

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Naimatullah Phulpoto.
Mr. Justice Mohammed Karim Khan Agha.

C.P. No. D-4960 of 2016
Goharullah

Vs

National Accountability Bureau & others

C.P. No.D-4549 of 2016
Sohail Akbar Shah

Vs

National Accountability Bureau & another

CP No.D-6889 of 2016
Faqr Khan Khoso & others (Hafeez Ur Rehman, Haji Abdul
Razzaik and Shakeel Ahmed Khan)

v.

National Accountability Bureau & others

CP No.D-6887 of 2016
Abdul Rasheed Solangi

v.

National Accountability Bureau & another

Date of hearing:	23-11-2016, 13-12-2016 and 16-01-2016
Date of Order	31-01-2017
Petitioners	Through 1. Dr. Farough Naseem, Advocate and Samiullah Shah Advocate for petitioner in C.P. No.D-4960/2016 2. Mr. Mukesh Kumar Khatri, Advocate and Mansoor Ul Haq Ansari Advocate for petitioner in C.P. No.D-4549/2016. 3. Mr. Rafique Ahmed Kalwar, Advocate for petitioner's in CP No.D-6889/2016. 4.Mr. Malik Altaf Javaid, Advocate for petitioner in CP No.D-6887/2016.
Respondents NAB	Through Mr. Muhammad Altaf Khan, Special Prosecutor NAB.

ORDER

Mohammed Karim Khan Agha, J. By this common order, we propose to dispose of the above petitions filed by petitioner No.1

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(Gorahullah) in CP D 4960/2016 for post arrest bail, petitioner No.2 (Sohail Akbar Shah) in CP D 4549/2016, petitioner No.3 Faqir Khan Khoso, petitioner No.4 Hafeez Ur Rehman, petitioner No.5 Haji Abdul Razzaik and petitioner No.6 Shakeel Ahmed Khan (all petitioners 3 to 6 inclusive are petitioners in CP D 6889/16) and petitioner No.7 Abdul Rasheed Solangi in CP D 6887/2016 for the confirmation of their pre arrest bail granted by this Court all of which petitions stem from National Accountability Bureau (NAB) Reference No.52/2016 State v. Goharullah and 11 others which has been filed in connection with the offences of corruption and corrupt practices under the National Accountability Ordinance 1999 (NAO) which is pending before an Accountability Court in Karachi.

2. The factual position as set out in the Reference are that NAB on receipt of a complaint against Goharullah, President Chamber of Commerce Hyderabad and Director of Fateh Textile Mills Ltd. (Fateh) Hyderabad for illegally selling coal reserved for power plant in the open market in connivance with Government Officials, thereby causing loss to the National Exchequer, an inquiry was authorized by NAB under the NAO into such allegations which after inquiry was subsequently up-graded into an investigation on 22.06.2016.

3. That the investigation revealed that the Government of Sindh (GOS) had kept reserved an area of 8626 acres in compact Block of Lakhra Coalfield District Jamshoro for power generation (the land). A MoU was signed on 15.04.2005 among M/s. Fateh Group, M/s. Ukrinterenergo (Ukraine), Sindh Coal Authority (Pakistan) (SCA) and Services, Research and Development Institute "LvovTEP" for the "Feasibility Report for Development of an integrated Coal Mine and Coal Fired Power Plant and for "Development of Washing Plant" at Lakhra in District Jamshoro, whereby Fateh Group agreed to develop the coal mining leading to an integrated coal fired Power Plant. The accused No.1/**petitioner No.1 (Goharullah)** to 4 being Directors of Fateh played an active role in the matter and acts committed in pursuance of above mentioned MoU.

4. In pursuance of MoU dated 15.4.2005, the Fateh Group entered into another MoU with GOS on 17.5.2005 whereby, they were required to install a Power Plant and Washing Plant and to start production of electricity within the period of 5 years from the

date of signing of the MoU. Fateh was also granted exploration license accordingly.

5. In pursuance of above MoU's, the said land was leased out in favour of Fateh on 22.8.2006 whereby **after** meeting with the requirement of plants, they were allowed to sell the surplus coal in open market.

6. **M/s. Fateh installed a used washing plant near super Highway, which was to be installed at mine mouth. The said washing plant was an eye wash in order to falsely show the establishment of washing plant, whereas the Power Plant was not established at all.** (bold added)

7. The accused No.5 namely Manzoor Hussain Memon malafidely issued NOC without approval of the Competent Authority, whereby Fateh was allowed to mortgage the mining lease rights in favour of any bank / financial institution. M/s. Fateh by using said NOC mortgaged the said land with M/s FGBC for US\$ 100,000,000/- **which was not a financial institution and having controlling share of accused No.1/petitioner No.1 (Goharullah).** The mortgage paved the way for FGBC to start litigation and a Suit bearing NO.333/2012 was filed by FGBC for declaration against DG SCA etc.

8. The **accused No.6/petitioner No.2 Sohail Akbar Shah** vide letter dated 04.02.2009 allowed the sale of surplus coal in open market by showing it as a telephonic direction of the Chief Minister / Minister Incharge, which proved incorrect and **accused No.7/petitioner No.7 Abdul Rasheed Solangi** blindly implemented the order of **accused No.6/ petitioner No.2 Sohail Akbar Shah** and allowed sale of surplus coal in open market vide letter dated 13.02.2009 **although the power plant was not established and as such question of surplus coal does not arise.** (bold added)

9. That Mines and Mineral Development Department issued a show cause notice to Fateh on 15.03.2008 on persistent violations of clauses 20 and 21 of Mining Lease Deed. The lease was extended for one year on 11.11.2008 by the Chief Minister and **on failure of Fateh to establish the power plant within the extended time,** another show cause notice was issued and ultimately the lease to Fateh was cancelled on 15.03.2010.

