petitions Nos.D-3682 of 2011 and 2176 of 2012 as the same arise out of Reference No.20 of 2011, filed against the petitioners by the Chairman, National Accountability Bureau.

2. Brief facts of the constitutional petition filed on behalf of the petitioner Syed Sohail Hassan are that he is one of the partners of registered partnership in the name and style of M/s. Cargo Aids. The firm which was formed on 03.08.1976 is an IATA approved agency since 1977 and has been engaged in the business of Air cargo and travel agent with all IATA Airlines, including Pakistan International Airlines (PIA). On 15.06.2007 new partner, namely, Muhammad Taseer son of Shehanshah Hussain joined the firm. Mst. Kiran Asif wife of Asif Ali Choudhry was inducted as partner of the firm on 28.01.2008. She accepted and acknowledged all the previous liabilities of the Firm. The firm received several performance awards. It is stated that firm, prior to induction of the new partners, never defaulted in the required payments against the sales receipts to the PIA but during the period June 2007 to September 2007 the aforesaid newly inducted partners in the firm in connivance with each other committed irregularities with the business of the firm, which resulted into short payments to PIA. During the said period PIA started sending bogus invoices to the Firm. It is alleged that when PIA raised huge claims it was the first time that petitioner came to know, whereafter it was negotiated by the petitioners with the above named partners of the Firm to settle the matter amicably. It is stated that an amended partnership deed was executed on 28.01.2008 between the existing two partners at that point in time. In terms of clause 7 of the amended partnership deed, one Mst. Kiran Asif agreed to own all the previous accumulated financial liabilities/ commitments of the Firm. In May 2008 firm also filed a Civil Suit bearing No.1069/2008 on the original side of this Court against seven partners of the Firm for rendition of accounts, cancellation of forged documents and recovery of Rs.20 Crore from defendants. It is stated that the said suit is still pending adjudication. In the petition it is stated that partnership firm on account of misdeeds of its joining partners could not honour four postdates cheques dated 25.10.2007, 27.10.2007, 29.10.2007 and 31.10.2007 issued to the PIA amounting to Rs.46.716 Million. The PIA soon after dishonouring of the aforesaid cheques approached IATA and got encashed the bank guarantee worth Rs.5.8 Million issued by the Firm to adjust the payment against outstanding. The petitioner has stated that he approached

PIA to resolve the issue in relation to the claim of the PIA but the PIA management became hostile to the petitioner. It is alleged that the dispute raised by the petitioner with PIA management as to the actual amount due against the payments was not timely resolved by the PIA management. Resultantly, prescribed period of limitation under the Limitation Act 1908 provided for filing a summary suit against the Firm expired. It is stated that the PIA management neglected to take matter timely to the Civil Court to determine the actual amount due against the petitioner after adjustment of the amount it received from the encashment of the bank guarantees from IATA. It is stated that PIA started harassing to the petitioner. On receipt of complaint from PIA the respondents took cognizance of the case and started investigation against the petitioner without determination by the competent Court of law. On 25.01.2011 petitioner with a view to persuade the respondents to resist from harassing the petitioner went to the office of respondent No.2. All of sudden, the then Director General, NAB arrested the petitioner. On 26.01.2012 the petitioner was produced before learned Administrative Judge, Accountability Court Karachi and the petitioner was remanded to NAB custody. Initially from 26.01.2011 to 09.02.2011 the petitioner was under investigation with the NAB for about 90 days. It is stated that the petitioner filed constitutional petition No.D-316/2011 for post arrest bail. Petition was dismissed on 07.02.2011. It is stated that in disregard to the provisions of Section 24 of the National Accountability Ordinance, 1999 the respondents were not able to complete the investigation in the matter nor a reference could be filed against the petitioner within 90 days. Petitioner through his counsel filed another C.P. No.D-1247/2011 for quashment of proceedings initiated by the respondents on the complaint filed by PIA. On 10.05.2011 petitioner was released on bail and petition was disposed of. It is stated that at the time of arrest of the petitioner on 25.01.2011 Mr. Justice (R) Syed Deedar Hussain Shah was the Chairman, NAB, whose appointment was declared as illegal by the Honourable Supreme Court of Pakistan. It is the case of petitioner that from 10.03.2011 till October 2011, the respondent No.1 was without Chairman NAB. It is pleaded that arrest of the petitioner after 10.03.2011 was illegal. Petitioner has stated that it has been reported in daily Dawn newspaper dated 03.11.2011 that newly appointed Chairman, NAB while presiding over his first meeting of the Executive Board on 02.11.2011 approved the reference against the petitioner. Therefore, the petitioner apprehended his arrest and filed petition for pre-arrest bail. He has prayed for the following reliefs:

