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IN THE HIGH COURT OF SINDH KARACHI

Present:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Mohammad Karim Khan Agha

CONSTITUTION PETITION NO.D-3624 OF 2016

Syed Rashid Hussain Rizvi
Petitioner

Through Mr. Kumail Ahmed
Sherazi, advocate

The Chairman, National
Accountability Bureau &
03 others Respondents No.1&2

Through Mr. Muhammad Altaf
Special Prosecutor, NAB

Karachi Metropolitan Corporation
Respondent No.3

Through Mr. Ashfaq Rafique
Janjua, Standing Counsel.

Date of Hearing:

23.11.2016

Date of Order:

29.11.2016

ORDER

Mohammed Karim Khan Agha, J. This petition has been filed by Syed Rashid Hussain Rizvi (the petitioner) for grant of post arrest bail on statutory grounds in National Accountability Bureau (NAB) Reference No.27 of 2015 The State v. Fareed Ahmed Yousafani & others which was filed by the NAB at Karachi on 12-09-2015 on account of the petitioner's and other co-accused's involvement in corruption and corrupt practices under the National Accountability Ordinance 1999 (NAO). By Order dated 18-12-2015 the petitioner along with some other co-accused had been declined post arrest bail on merits by this Court. The petitioner did not approach against the aforesaid order to the Hon'ble Supreme Court

2. In essence the allegation against the petitioner as per reference is that he was one of the officers/officials of Lines Area Redevelopment Project (LARP) who in connivance with other accused made illegal bifurcation of large commercial auction plots into small plots, then amalgamated the same and leased them out to private parties at the rate of Rs. 200 per sq. yard instead of being auctioned at a reserve rate of Rs. 50,000/- per sq. yard. In particular the petitioner as Deputy Director Planning (LARP) at the relevant time carried out various planning activities for 32 yard plots and approved the site plans for all the plots that were fraudulently carved out of large auction plots. This amounted to a

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misuse of authority which caused a colossal loss of RS 363,200,000. An additional loss of RS 36,038,196 was caused to the national exchequer on account of non recovery of non utilization fee against plot #MC 06. Thus a total loss of RS 399.238M was caused to the national exchequer.

3. The specific allegation against the petitioner as disclosed in the said reference is that the petitioner as Deputy Director Planning (LARP) at the relevant time carried out various planning activities for 32 yard plots and approved the site plans for all the plots that were fraudulently carved out of large auction plots.

4. At the outset learned counsel for the petitioner made it clear that he was only pressing this petition on statutory grounds. He submitted that the petitioner was entitled to statutory bail since as per order sheets he had been in confinement for around 17 months and no delay had been caused on his part or by any other person acting on his behalf in completing the trial. In addition he further submitted that co-accused Atta Abbas Zaidi who had played a similar role to the petitioner in the land scam had been granted bail on hardship grounds vide **order dated 03-10-2016 by this Court in CP D 1865 of 2016 Atta Abbas Zaidi V Chairman NAB** and as such he was entitled to similar treatment and should therefore also be enlarged on bail on hardship grounds.

5. Learned counsel for the petitioner in support of his submissions also placed reliance on the cases of **Khan Asfand Yar Wali v. Federation of Pakistan**. (2001 PLD S.C. 607), **Muhammad Bashir v. The State** (1987 P.Cr. L.J. 230), **Muhammad Saeed Mehdi v. The State** (2002 SCMR 282), **Mian Manzoor Ahmed Watto v. The State** (2000 SCMR 107), **Sanjay Chandra & others v. Central Bureau of Investigation-Principle of granting bail**. (2012 SCMR 1732 S.C, India), **Makhdoom Javed Hashmi v. The State** (2003 P. Cr. L. J. 266), **Muhammad Afzal Butt v. The State** (2015 SCMR 1696), **Muhammad Javaid v. The State** (2003 P.Cr.L.J. 273), **Munawar Hussain Manj v. The State** (2000 SCMR 1585), **Imran Amin v. The State** (2002 MLD 1416), **Muhammad Bashir v. The State** (1987 P.Cr.L.J.), and **Amir v. The State** (1991 P.Cr.L.J. 534).

6. On the other hand learned special prosecutor NAB opposed the grant of bail on the ground of statutory delay as according to

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him, as indicated by the order sheets, the petitioner's counsel had on 4 separate occasions absented himself from the proceedings and had caused the delay in the completion of the trial and as such the petitioner was not entitled to the grant of statutory bail and his petition may be dismissed.

7. We have considered the submissions of learned counsel for the parties, perused the record, considered the relevant law and case law cited by them at the bar.

8. Although it appears that both this Court and other High Courts have in the recent past been regularly entertaining petitions for grant of bail on statutory grounds it would seem that this ground is no longer open to petitioners in NAB cases. This position was recognized in the above mentioned case of **Atta Abbas Zaidi** (Supra) which the petitioner was primarily relying upon. In this case it was recognized that in NAB cases bail was only available in hardship cases as emphasized and reiterated by this Court in the later case of **Syed Salahuddin V Federation of Pakistan in CP 3863 of 2016 dated 14-11-2016**.