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10. That **accused No.8 to 11/petitioners 3 to 6 (petitioner No.3 Faqir Khan Khoso, petitioner No.4 Hafeez Ur Rehman, petitioner No.5 Haji Abdul Razzaik and petitioner No.6 Shakeel Ahmed Khan)** knowingly and in connivance with **accused No.1/petitioner No.1 (Goharullah)** to 4 (Directors of Fateh) entered into an **illegal agreement** for extraction of coal knowing that this is a gross violation of MOU and lease deed executed between Fateh and the GOS in that Fateh was forbidden from sub-letting the said lease. They all (petitioners 1,2, 3,4,5,6,7 and other accused in the reference) in active connivance with each other **sold the extracted coal in open market in utter violation of MoUs and lease deed, which was basically to be utilized for running of the power plant.** The active connivance of accused No.8 to 11/petitioners 3 to 6 (**petitioner No.3 Faqir Khan Khoso, petitioner No.4 Hafeez Ur Rehman, petitioner No.5 Haji Abdul Razzaik and petitioner No.6 Shakeel Ahmed Khan**) is established, when they challenged the order passed in Civil Suit No.333/2012 instituted by M/s FGBC and **admitted their pecuniary interest in the said land and sharing of RS500 Million with Fateh through accused No.4 Hamid Mehmood Nasir, Director of Fateh Group.**

11. The above accused persons (including petitioners 1 to 7 inclusive) in active connivance with each other **have caused loss to the national exchequer to the tune of RS 2.503 Billion through illegal extraction of coal and its sale in the open market for personal gains** and committed an offence as defined under section 9(a) NAO and punishable under section 10 of the NAO and schedule thereto and hence reference 52/2016 was filed against them on 30-11-2016 before the Administrative Judge Accountability Court at Sindh.

12. Learned counsel for Goharullah (petitioner No.1) in CP No. D-4960 of 2016 who was seeking post arrest bail contended that in he was innocent of the offense as charged, that there was no incriminating evidence against him and, in particular this was a civil dispute which had no criminal aspects and as such did not fall within the jurisdiction of NAB under the NAO. In this regard he took the Court through the various documents which had allowed Fateh to undertake coal mining at Lakhra which, according to him, were all in accordance with the relevant rules and procedures.

Thus, a MOU dated 15-04-2005 between Fateh Group which had been signed on its behalf by petitioner No.1 who was stated to be President of the Fateh Group, Ukrinterenergo (Ukraine), SCA and Science Research and Development Institute (Lviv Tep) for the feasibility Report for the Development of an integrated coal mine and coal fired plant and on the second part for the development of coal mines and washing plant at Lakhra in Dadu District.(1st MOU).As per para 6 of the 1st MOU a 2nd MOU was entered into between SCA, Fateh Group, Ukrinterenergo (Ukraine) and Lviv Tep for feasibility Study for the Development and Establishment of a coal mining and coal washing Plant leading to a power plant upto 200MW at Lakhra Compact Block District Jamshoro Sindh which set out the obligations of the Fateh Group and the SCA in respect of the project. The mines and Mineral Development Department approved the grant of an exploration license to Fateh. The Director General Mines and Mineral Development by letter dated 20-05-2005 approved the grant of a mining lease to Fateh for coal over an area of 8626 acres at Lakhra and offered to grant an exploration license under Sindh Mining Concession Rules 2002 (Division II Part 3) subject to certain terms and conditions which was duly notified by DG Mines Mineral and Development Department on 04-06-2005. The SCA by letter dated 08-06-2005 recommended Fateh's request for a mining lease which was approved subject to the submission of a feasibility study. The feasibility Report was duly submitted. Accordingly by letter dated 14-10-2005 Fateh was offered a mining lease subject to certain terms and conditions by GOS DG Mines and Mineral Development Department. By Notification dated 2005 the GOS DG Mines and Mineral Development Department granted Fateh a mining lease on the terms and conditions as set out in its 14-10-2005 letter and there after a lease deed between GOS DG Mines and Mineral Development Department and Fateh was entered into on 22-08-2006 setting out the various terms and conditions between the parties.

13. According to learned counsel for petitioner No.1 the petitioner No.1 had complied with all terms and conditions of the various letters and leases however this had been disputed by the SCA which had terminated the mining lease which consequently lead to civil litigation between the parties which was still pending before this Court. He stressed that two parts of the agreements

had been fully complied with i.e. development work and the construction of the washing plant and if there had been any default this was only on account of the construction of the power plant which default had been on account of certain circuit magnets not being made available by WAPDA and was due to no fault of Fateh.

14. He further submitted that since November 2013 Fateh has had no control over the leased land because an encroachment incident took place in the lease area for which 2 FIRs were registered whereby land grabbers (petitioners 3 to 6 inclusive) had encroached and taken over the possession of the mines and equipment thereon and also ejected the employees of Fateh from the leased area.

