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**IN THE HIGH COURT OF SINDH, KARACHI**

Present: **Mr. Justice Ahmed Ali M. Sheikh**  
**Mr. Justice Muhammad Karim Khan Agha**

**Cr. Accountability Appeal No. 10/2012**

· Noor Qadir

V

National Accountability Bureau

Date of hearing	10.02.2016
Date of judgment	31.03.2016
Appellant	Through Mr. Shahab Sarki, advocate
Respondent	Through Noor Muhammad Dayo, ADPG, NAB

**JUDGMENT**

**MUHAMMAD KARIM KHAN AGHA, J:-** The Appellant in the above appeal has challenged the order dated 29.02.2012 passed by Accountability Court No.IV, Sindh, Karachi, whereby the Appellant was convicted under section 15 of the National Accountability Ordinance 1999 (NAO) where under the Appellant was disqualified for ten (10) years from the date of the order from holding public office or for seeking or from being elected, chosen, appointed or nominated as member or representative of any public body or any statutory or local authority or any service of Pakistan or of any province. It was also ordered that he shall also not apply for or be granted or allowed any financial facilities in the form of any loan or advance or other financial accommodation by any bank or financial institutions owned and controlled by the government for a period of ten (10) years from the date of his conviction.

2. The allegations against the appellant in brief as per Reference No. 24 of 2003 are that an FIR No. 10/1996 was lodged by FIA/SIU Islamabad on a complaint made by Tahir Akhtar Khan Vice President/Zonal Chief National Bank of Pakistan (the Bank)(which was later transferred by order dated 02-08-2003 from the Special Court (offenses in Banks) Sindh on application by the Chairman NAB under S.16(A)(a) NAO to the Accountability Court

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after it had already been challaned by the FIA under S.409,420,and 109 PPC) wherein it was proceeded with by NAB by way of reference 24/2003) stating therein that M/s. Naya Daur Motors (the Company) (formerly Kandawala Industries) which originally was a public enterprise owned by the Government of Pakistan and functioning as a unit of Pakistan Automobile Corporation (PACO) was extended finance facilities which were renewed and extended from time to time by the Bank subject to security being provided by the Company. That on or about 12.01.1993 the Company was privatized through the Privatization Commission Ministry of Finance Govt. of Pakistan under an agreement executed between PACO, the parent body of the Company and Farid Tawakal and under the said agreement 90% of the total paid up capital of the Company owned by PACO was transferred to the successful bidder Farid Tawakal. After disinvestment of the Company as a public sector unit and its privatization and transfer to private sector by sale of its shares to Tawakal Group the status of the Company as a company limited by shares and incorporation under the Companies Act, 1913 or Companies Ordinance, 1984 continued and there was no breakage in continuity of the Company due to privatization as only the shares changed hands. All the liabilities of the Company owed to the Bank continued as before and the securities held by the Bank continued to be alive and enforceable as before. The Company through its new management acknowledged its liability of Rs.124.916 Million against its cash finance account maintained with the Bank vide its letter dated 8.11.93. The Company defaulted/defrauded in the repayment of its dues in spite of repeated reminders and demands made in this behalf by the Bank.

3. The Company became indebted to the Bank in the sum of Rs.14,86,24,995.15 as on 30.09.1994 and it was further alleged that the Company removed/sold the hypothecated stock (which was the Banks security) without adjusting its amount in the account and without the knowledge or consent of the Bank. It was alleged that the Company had intentionally disposed of the stock and misappropriated the money without repaying the finance facilities which it had availed from the Bank and had defaulted in repaying the same.

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4. The Appellant was a part of the management of the Company and he along with others was charged on 01.12.2006 for the companies default/fraud as narrated in the above paragraphs in the following terms:

"7. That the company has intentionally disposed off the stocks and have misappropriated the money and in breach of the terms of letter of hypothecation failed to adjust its account from the sale proceeds. Thus you accused No.1 being Chairman of Tawakal Group of Companies and you accused No.2 (**the Appellant**) being Director of Naya Daur Motors (Pvt.) Limited with common intention, collusion, connivance and abetment with fraudulent intention, committed fraud jointly and severally and disposed off the stocks and have misappropriated the money and in breach of the terms of letter of hypothecation failed to adjust its account from the sale proceeds thus you have defrauded the bank by selling the hypothecated stocks without bank's knowledge/consent and thereby you have committed the offence of criminal breach of trust and misappropriation of property under Section 405/109 PPC read with Section 9 (a)(iii) and (x) of National Accountability Ordinance, 1999 read with Schedule thereto, punishable under Section 10 of National Accountability Ordinance, 1999 within the cognizance of this Court."