- (A) Declare that the complaint sent by PIA to the respondents for initiating proceedings against the petitioner was without lawful authority being in violation of section 5(r) of the National Accountability Ordinance, 1999 and the entire proceedings initiated by the respondents as consequence thereof are void ab initio.
- (B) Declare that the decision approved by the respondents in a meeting of the Executive Board held on 02.11.2011 for sending a Reference against the petitioner to the Administrative Judge, Accountability Cour at Karachi Sindh was illegal, void and without jurisdiction.
- (C) That it is case of clear discrimination on the part of the PIA as well as the respondents inasmuch as no other Reference was ever filed by the NAB for recovery of so-called dues of PIA and that it was always civil proceedings through which PIA has recovered such dues. An attempt has been made in the present case to connect a civil dispute into criminal proceedings.
- (D) Quash the investigation against the petitioner being without jurisdiction and violative of the provisions of NAB Ordinance.
- (E) Admit the petitioner on pre-arrest bail pending the final disposal of this petition.
- (F) Any other relief which this Honourable Court may deem fit and proper under the circumstances of the case.

3. In the petition (C.P. No.D-2176/2012) it is prayed as under:-

- (I) To grant bail after arrest to the petitioner in NAB Reference No.20/2011 titled State Vs. Syed Sohail Hassan and others, pending before the learned NAB Court No.I Karachi, against the surety already lying with the Nazir of this Honourable Court in the sum of Rs.500,000/- as well as P.R. Bond in like amount, consequently directing for release of the petitioner on bail after arrest.

(II) Grant such other/better relief which this Honourable Court may deem fit and proper under the circumstances of the case.

(III) Cost of the petition.

4. Mr. Rashed A. Rizvi, learned Advocate for the petitioner contended that complaint sent by PIA to the respondents for initiating proceedings against the petitioner was in violation of section 5(r) of the National Accountability Ordinance, 1999 as amount due has not been determined by competent Court. The decision of sending reference to Accountability Court was illegal. It is also argued that action of PIA in sending complaint to respondent was discriminative, other agents have not been questioned. It is argued that an attempt has been made to convert the civil dispute into the criminal proceedings. It is argued that pre-arrest bail may be granted to the petitioner and proceedings pending before the Accountability Court may be quashed. Mr. Khawaja Shamsul Islam, learned Advocate for petitioner Muhammad Ibrahim Noor argued that allegation against the present petitioner is only that he neglected to perform his statutory duty of collecting/depositing the cheques pertaining to the Airways bills under the facility granted to the principal accused. Mr. Khawaja Shams further contended that name of the petitioner Muhammad Ibrahim is not mentioned in the complaint, he was only Manager Finance. No case is made out against him and argued that concession of the pre-arrest bail may be extended to him. In support of the contentions reliance has been placed on the following reported cases:

1. Air Marshal (Retd.) Waqar Azim and 3 others versus The State (2002 YLR 1811) [Lahore]
2. Mrs. Shahida Faisal and others versus Federation of Pakistan and others (2001 SCMR 294)
3. Asif Sehgal versus National Accountability Bureau (PLD 2003 Lahore 686)
4. Irfan Jabbar versus The State (2004 CrLJ 583)
5. Ahmed Vs. The State (2005 YLR 236)

6. Mian Muhmud Ali Qasuri and others Vs. State (PLD 1963 SC 478)
7. Lakhi Narayan Kundu Vs. the Crown (PLD 1955 DACCA 84)