15. Learned counsel justified a large amount of coal reserves being 17 M tons being given to Fateh on account of the large start up capital which it had to incur as well as the cost of building the power plant and as such 17 M tons was not, according to him, an unreasonable allocation under the circumstances especially as Fateh had been given no Government subsidy.

16. As such he reiterated that this was simply a civil dispute between two contracting parties and there was no element of criminality as would bring the matter within the purview of the NAO. He also stressed that all evidence was documentary and thus petitioner No.1 could not tamper with the same and that other co-accused had already been granted pre arrest bail by circuit Court Hyderabad. Thus for all the above reasons petitioner No.1 was entitled to be enlarged on post arrest bail. In support of his contentions he placed reliance on **Mst Fehmida Begum, V Federation of Pakistan** (PLD 2000 Lah 602)

17. Learned counsel for petitioner No.2 (Sohail Akbar Shah) in CP No.D-4549 of 2016 was applying for confirmation of his pre arrest bail which had been granted to him by this court vide order dated 22-08-2016 submitted that petitioner No.2 is a senior Government officer having an excellent service record and reputation and is innocent of any allegation which has been made against him. At the relevant time he was secretary to the Chief Minister of Sindh Syed Qaim Ali Shah who, according to the petitioner No.2, had given him verbal orders to direct the DG Mines

to allow the Fateh Group to extract coal from the coal washing plant and to sell the surplus coal till the functioning of their power plant which verbal order he passed on vide letter dated 04-02-2009 to the DG Mines and Mineral Department GOS. According to him such letter was only sent due to the verbal directives which had been given to him by the Chief Minister and had not been issued solely on his own accord. He attempted to shift the blame to the chief Minister especially as the Chief Minister had initially refused to cancel the mining lease of petitioner No1/Fateh and instead extended it for a period of one year despite their alleged non performance and submitted that the malafide on the part of the NAB was clear from the fact that the Chief Minister had been excluded from the reference.

18. In support of his contentions he placed reliance on the following case law; **Sarfaraz Ahmed & another v. Chairman NAB & others** (SBLR 2016 Sindh 551), **Muhammad Afzal v. National Accountability Bureau & others** (SBLR 2016 Sindh 1995) and **Najma Swaleh Syed v. The State through National Accountability Bureau & another** (2008 YLR 1087 Karachi)

19. Learned counsel for petitioners 3 to 6 inclusive submitted that petitioners 3 to 6 were all Directors of M/S Friends Mining Group (FMG) who as sub contractors had entered into a valid sub contract with Fateh on 02-03-2009 which was authorized by the MOU's. As per letter dated 13-02-2009 from Abdul Rasheed Solangi (petitioner No.7) DG Mines and Mineral Development to Assistant Director Mineral Development Lakhra they were also entitled to sell surplus coal until the functioning of the power plant. According to them the Fateh Group (**accused No.1 to 4 in the reference including petitioner no.1 Goharullah**) lacked the expertise to establish mines for the purpose of excavating coal and as such Fateh contracted them on account of their expertise in establishing mines. With regard to "surplus coal" according to petitioners No.3 to 6 this did not have its ordinary dictionary meaning which meant anything over and above that required for the power plant but had a technical meaning which meant coal that came to the surface and was scattered during the development of the mines. According to petitioners 3 to 6 they had a legal sub contract with Fateh and they had not taken over the land by force from Fateh. The filing of the FIR's against them by

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Fateh was simply in order to put up a smokescreen to cover any illegality which Fateh may have committed and to place the blame on petitioners 3 to 6. Thus learned counsel submitted that since no criminality had been committed by petitioners 3 to 6 they were entitled to the confirmation of their pre arrest bail. In their view the very filing of the reference when the facts on record were considered showed malafide on the part of NAB

20. In support of his contentions he placed reliance on the cases of **Rafiq Haji Usman v. Chairman, NAB and another** (2015 SCMR 1575), **Abdul Shakoor Kaloodi and another v. The State** (2003 P.Cr.L.J. 626), **Himesh Khan v. The National Accountability Bureau (NAB), Lahore and others** (2015 SCMR 1092), **Shahid Imran v. The State and others** (2011 SCMR 1614) and **Khan Asfandiyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others** (PLD 2001 S.C. 607),

21. Learned Counsel for petitioner No7 Abdul Rasheed Solangi who was DG Mines and Mineral Development GOS at the relevant time submitted that he had simply followed the written instructions contained in petitioner No.2's (Sohail Akbar Shah) letter dated 04-02-2009 whereby the Fateh Group was allowed to sell surplus coal till the functioning of their power plant. This direction had apparently come from the Chief Minister who was Minister in Charge and the letter had been copied to the concerned secretary so he had no reason not to comply with the directions especially as he had verbally discussed the directions with the concerned Secretary (Mr. Mohammed Younas Daga) who gave him the go ahead. In his view he was simply acting as a post box in passing on instructions. According to him he had reduced the order into writing vide his letter dated 13-02-2009 to the Assistant Director Mineral Development Lakhra. As per learned counsel there had been no wrongdoing on the part of petitioner No.7, he had not made any pecuniary gains and had not committed any act of corruption and as such he was entitled to have his pre arrest bail confirmed.

22. On the other hand learned Special Prosecutor NAB has opposed the grant of post arrest bail to petitioner No.1 (Goharullah) and the confirmation of pre-arrest bail to all the other petitioners and has submitted that NAB has more than enough evidence to prove beyond a reasonable doubt the offenses which

each of them have been charged with in the reference through both S.161 statements and other documentary evidence which he placed before the court and took the court through.