5. An amended charge was framed on 04.8.2011 as under:

"6. That you accused above named (**including the Appellant**) and the absconding accused have disposed off the stocks and have misappropriated the money in breach of the terms of letter of hypothecation and failed to adjust its account from the sale proceeds, thus you accused Abdul Qadir Tawakal, being Chairman of Tawakal Group of Companies, accused **Noor Abdul Qadir Tawakal (the Appellant)** and Muhammad Fareed Tawakal being directors of M/s. Naya Daur Motors (Pvt.) Limited with your common intention, inclusion and in connivance with each other and abetment committed fraud jointly and severally and with fraudulent intention disposed off the stocks hypothecated with the bank and have misappropriated the money in breach of the terms of letter of hypothecation and failed to adjust its account from the sale proceeds thus you have defrauded the bank by selling the hypothecated stocks without bank's knowledge or consent and thereby you have committed the offence of Criminal Breach of Trust and misappropriation of property under section 405/109 PPC read with Section 9(a)(iii) and (x) of the National Accountability Ordinance, 1999 within the cognizance of this Court."

6. On 23.09.2011 the matter was fixed for prosecution evidence when P.W. Tariq Akhtar Khan appeared in Court and submitted

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that the amount involved in the reference had been recovered by the Bank. He placed on record written statement and certain documents in this regard upon which report was called from the National Accountability Bureau (NAB) and learned prosecutor filed a statement which, amongst other things, stated that the amount involved in the reference had been recovered by the Bank and therefore the accused may be convicted under S.15 NAO.

7. Accordingly as mentioned earlier the Accountability Court convicted the Appellant under S.15 NAO by order dated 29-2-12 (the impugned order).

8. Learned counsel for the Appellant argued that the impugned order is against law, justice and equity and the Appellant has been convicted and disqualified under section 15 of the NAO illegally as section 15 of the NAO is not a schedule offence. He further contended that a person cannot be convicted under it as section 15 is not itself an offense but rather a sentencing section.

9. Learned counsel further submitted that the impugned order indicated that the Appellant had been convicted through a plea bargain but this was not the case as the Appellant had never entered into a plea bargain under S.25 NAO. In this respect he placed reliance on **Syed Ali Nawaz Shah V the State** (PLD 2003 SC 837)

10. He also submitted that the prosecution had not produced a single witness in the trial court after or before framing the charge in support of their allegations and the Appellant could not have been convicted without producing witnesses in the court. This was more so since the Appellant had not recorded his S.342 Cr.PC statement which was an essential requirement of a criminal trial and no conviction could be handed down in the absence of such a statement.

11. For all the above reasons he submitted that the impugned order had not been lawfully passed and as such should be set aside by this Court

12. On the other hand learned ADPGA on behalf of NAB supported the impugned order and submitted that the Appellant

had rightly been convicted under S.15 NAO by the Accountability Court based on the facts and circumstances of this case.

13. We have carefully perused the record and considered the submissions of learned counsel at the bar along with the relevant law and authorities cited by them.

14. On a perusal of the record it would appear that initially this case was challaned by the FIA and then transferred to the NAB on an application by the Chairman under S.16 (A) (a) NAO. A charge, then amended charge, as alluded to above was framed by the Accountability Court. As such the only option open to the accused was to either enter into a plea bargain or proceed with the trial until its conclusion.

15. According to the NAB prosecutor at trial although all the amounts due from the Appellant had been recovered through civil proceedings the Appellant had still committed the offense of willful default and as such he was liable to punishment under S.15 NAO. Since it is not the main issue in this Appeal in this Judgment we do not intend to deal with the question of whether or not the Appellant was charged with willful default or not under the NAO.