9. After **Atta Abbas Zaidi's case** the detailed reasons for the Supreme Court only allowing bail on hardship grounds in NAB cases in the case of **NAB V Bakhat Zameen** (CP 1542 of 2016 dated 26-08-2016) have now become available. Since **NAB V Bakhat Zameen** (Supra) is a Judgment passed by a 3 member bench of the Hon'ble Supreme Court and is the latest Supreme Court authority in respect of statutory bail and bail on hardship grounds in NAB cases we set out below its main findings which will assist us in deciding the petition in hand.

JUDGMENT

"Anwar Zaheer Jamali, C.J. – Through this petition, the Chairman, NAB has sought cancellation of bail granted to the respondent No.1 by the Peshawar High Court, Peshawar vide its impugned order dated 03.03.2016, passed in Writ Petition No. 3447-P/2015.

2. We have heard the arguments of learned Special Prosecutor NAB on behalf of the petitioner and learned ASC for respondent No.1. The perusal of material placed on record reveals that respondent No.1 is the only nominated accused in Reference No.3 of 2015, under section 18(g), read with section 24 of the National Accountability Ordinance, 1999 (hereinafter referred to as the "Ordinance of 1999"), submitted by the Director General, NAB before the Administrative Judge, Accountability Courts, KPK

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Peshawar on 09.1.2015, wherein on 04.02.2015 he has been charged as under:-

"Firstly that you in connivance with others prepared 09 (nine) bogus stamp papers of rent agreements for a period of three years commencing from 2008 to September 2011 with M/s. Jan & Bangash Hotel Kohat Road, Peshawar claiming thereby a payment of Rs. 2,43,71,712/- that trainees in the said hotel stayed only for four months at the actual monthly rent of Rs.5,00,000/- including bus charges and that you accommodated students at small houses in different areas of the city at nominal rents and thus misappropriated an amount of Rs. 1,76,71,254/- in the head of accommodation.

Secondly that you in connivance with your co-accused Ali Akbar, Younas Shah (who entered into plea-bargain with the NAB Authorities) and Nasim Jan (who became approver and was granted conditional pardon) also prepared bogus invoices of J&S Enterprises. Irshad Traders and Yasir Enterprises claiming expenditure of Rs. 1,39,62,027/- but you cannot justify the amount spent on these fake invoices that your liability after deducting the liability of your co-accused comes to Rs. 1,18,67,723/- in the head of procurement.

The vocational training part of the FRDP was outsourced by Project Director to you through Memorandum of Understanding (MOUs) and amount was released in full to your account but you misappropriated / embezzled the fund and caused a total loss of Rs. 2,95,38,977/- to the Government and you thereby committed the offence of corruption and corrupt practices within the meaning of section 9(a)(vi) of the National Accountability Ordinance, 1999 punishable under section 10 of the said Ordinance and schedule thereto and within my cognizance."

3. The plea for grant of bail on merits raised by respondent No.1 in his earlier Writ Petition No.3545-P/2014 was rejected by the High Court vide its order dated 28.4.2015, which is available at Pages 19 to 23 of the Court file and speaks for itself. On 10.10.2015, another petition under Article 199 of the Constitution for grant of bail was moved by respondent No.1 on the ground of statutory delay. The learned Division Bench in the Peshawar High Court, while admitting respondent No.1 to bail through the impugned order, noted down that the respondent No.1 has remained in custody since 15.9.2014 and during this period the prosecution has only examined 14 out of 31 witnesses, while during ten months period of trial, respondent No.1 has obtained only six adjournments. Thus, he was entitled for grant of bail on the ground of statutory delay of over one year, as the offence for which he was charged was not punishable with death penalty.

4. Before reverting to the facts of the case as regards delay or otherwise in the proceedings of the trial before the Accountability Court and the merits of the findings of the learned Division Bench recorded in the impugned order, **we would like to make it clear that the provisions of section 497, Cr.P.C. are not as such applicable for the purpose of grant of bail to an accused facing charge/trial under the Ordinance 1999.** However, in appropriate cases, the question of delay in the conclusion of trial, depending upon the facts and circumstances of each case on its own merit, has been considered by the superior Courts on the yardstick of hardship vis-à-vis scheme of Articles 4 and 15 of the Constitution. Thus, *ipso facto*, application of principles for grant of bail embedded in section

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497, Cr.P.C, including the provision of statutory delay, is devoid of any legal force.