23. We have perused the record, considered the arguments (both oral and written) of learned counsel for the petitioners and Special Prosecutor NAB, the relevant law and the authorities cited by them at the bar.

24. As per settled law we have only made a tentative assessment of the material placed before us and this order shall not prejudice the case of either party at trial which shall be decided by the trial court based on the evidence before it strictly on merits.

25. At the outset, as we have done before in other similar NAB cases, we observe that cases of white collar crime are generally of an intricate and complex nature and the whole transaction and each component part of the scam needs to be viewed in a holistic manner and not in isolation. This is because in most cases the offence could not be committed without the active involvement of all the accused/petitioners in the chain of events which lead to the commission of the offense. However, notwithstanding this observation it is settled law that in cases of bail each of the accused/petitioners needs in some way to be connected with the alleged offense and in the case of non bailable offenses such as this there are reasonable grounds for believing based on a tentative assessment of the material before the court that the accused/petitioner is connected to the offense with which he is charged.

26. The accused/petitioners in this case all claim that they are innocent of any wrong doing and not connected to the offence in any way. Without going into a deep appreciation of the material on record it would appear prima facie that through the investigation report and material collected by NAB that all of the petitioners/accused to a lesser or greater extent are connected to the commission of the alleged offence. It is more a question of degree.

27. The current case, as with many NAB cases, is more a case of a joint criminal enterprise whereby every accused/petitioner plays their role in order to achieve a criminal object all of which they

were aware of and could not have been achieved without the active participation of all involved.

28. Turning firstly to the case of petitioner No.1 Gorahullah who has applied for post arrest bail. His main submission is that this is a civil dispute and not one of a criminal nature and as such does not fall under the jurisdiction of NAB under the NAO. We agree that to a certain extent there are civil aspects to this case however overall based on the material before us and when the facts of the case are read in a holistic manner it is an overwhelming criminal case which concerned a scam of billions of Rupees which was caused through corruption and corrupt practices and as such falls within the jurisdiction of NAB under the NAO. As such the case of **Rafiq Haji Usman v. Chairman, NAB (Supra)** is inapplicable to the instant case based on the particular facts and circumstances of the case and material before us.

29. The petitioner No.1 was given a specific role in the reference at Para's 4 to 6 as under:

4. In pursuance of above MoUs, the said land was leased out in the favour of FTML on 22.8.2006 whereby after meeting with the requirement of plants, they were allowed to sell the surplus coal in open market.

5. **M/s. FTML installed a used washing plant near super Highway, which was to be installed at mine mouth. The said washing plant was an eye wash in order to falsely show the establishment of washing plant, whereas the Power Plant was not established at all. (bold added)**

6. The accused No.5 namely Manzoor Hussain Memon malafidely issued NOC without approval of Competent Authority, whereby FTML was allowed to mortgage the mining lease rights in favour of any bank / financial institution. M/s. FTML by using said NOC mortgaged the said land with M/s FGBC for US\$ 100,000,000/- **which was not a financial institution and having controlling share of accused No.1/petitioner No.1 (Gorahullah).** The mortgage paved the way for FGBC to start litigation and a Suit bearing NO.333/2012 was filed by FGBC for declaration against DG Sindh Coal Authority etc.

30. Notwithstanding the above role of the petitioner No.1 it is interesting in itself to observe as to how the SCA could have entered into a MOU with the Fateh Group (whose CEO was petitioner No.1) to develop coal mines and establish a Coal washing plant leading to an integrated coal fired power plant up to 200MW capacity when the concerned company by admission of its counsel

had no past experience in such ventures as it was basically a textile company. His argument that the Ukrainian company was to provide the expertise seems to be a complete eyewash as little, if any, work was done on site in connection with the project by the Ukrainians and even according to petitioners 3 to 6 they were called in two years after the event because the project was mainly going nowhere on account of a lack of expertise as to how to implement the project.

31. As has been established no new washer plant was established rather an old second hand washer plant was brought in and placed miles away from the site. It was a pre requirement to selling the surplus coal that a new coal washing plant be established which was never fulfilled as is evidenced by numerous documents on record and even lead to the first recommendation to terminate the lease to Fateh which the then Chief Minister, who was also the concerned Minister, declined but which ultimately was a factor in the later cancellation of the lease. Although at first impression this could be deemed as a simple breach of contract the real criminality in our view started when in order to obtain a loan to finance the project (as petitioner No.1 was a massive bank defaulter and had no funds of its own which again begs the question how MoU's and later agreements for such a costly and complex project was signed with them in the first place) petitioner No.1 set up a shell company in New Zealand(NZ) named FBGC Limited in which he was a director and beneficiary to whom he mortgaged the land (which had been leased to Fateh/him) and where the project was to be constructed to FGBC for US100,000,000 which company was established on 30th January 2008 and the loan was made on 24-03-2008 (less than 2 months later with petitioner No.1 as the hidden beneficiary) which funds were used by the petitioner for the benefit of the Fateh Group and to commence and defend litigation in respect of the alleged illegal cancellation of the lease and the case brought by petitioners 3 to 6 against Fateh. The petitioner No.1 had no right or legal authority to mortgage the leased land especially to a shell company of which he was a beneficiary and it was in this respect that the accused No.5 Manzoor Hussain Memon Ex Director mines and mineral development Department GOS connived/colluded with the petitioner No.1/Fateh in giving a bogus/unauthorized NOC for the creation of such mortgage.