16. Likewise in the impugned order at Para 15 NAB's statement is reproduced whereby it is confirmed that the amount owed by the Appellant had been fully adjusted and it was submitted that the Hon'ble Court may decide the case in light of S.15 NAO that the accused person who has availed the benefit shall also have been deemed to have been convicted for an offense under the NAO.

17. The learned Judge in the impugned order at para 15 also stated that since admittedly the claim of the NAB in the present reference has already been satisfied in civil suit by the Company and the accused persons cannot be held responsible for payment of the same to the Bank in the present proceedings further proceedings of the present reference would be a futile attempt and would be an abuse of the process of court.

18. However by placing reliance on a decision of the Sindh High Court in Cr. Accountability Appeal No.10/2011 the learned Judge

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went on to convict the Appellant under S.15 on the following basis at para 16 of the impugned order which reads as under:

"16. Section 15 of the National Accountability Ordinance 1999 is a deeming clause which provides the conviction in which the accused persons are deemed to be convicted. In this case the recovery has been made. The National Accountability Bureau also consented not to proceed further with this reference. In the circumstances deeming conviction under section 15 is required to be awarded. The accused are thus convicted under section 15 of the National Accountability Ordinance 1999."

19. At the outset it is important to consider S.15 NAO which provides as under:

"S.15. (a) Where an accused person is convicted of an offence under section 9, of this Ordinance he shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he is released after serving the sentence, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province.

**Provided that any accused person who has availed the benefit of sub-section (b) of section 25 shall also be deemed to have been convicted for an offence** under this Ordinance, and shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he has discharged his liabilities relating to the matter or transaction in issue, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province.(bold added)

(b) Any person convicted of an offence under section 9 of this Ordinance shall not be allowed to apply for or be granted or allowed any financial facilities in the form of any loan or advances or other financial accommodation by any bank or financial institution owned or controlled by the Government for a period of 10 years from the date of conviction."

20. With regard to the commission of the offense both the charge and amended charge in essence state as under:

"thereby you (i.e. **the Appellant**) have committed the offence of Criminal Breach of Trust and misappropriation of property under section 405/109 PPC read with Section 9(a) (iii) and (x) of

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the National Accountability Ordinance, 1999  
within the cognizance of this Court."

21. The offenses for which the Appellant has been charged with are:

- (a) S.405 PPC which is criminal breach of trust
- (b) S.109 PPC which is punishment for abetment if the act abetted is committed in consequence and where no express provision is made for its punishment.
- (c) S.9(a)(iii)NAO is the commission of the offense of corruption or corrupt practices by dishonestly or fraudulently misappropriating or otherwise converting for his own use, or for use of any other person, any property entrusted to him, or under his control, or willfully allows any other person so to do
- (d) S.9 (a) (x) is the commission of the offense of corruption or corrupt practices by committing the offense of criminal breach of trust as defined in S.405 PPC 1860 with regard to any property including money or valuable security entrusted to him by members of the public at large.

22. Unless these offenses were proved by admissible, cogent and reliable evidence beyond a reasonable doubt by the prosecution the Appellant could not have been convicted at trial.

23. From the record it appears that no trial took place since no evidence was lead by the prosecution against the Appellant after framing the charge, the Appellant's S.342 Cr.PC Statement was not recorded and he had no opportunity to call defense witnesses. Furthermore, since no evidence was lead there was no possibility of the Appellant being convicted for any offense let alone those for which he was charged.

24. Therefore since in our view the Appellant was not formally convicted after the recording of evidence the first part of S.15 (a) as set out above will not be applicable to him

25. It would therefore seem that the only possibility is that the Appellant was convicted under the proviso to S.15 (a) especially keeping in view the language used at para 16 of the impugned order as was earlier reproduced.