5. Mr. Noor Muhammad Dayo, learned Prosecutor NAB, argued that the petitioners are responsible for payment of the defaulted amount. It is submitted that the on 25.01.2011 petitioner Syed Sohail Hassan was arrested by the NAB authorities for 90 days, investigation was finalized and papers were sent to the NAB Headquarters, Islamabad for signature of the Chairman NAB but reference could not be signed as office of Chairman, NAB was lying vacant. It is argued that an amount of Rs.127 Million is proved against the petitioners, it is great loss to public exchequer, NAB had no enmity with petitioners. Reference is pending before Accountability Court. Lastly, it is submitted that involvement of the petitioner Muhammad Ibrahim Noor is also established. He had neglected to perform his statutory duty and gave monetary gains to principal accused. Mr. Dayo seriously opposed the petition. In support of his contentions, relied upon following authorities:

1. Faisal Hussain Butt versus The State (2009 SCMR 133)
2. Mrs. Riaz Qayyum versus The State (2004 SCMR 1889)
3. Asif Ayub versus The State (2010 SCMR 1735)
4. The State versus Aziz alias Abdul Aziz (PLD 1985 Kar. 27)
5. The State versus Haji Kabeer Khan (PLD 2005 SC 364)
6. Frida Rohail versus The State (2007 MLD 347)

6. We have carefully heard the learned counsel for the parties, perused the reference No.20/2011 filed by the Chairman NAB against the petitioners/accused and case law cited at bar.

7. For the sake of convenience Para Nos.3 and 4 of reference are reproduced as under:-

“3. That the investigation report further reveals that an agent for a Cargo or Passenger Tickets Sales make an Agency Agreement with IATA, which acts on behalf of member airlines, then member airlines extend credit facilities to the agent. Under the agreement, the agent has to submit the industry Bank Guarantees to IATA Singapore. This condition is to cover any possible default. M/s. Cargo Aids was required to submit the due Sales Report for period ending on September 15, 2007 alongwith due cheques. However, the Sales Report and cheques were not delivered to District Sales Officer, Karachi till October 02, 2007. However, 4 cheques deposited on October 03, 2007 viz cheque No.9941161 dated 01.10.2007 of Rs.9,528,770/- cheque No.9941162 dated 01.10.2007 of Rs.15,426,315/-, cheque No.9941175 dated 17.10.2007 of Rs.13,882,510/- and cheque No.994116 dated 17.10.2007 of Rs.7,878,608/- totaling Rs.46,716,203/- drawn on Allied Bank Ltd., SMS Branch, Karachi were dishonoured. The agent was given notice dated October 10, 2007 for making outstanding payment but they did not pay and subsequently, the agent was declared s defaulted by PIAC and IATA.

4. That the Investigation Report reveals that the accused No.1, 2 and 3 were not depositing the amount duly collected by them for shippers on behalf of PIA and thereby caused loss to PIAC in connivance with Aftab Ahmed (accused No.4) and Ibrahim Noor (Accused No.5) employee of PIAC who failed to perform their duty and gave monetary gains to the accused No.1, 2 and 3. The aggregate amount of loss was calculated by PIAC Management which is to the tune of Rs.127.845 Million.”

8. As regards to the jurisdiction of the High Court with regard to the grant of pre-arrest bail in National Accountability Ordinance 1999, it has been held in the case of titled the State versus Haji Kabeer Khan (PLD 2005 Supreme Court 364), that the High Court would exercise its powers sparingly in rare and exceptional circumstances for valid reasons. Relevant portion of the judgment is reproduced as under:-

“9. Now turning towards the case arising out of Writ Petition No.20214 of 2002 wherein respondent had sought bail before arrest in Reference No.38 of 2002. It is to be noted that under the NAB Ordinance there is no provision for grant of bail before arrest,

therefore, this Court while examining the vires of 9(b) of the NAB Ordinance in the case of Khan Asfandiyar Wali (ibid) took view that High Court shall exercise this power sparingly in rare and exceptional circumstances for valid reasons to be recorded in writing. In this behalf reference can also be made to the case of Meeran Bux v. The State PLJ 1986 (sic) 526 and Murad Khan v. Fazal-e-Subhan and another PLD 1983 SC 82. As such we are of the opinion that the powers for grant of bail conferred by this Court has to be exercised strictly keeping in view the observations made therein but it seems that the learned High Court had not recorded reasons indicating the exceptional circumstances for exercising extraordinary constitutional jurisdiction in favour of respondent particularly in the case in which the accused had not been arrested and no ground of malafide for bail before arrest has been attributed to the prosecution in the memo of petition.