32. The petitioner No.1 then furthered his criminality by entering into a commercial contract with petitioners 3 to 6 whereby petitioners 3 to 6 were able to sell off surplus coal subject to the petitioner receiving a share of the profits notwithstanding its failure to build the washing plant or power plant, having its lease canceled and having no right under the lease to sub contract. In fact it appears that once the illegalities of petitioner No.1 were uncovered he attempted to plead that he had been thrown off the land by petitioners 3 to 6 who he had not entered into a sub contract with dated 02-03-2009 and had no role in exploiting or selling any surplus coal which he blamed on petitioners 3-6 who he alleged were land grabbers and against whom he registered FIR's in this respect. This argument however and the filing of the FIR's is in our view a smokescreen by petitioner No.1 which has been made in an attempt to conceal his illegalities. This is because the FIR's were disposed of in "C" class and there is an agreement on record between petitioner No.1's company Fateh and petitioner 3 to 6's company (Friends Mining Group FMG) which clearly shows that Fateh and FMG entered into a commercial arrangement to mine and sell off the coal which they did to their huge financial benefit at the expense of the national exchequer to the tune of around RS 2.2 Billion despite the required pre conditions of establishing a new washer plant and power plant not being met.

33. **S.161 Statement of Aftab Ahmed Khokhar** (shows the extent of mining operations at the land and how the loss of RS 2.2 Billion in terms of illegally extracted and sold coal in the open market by petitioner No.1 and petitioners 3 to 6 was calculated), **S.161 Statement of Muhammed Khalid Mirza** (shows that Fateh was carrying out mining and selling coal in the open market which caused huge loss to the national exchequer **before** it had established the washing plant and no efforts were made to install the washing plant or construct the power plant by petitioner No.1), **S.161 Statement of Khalil Rahman** (states that no power plant was installed by the petitioner and allowing petitioner No.1 /Fateh to extract coal for the washing plant and further sell the surplus coal till functioning of their power plant was contrary to the rules, MOU and lease deed, he also received extraction of coal reports from March 2009 to December 2009 but thereafter none were filed as the lease had been cancelled on 24-05-2010 but

notwithstanding that petitioner No.1 sold coal in the open market despite not establishing either a new washing plant or a power plant in order to make personal gains whilst being hand in glove with petitioners 3 to 6 through out) and corroborates Aftab Ahmed concerning the amount of loss caused to the exchequer on account of the illegal extraction of coal) **S.161 Statement of Syed Abbas Ali Shah** (showed that on a field visit he noticed that parts for the establishment of the washing plant looked used and rehabilitated and was informed that no site had been selected for its erection since no feasibility study was conducted on the economics of coal mining, he observed a lack of seriousness in the project and its progress was not up to the mark, locations of washing plant and power plant which ought to be close to each other and the coal mining area had not even been identified. No one was seen at the coal washing plant area, in his view the petitioner No.1 /Fateh was not at all serious in establishing modern semi mechanized mines, washing plant and coal fired power plant). **S.161 statement of Shariq Raza** (petitioner No.1/Fateh was in no case allowed to sell coal in the open market but they twisted the meaning of surplus coal and sold it in the open market despite this being illegal as they had not fulfilled the purpose of the mining lease, Mansoor Hussain Memon(accused No.5) illegally gave an NOC without the approval of the competent authority and was also contrary to the mining rules for the illegal mortgage by Fateh to the newly created NZ shell company FGBC, that also FBGC was owned by petitioner No.1, the contract between Fateh/petitioner No.1 and petitioners 3 to 6 for the extraction of coal and how petitioners 3 to 6 had entered into a profit sharing agreement with Fateh and had paid huge amounts to Fateh in respect of their share from the sale of the illegally excavated coal which was all a matter of public record as relevant documents had been filed in connection with litigation between Fateh and petitioners 3 to 6 once they fell out over the profit sharing. He also corroborated the huge loss caused to the national exchequer by Aftab Ahmed and Khalil Rahman in connection with the illegal excavation and sale of coal. **S.161 Statement of Khalid Malik** (who was a part of the Fateh group one of whose responsibilities was to look after the Lakhra coal mines Project. He produced record of payments received by him on behalf of Fateh from petitioners 3-6 from the sale of coal in open market as per agreement between them dated 02-03-2009 which was paid by either cheque or cash and deposited in Fateh's bank