5. Reverting to the facts of the present case, we have noticed that the observations of the learned Division Bench that respondent No.1 has been attributed only six adjournments during the ten months period of trial before the Accountability Court, is result of patent misreading of record, inasmuch as from the perusal of Court diaries of the Accountability Court, which have been placed on record on behalf of the petitioner, through C.M.A. No.4807/2016, it is evident that after framing of charge on 04.2.2015, from 06.2.2015, respondent No.1 has been instrumental in seeking adjournments on 16.12.2015, 25.2.2015, 06.4.2015, 20.6.2015, 13.7.2015, 28.8.2015, 09.9.2015, 22.9.2015, 20.10.2015, 29.10.2015, 06.11.2015, 19.11.2015, 01.12.2015, 12.12.2015, 02.1.2016, 27.1.2016, 18.2.2016 and 29.2.2016 (i.e. eighteen dates of hearing). Not only this, but even after grant of bail through the impugned order, he continued with such practice by seeking adjournments on 15.3.2016, 30.3.2016, 18.5.2016 and 02.6.2016, while order sheets of subsequent dates are not available before us. **It will not be out of context to mention here that even otherwise the practice of making mathematical calculations, for ascertaining the actual period of delay attributable to the prosecution or the accused for the purpose of computing the period of statutory delay has not been approved by this Court, as even delay on few dates of hearing at the instance of an accused can be fatal for this purpose, irrespective of the actual time wasted on that account. More particularly in the cases where accused is being tried under the Ordinance 1999, which is a special law and specifically bars grant of bail to an accused by virtue of its sections 3 and 9(b), which respectively read as under:-**

Section 3:

"The provisions of this Ordinance shall have effect notwithstanding anything contained in any other law for the time being in force."

Section 9(b):

"All offences under this Ordinance shall be non-bailable and, notwithstanding anything contained in section 426, 491, 497, 498 and 561A or any other provision of the Code, or any other law for the time being in force no Court shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance."

6. The above discussion clearly goes to show that grant of bail to respondent No.1 through impugned order of the learned Division Bench of the Peshawar High Court, Peshawar is result of misreading of record of the proceedings before the NAB Court as well as erroneous understanding of relevant provisions of law in this regard. Thus, mere fact that in case an accused has remained in custody for a period of 13 months will not be sufficient to hold that it is a case of hardship within the parameters as defined by this Court in this regard in the various earlier pronouncements. For further guidance in this regard, reference can be made to the cases of Khan Asfandiyar Wali v. Federation of Pakistan (PLD 2001 SC 607) and Himesh Khan v. The National Accountability Bureau, Lahore (2015 SCMR 1092). (bold added)

10. What appears to be clear, in our view, from the above Judgment is that (a) bail on account of statutory delay is **not**

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available in NAB cases; (b) only bail on hardship grounds is available in terms of delay in NAB cases, (c) mathematical calculations in determining the extent of delay based on adjournments sought may not be particularly relevant since a delay on even a few dates may be fatal to the hardship application, (d) usual grounds for hardship will apply which generally involve, as mentioned in **Atta Abbas Zaidi's case**, a substantial period of time being spent in custody with delay not being caused by the petitioner (e) the grounds of what amounts to hardship in NAB cases must be cautiously and strictly construed as the NAO is a special law passed in order to combat a particular evil which is afflicting the country, namely corruption and (f) each application for the grant of bail on hardship grounds must be judged on its own particular facts and circumstances.

11. It is true that the facts and circumstances in **Atta Abbas Zaidi's case** are similar to this case. However they are **not identical** and even otherwise the Hon'ble Supreme Court in **NAB V Bakhat Zameen's case** (Supra), which decisions this Court is constitutionally bound to follow, has **after** the decision of this Court in the case of **Atta Abbas Zaidi** further enunciated the law on statutory bail/hardship grounds in NAB cases.

12. Turning to the particular facts and circumstances of this case. The petitioner has been in custody for around 17 months. The diary sheets show that he has been responsible for at least 4 separate adjournments (only a few of which according to **NAB V Bakhat Zameen** (Supra) may be fatal to his case). After **Atta Abbas Zaidi's case** was decided by this Court it also appears that the situation has changed to some extent in terms of the expedition of the trial proceedings in that 2 out of 10 PW's have now been examined and the prosecution has submitted that it may drop some PW's. Likewise there are now, after plea bargains and bifurcation of the reference, 23 accused as opposed to 38 (which means far fewer cross examinations and as such a speedier trial) and the diary sheets also reflect that the trial is now proceeding on a more regular and faster basis. So even in this respect **Atta Abbas Zaidi's case** is now distinguishable on its own particular facts and circumstances from the current petition although it relates to the same reference.

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13. As such based on the case of **NAB V Bakhat Zameen (Supra)** which came **after** Atta Abbas Zaidi's case and further enunciated the law on the grounds of statutory bail and bail on hardship grounds in NAB cases and the progress which has been made in the trial in the short period of time since **Atta Abbas Zaidi's case** was decided **we reiterate and find that bail on statutory grounds is not available in NAB cases** and find that the petitioner has **not** made out a case for bail on hardship grounds based on the current law and the particular facts and circumstances of this case and as such his petition for post arrest bail on hardship grounds is dismissed.

14. However, in order to avoid the delay in the instant case becoming inordinate, shocking or unconscionable and taking into account the right of the petitioner to an expeditious trial the Accountability Court which is hearing the reference is directed to hear the case on a day to day basis without allowing any adjournments on any flimsy grounds and to complete the trial within 4 months of the date of this order. The office shall immediately provide a copy of this order to the concerned Accountability Court for compliance

Dated: 29-11-2016