26. The proviso to S.15 (a) NAO as reproduced above and again set out below for ease of reference therefore becomes of particular importance:



15(a) **Provided that any accused person who has availed the benefit of sub-section (b) of section 25 shall also be deemed to have been convicted for an offence** under this Ordinance, and shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he has discharged his liabilities relating to the matter or transaction in issue, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province.(bold added)

27. Keeping in view the proviso to S.15 (a) NAO we now need to consider S.25 (b) NAO which for ease of reference is set out below:

S.25 (b) Where at any time after the authorization of investigation, before or after the commencement of the trial or during the pendency of an appeal, **the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused.**(bold added)

28. It is apparent on a bare reading of S.25 (b) (commonly referred to as a plea bargain (PB)) that the following ingredients must be present:

- (a) the case must be past the inquiry stage and at the investigation stage or beyond and
- (b) the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under the NAO i.e. S.9 and
- (c) the Chairman, NAB, may, in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary and
- (d) if the accused agrees to return to the NAB the amount determined by the Chairman NAB on the terms and conditions, if any, laid down by the Chairman NAB, then
- (e) the Chairman, NAB shall refer the case for the approval of the Court, or as the case may be, the

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Appellate Court and for the release of the accused and

- (f) the concerned court must approve the Chairman NAB's agreement with the accused for repayment of an agreed amount if necessary on agreed terms and conditions

29. Only if all the ingredients in the order (a-f) as mentioned in para 28 above are met will the proviso to S.15 (a) be applicable. Namely the Appellant would **be deemed to have been convicted for an offence** under this Ordinance, and shall forthwith cease to hold public office, if any, held by him and further he shall stand disqualified for a period of ten years, to be reckoned from the date he has discharged his liabilities relating to the matter or transaction in issue, for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province.(bold added)

30. In this respect reliance is placed on **Syed Ali Nawaz Shah V the State** (PLD 2003 SC 837) where the Hon'ble Supreme Court held as under at P.487

"12. The examination of the statutory provision on the subject in the light of the verdict given by this Court would reveal that policy of law is that **plea bargain must be executed in writing in plain and express words showing the intention to avail the benefit of section 25 of the Ordinance which must be voluntary and free of an element of threat, pressure, compulsion and duress.** The Court may direct the discharge or release of an accused person during the investigation/inquiry or at any subsequent stage before or after the commencement of the trial if he enters into a plea bargain which is a compromise in the nature of compounding the offence. **The plea of bargaining being a guilty plea, the agreement of the accused with prosecution must contain the essential elements of offer and acceptance in express words and, the Court must pass a speaking and proper order of its approval.**" (bold added)

31. And at P.848 as under:

"In the present case, the perusal of record would show that the appellants did not enter into an express agreement with the prosecution for disposal of case against them in terms of section 25 of the Ordinance and the essential element of plea bargain of offer and acceptance being missing, the transaction would not be given the status of plea bargain in terms of section 25 of the Ordinance. **We thus conclude, that plea**

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**bargain must be made part of the judicial record in the form of offer and acceptance through an express agreement containing the terms and settlement."**(bold added)

32. In essence therefore for a plea bargain under S.25 (b) NAO to be legally recognized apart from the conditions in para 28 all being met there must be a clear written offer by the accused to return the assets or gains made by him, a clear written acceptance of that offer by the chairman NAB and a speaking order by the Court approving the PB being entered into by the accused and the Chairman NAB.

33. We have scanned the record and have not found any written offer of a PB by the Appellant, any written acceptance of that offer by the Chairman NAB and no approval of the PB agreement between the Appellant and the Chairman NAB by the Accountability Court. The above position has not been disputed by learned ADPGA on behalf of NAB. It appears that once the Accountability Court was informed that the defaulted amount had been repaid through a recovery suit it simply deemed the Appellant to be convicted, presumably under S.25 (b) NAO, and applied the consequences of that sub section to him as per the proviso to S.15 (a) NAO.

34. In our view, since the required ingredients i.e. written offer by accused, written acceptance by chairman NAB and Court order of approval, were not present the case in hand did not amount to a plea bargain under S.25 (b) NAO and as such the consequences as mentioned in the proviso to S.15 (a) will not be applicable to the Appellant.

35. As such the appeal is allowed, the impugned order is set aside and the matter is remanded back to the Accountability Court to proceed with the reference against the Appellant on merits in accordance with law.

Dated: 31-03-2016