account, he received approx RS 29,500,000 in this respect and he produced the relevant deposit receipts which showed the connivance between Fateh and petitioners 3 to 6.) **S.161 of Mohammed Younas Dagha** (Ex Secretary Mines and Minerals Department GOS who sent a summary to chief Minister recommending the cancellation of the coal mining lease to Fateh due to Fateh's failure to prepare bankable feasibility study despite lapse of 3 years, causing damage to coal reserve ear marked for power generation through local sale of coal through traditional mining which he heard nothing on, he then in continuation of the summary informed Advisor to the Chief Minister on Mines and Mineral Development Department of additional grounds for cancellation namely that the PPIB had rejected the documents presented as feasibility study by Fateh and that the letter of intent for power generation issued to them by PPIB had also expired. The SBP also informed him that Fateh had been defaulting on bank loans to the tune of RS 2.76 Billion so it was also added in the summary for cancellation as Fateh would not be able to arrange the finances required for the project due to its position of bank default (hence the need for a shell company of which petitioner No.1 was the beneficial owner to take a massive loan against land which did not belong to Fateh). The Chief Minister however rather than canceling the lease extended it for a year subject to keeping a close watch on Fateh to ensure that it established the power plant. That Sohail Akbar's letter dated 04-02-2009 purportedly on the verbal instructions of the Chief Minister allowing the sale of surplus coal in the open market opened the gateway for Fateh to sell coal in the open market which caused a huge loss to the national exchequer). **S.161 statement of Abdul Hameed Akund** (shows how the NOC for the mortgage from Fateh of the land to FBGC (the NZ shell company owned by petitioner No.1/Gorahullah) was illegally given with the active connivance of petitioner No.7 (Abdul Rashid Solangi.) **S.161 Statements of Saleh Muhammed Memon, Syed Safdar Abbas Zaidi and Syed Mohammed Noman** (all of whom were bank officials who produced banking documents to show the opening of Accounts of Fateh and bank statements which showed the movement of funds between Fateh and petitioners 3-6 in connection with their sub letting agreement whereby surplus coal was illegally sold in the open market) and **Petitioners 4, 5 and 6's HCA No.201/2014** against Fateh, FGBC Limited and others **admitting** that they had paid

over Rs 500M to Fateh in connection with selling coal in the open market—such a huge amount in our view cannot possibly have come from even the petitioners 3 to 6's alleged definition of surplus coal—it would appear that the Appeal itself admits that the petitioners 3 to 6 were carrying on coal mining which coal they were selling in huge quantities in the open market through there 02-03-2009 agreement with Fateh

34. Based on the documents, S.161 statements and other material before us we are of the view that prima facie there is sufficient material to connect the petitioner No.1/Fateh to the scam as set out in the reference whereby in essence the petitioner No.1 with criminal intent duped the SCA, GOS into entering into a MOU with him/Fateh and later a leasing agreement with the criminal intent of not building any washing plant or power plant for which he/Fateh neither had any finances or expertise to carry out which lead to him criminally arranging an illegal mortgage of the land in connivance with other accused with the sole aim of extracting coal and making huge profits in connivance with other accused with no intention of ever fulfilling his obligation of constructing either a coal washing plant or power plant and thus through his illegalities became a huge beneficiary of the scam along with others which was assisted by the misuse and failure to exercise authority by other accused which shall be dealt with later in this order and as such as there is in our view sufficient material to prima facie link him with the offense charged in the reference and we hereby dismiss his application for post arrest bail.

35. Turning to the case of Petitioner No.2 Sohail Akbar Shah. According to him his was simply passing on the verbal directions of the Chief Minister which, according to him, is and was the usual practice in the GOS and as such he has not acted illegally at all and is entirely innocent of any wrong doing.

36. At Para 7 of the reference a specific role has been attributed to petitioner No.2 as set out below:

"7.The accused No.6/petitioner No.2 Sohail Akbar Shah vide letter dated 04.02.2009 allowed the sale of surplus coal in the open market by showing it as a telephonic direction of the Chief Minister / Minister Incharge, which proved incorrect and **accused No.7/petitioner No.7 Abdul Rasheed Solangi** blindly implemented the order of **accused No.6/petitioner No.2 Sohail Akbar Shah** and allowed sale of

surplus coal in open market vide letter dated 13.02.2009 **although the power plant was not established as such question of surplus coal does not arise**".

37. After a holistic examination of the record we do not accept the contentions of petitioner No.2. Petitioner No.2 was a very senior Government official with years of experience behind him. He would have known full well that as per Sindh Government Rules of Business 1986 all verbal orders had to be reduced into writing and sent for subsequent approval by the issuer of the verbal order which he completely failed to do.

38. Rule 23 (iii) concerning the general procedure for disposal of business specifically provides as under:

"Rule 23 (iii) Every order shall be passed in writing, and in case of verbal order, it shall be reduced to writing at the earliest opportunity by the officer receiving it and confirmation thereof shall be obtained from the Minister if such order is given by him."

39. There was **no urgency** in the matter so petitioner No.2 need not have acted on the verbal order in such an unholy haste. He could have made a request for it to be made in writing as per Rules of business which bearing in mind his experience and seniority he was fully conversant with and even if he choose to act on the verbal orders he had plenty of time to have the orders reconfirmed in writing as required by the Rules of business which as mentioned above he completely failed to do for which he was not able to give any adequate explanation. It was this letter which opened the flood gates for the huge loss by allowing the sale of the surplus coal in the open market which was strictly prohibited under the MOU's and mining lease until certain pre conditions had been met. Petitioner No.2 was also fully aware of the poor performance of Fateh in fulfilling their obligations as he had been privy to the first Summary which had suggested that the Chief Minister cancel Fateh's lease. It thus seems to us inconceivable that he could pass on such a verbal order without seeking ex post facto approval of the same, bearing in mind the potential consequences of the letter, which he was required to do under the rules of business. It is also settled law that verbal orders have no sanctity in the eyes of the law and that such orders are alien to the process of the law and the courts and all orders particularly by State or public functionaries must be in writing and in this respect reference may

be made to the case of **Capital Development Authority V Mrs Shaheen Farooq** (2007 SCMR 1328).