Besides it respondent has failed to bring his case within the said principles, as such he was not entitled to bail before arrest as it has been held in the case of Malik Zafar Abbas v. Agha Raza Abbas Qazilbash and another PLD 2002 SC 529. Therefore, for this added reason, impugned order dated 18th December 2002 in Writ Petition No.20214 of 2002 is not sustainable in law.

Thus for the foregoing reasons Civil Petition Nos.99-L and 100-L of 2003 are converted into appeals and allowed as a result whereof order dated 18th December 2002 in both the petitions is set aside. Before parting with the judgment we may observe that the Accountability Court may dispose of the reference pending against the respondent expeditiously in the interest of justice.”

9. From perusal of Reference No.20/2011 prima facie, it appears that documentary evidence has been collected against the petitioners/accused Syed Sohail Hassan showing that he was not depositing the amount duly collected by him and apparently he has committed willful default as defined in section 5(r) of National Accountability Ordinance, 1999. It is admitted fact that 04 cheques were issued and same were dishonoured and loss was caused to PIAC to the tune of Rs.127.845 Million. No mala fide has been attributed against prosecution. Prima facie, an offence of corruption and corrupt practices as envisaged under Section 9(a) of the National Accountability Ordinance, 1999 is made out. It may be mentioned here that learned Accountability Court No.I after receipt of Reference No.20/2011 has framed charge against the petitioners/accused Syed Sohail Hassan, Aftab Ahmed and Muhammad Ibrahim Noor and evidence of 4 prosecution witnesses has been recorded. The contentions of the learned counsel

for the Petitioner/accused Syed Sohail Hassan that he has been falsely involved in this case and willful default has not been adjudicated by competent Court can only be determined by the trial Court where case has proceeded as no elaborate sifting of evidence can be made at the time of deciding the bail application because appreciation of evidence is primary function of trial Court but only tentative assessment of the same is to be made by this Court. Rightly reliance has been placed upon the case of Mrs Riaz Qayyum versus The State (2004 SCMR 1889), which is reproduced as under:

“It is settled principle of law that an elaborate sifting of evidence cannot be made at the time of deciding bail application but only tentative assessment of the same is to be made. Thus, prima facie there appears to be a reasonable ground disentitling the petitioner’s husband, namely, Khalifa Abdul Qayyum, to the concession of bail.”

10. Thus, prima facie there appear to be reasonable grounds to connect the petitioner Syed Sohail Hassan in this case, hence, he is not entitled to grant of pre-arrest bail. Consequently, interim pre-arrest bail already granted to him is hereby recalled, with direction to surrender before trial Court.

11. However, case of petitioner Muhammad Ibrahim Noor is distinguishable from the case of co-accused Syed Sohail Hassan as allegation against petitioner Ibrahim Noor was that he neglected to perform his statutory duties and gave monetary gains to accused Nos.1 to 3. Learned Special Prosecutor NAB could not explain which statutory duty petitioner failed to perform. Apparently, no financial gains have been availed by the petitioner Muhammad Ibrahim and he had initiated the case for recovery of defaulted amount from the accused persons. Connivance of applicant Muhammad Ibrahim with co-accused Syed Sohail Hassan and others and his involvement in the case is yet to be determined at trial. Prima facie, case against applicant/accused Muhammad Ibrahim requires further inquiry. For above stated reasons, interim pre-arrest bail already granted to the petitioners/accused is hereby confirmed on same terms and conditions. However, prosecution would be at liberty to apply for cancellation of bail,

granted to applicant/accused Muhammad Ibrahim if some tangible evidence is brought on record against him during trial.

12. Needless to mention here that observations made herein above are tentative in nature, learned Accountability Court No.1 shall not be influenced by such observations while deciding the case on merits.

JUDGE

JUDGE

Gulsher/PA