40. The fact that petitioner No.2 sent the letter directly to the DG Mines & Mineral Development Department rather than the concerned Secretary as was required under the Rules of business in our view is also a clear indication that he deliberately wanted to keep the concerned Secretary out of the loop/in the dark and by pass him. He allegedly copied the letter to the concerned Secretary however there is no evidence that the Secretary received this copied letter. Furthermore the Chief Minister in his statement before NAB has categorically denied giving any such verbal order to petitioner No.2 and when he came to hear of the petitioner No.2's letter ordered its immediate withdrawal. The petitioner has alleged malafide on the part of the NAB by excluding the Chief Minister from the reference. It has been observed however that NAB recorded the statement of the Chief Minister who specifically denied giving the verbal instructions as mentioned above and seems in our view to have given a reasonable explanation in his reply and as marked on the summary for the continuation of the lease for a limited period of one year subject to close watch on Fateh's performance. In our view the petitioner No.2 has not been able to show any malafide on the part of NAB. The Addl. Secretary Khalid Hyder Shah who sent the Chief Minister's reply to the questionnaire has been cited as a witness and if need be the Chief Minister can always be called as a CW and be cross examined by the petitioner no.2.

41. As is well known the conditions for the grant of pre arrest and post arrest bail are quite distinct and were well set out in the case of **Rana Mohammed Arshad V Muhammed Rafique** (PLD 2009 SC 427). In this case at P. 431 the following conditions need to be satisfied before pre arrest bail can be granted as set out below:

"9. Even since then, the said interpretation so made, the said powers so found and the parameters so prescribed, have been regularly and repeatedly coming up for scrutiny by the Superior Courts including this Court. But each time the matter was re-examined, the same was only re-affirmed. The said concept as it was initially propounded; as it developed and as the same stands today, may be summarized for the benefit of us all as under:--

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- (a) grant of bail before arrest is an extraordinary relief to be granted only in extraordinary situations to **protect innocent persons against victimization through abuse of law for ulterior motives;**
- (b) **pre-arrest bail is not to be used as a substitute or as an alternative for post-arrest bail;**
- (c) **bail before arrest can not be granted unless the person seeking it satisfies the conditions specified subsection (2) of section 497 of Code of Criminal Procedure i.e. unless he establishes the existence of reasonable grounds leading to a belief that he was not guilty of the offence alleged against him and that there were, in fact, sufficient grounds warranting further inquiry into his guilt;**
- (d) **not just this but in addition thereto, he must also show that his arrest was being sought for ulterior motive, particularly on the part of the police; to cause irreparable humiliation to him and to disagree and dishonour him;**
- (e) such a petitioner should further establish that he had not done or suffered any act which would disentitle him to a discretionary relief in equity e.g. he had no past criminal record or that he had not been a fugitive at law; and finally that;
- (f) in the absence of a reasonable and a justifiable cause, a person desiring his admission to bail before arrest, must, in the first instance approach the Court of first instance i.e. the Court of Session, before petitioning the High Court for the purpose."(bold added)

42. In our view based on the documents on record and the S.161 statements the petitioner No.2 has not been able to make out any grounds as would entitle him to pre arrest bail. Furthermore in our view there is prima facie sufficient material on record to connect petitioner No.2 to the offense with which he is charged especially as it was his letter which passed on alleged verbal orders of the Chief Minister (which it seems were never given) which allowed the whole scam to take place and shows clear connivance with other accused/petitioners in the reference through his misuse of authority and as such his interim pre arrest bail is recalled.

43. With regard to the case of petitioner No.7 Abdul Rasheed Solangi who is on interim pre arrest bail who received the letter from petitioner No.2 allowing Fateh to sell surplus coal a specific role has also been attributed to him at Para 7 of the reference as set out above.

44. In our view petitioner No.7 was a senior and experienced officer holding the position of DG Mines and Mineral Development at that time who should not have blindly acted on the instructions of Sohail Akbar Shah which admittedly were verbal orders and he would have known the consequences of implementing those orders (which led to losses in billions to the national exchequer). Furthermore there is no evidence that he ever questioned why the 04-02-2009 letter of Sohail Akbar Shah had been directly sent to him instead of the Secretary and as such being an experienced and senior officer must have known that this was a requirement of the law. He claims that he spoke about the issue to the concerned secretary and acted on the letter when the secretary gave him the go ahead, however there is no note about his discussion with the Secretary in this respect. Furthermore, the letter he forwarded on 13-02-2009 to Assistant Director, Mineral Development Lakhra makes no reference to such a conversation which he allegedly copied to the Secretary (although there is no material to show that it was ever sent to him). Thus it appears that petitioner No.7 was also making a conscious effort to by pass the concerned secretary and keep him out of the loop/in the dark regarding the alleged illegal verbal orders to allow the sale of surplus coal. Even under these circumstances although, at first impression, the benefit of doubt may arise as to the petitioner No.7's involvement in the scam such impression is crushed by the S.161 Statement of Abdul Hameed Akhund which shows petitioner No.7's role in connection with the illegal NOC which was given to Fateh in order to mortgage the land to the FGBC shell NZ company owned by petitioner No1 (Goharullah).

45. In our view the petitioner No.7 has not been able to make out a case of malafide against NAB and even otherwise in our view there is sufficient material on record to prima facie connect him with the commission of the offense which caused losses of billions of rupees to the exchequer by blindly acting on Sohail Akbar Shah's letter and thereby deliberately by passing the Secretary and as such failing to exercise his authority and his involvement in the illegal NOC to allow the mortgage of the land by Fateh to FBGC and as such his interim pre arrest bail is recalled.

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46. Turning to the case of petitioners 3 to 6 all of whom were directors of the FMG who entered into a sub contract with petitioner No.1/Fateh for the extraction of coal.

47. The petitioners 3 to 6 have been given a specific role in the reference at Para 9 which are set out below for ease of reference:

"9. That accused No.8 to 11/petitioners 3 to 6 (petitioner No.3 Faqir Khan Khoso, petitioner no.4 Hafeez Ur Rehman, petitioner No.5 Haji Abdul Razzaik and petitioner No.6 Shakeel Ahmed Khan) knowingly and in connivance with accused No.1/petitioner No.1 (Gorahullah) to 4 (Directors of M/s Fateh Textile Mills) entered into an illegal agreement for extraction of coal knowing that this is a gross violation of MOU and lease deed executed between FTML and Government in that FTML was forbidden from sub-letting the said lease. They all (petitioners 1,3,4,5, and 6 in active connivance of each other sold the extracted coal in open market in utter violation of MoUs and lease deed, which was basically to be utilized for running of power plant. The active connivance of accused No.8 to 11/petitioners 3 to 6 (petitioner No.3 Faqir Khan Khoso, petitioner No.4 Hafeez Ur Rehman, petitioner No.5 Haji Abdul Razzaik and petitioner No.6 Shakeel Ahmed Khan) is established, when they challenged the order passed in Civil Suit No.333/2012 instituted by M/s FGBC and admitted their pecuniary interest in the said land and sharing of 500 Million with FTML through accused No.4 (Hamid Mehmood Nasir, Director of Fateh Group).

48. The case of petitioners 3 to 6 as noted earlier is essentially that they had every right to enter into a sub contract with Fateh for the excavation of the coal and sell the same in the open market based on the MoU's and the letter dated 13-02-2009 from petitioner No.7 which enabled Fateh to sell the coal in the open market and even otherwise they were only selling surplus coal which was permissible as per mining industry practice.

49. It is apparent from the documents before us including the first MOU that petitioner No.1/Fateh had no power to sublet any part of the work which it had undertaken in the lease. Even if the lease had not been canceled at the time when the petitioners 3 to 6 entered into the sub lease it was clear that sub letting was illegal and the petitioners 3 to 6 would have known about this especially as no new washing plant or power plant had been established (the latter being a pre requisite for the availability of surplus coal). It was also illegal to sell surplus coal until certain pre conditions had been met which they had not been thus surplus coal could not have been sold. We do not accept the definition which the

petitioners 3 to 6 have attempted to put on surplus coal. No such definition is set out in any of the documents and in our view the ordinary meaning of surplus coal was meant to be applied under the particular facts and circumstances of this case i.e. what was left over after the basic requirements were met was surplus. Since the basic requirements of establishing a new washing plant and power plant had not been met there could have been no concept of surplus coal as there was in fact no surplus. Furthermore, in this case the agreement dated 02-03-2009 does not appear to refer to any surplus coal in such a manner rather it appears primarily to be an agreement for the extraction of coal which was then sold in huge amounts in the open market with the profits being shared between the petitioners 3 to 6 and petitioner No.1/Fateh which is clear from the documents on record and S.161 statements relating to what the term "surplus coal" meant and the huge amounts of money which was paid by the petitioners 3 to 6 to petitioner No.1/Fateh after the illegal extraction and sale of coal in the open market.

50. In our view petitioners 3-6 were not land grabbers as alleged by petitioner No.1 which is supported by the FIR's being disposed of in "C" class but had knowingly entered into an illegal commercial agreement with petitioner No.1 with criminal intent to exploit the coal resources of Lahkra whilst making vast profits for themselves and petitioner No.1/Fateh group and have tried to hide their illegality by creating an untenable definition of surplus coal once the ground realities are taken into account. In our view it is clear from the documents on record that they were beneficiaries in the scam through their connivance with petitioner No.1 and the misuse of authority and failure to exercise authority by accused No.5, petitioner No.2 (Sohail Akbar Shah) and petitioner No.7 (Abdul Rasheed Solangi) which lead to the loss of billions to the national exchequer. We are of the view that based on the documents on record and S.161 statements there is prima facie sufficient material to connect the petitioners 3 to 6 to the offense charged in the reference and they have not been able to make out a case of malafide against the NAB and as such the interim pre arrest bail of petitioners 3 to 6 is hereby recalled.

51. In our view as noted above from a tentative review of the evidence this scam was in effect a joint criminal enterprise between

all the petitioners and other accused which could not have taken effect without the active connivance of all the accused and petitioners who each played their own particular role in an unbroken chain of criminality which led to the loss of billions to the national exchequer. Had just one of the petitioners/ accused acted lawfully then there would have been a break in the chain of criminality and the offenses could not have been able to take place thus all the petitioners/ accused in our view are prima facie liable for the commission of the offense to a greater or lesser extent and in our view there is sufficient material on record to connect them each individually and jointly to the offense charged when the offense is considered in a holistic manner and the role of each accused is taken into account.

52. As per settled law it is made clear that the findings and observations made in this order are only of a tentative nature and will have no binding effect on the trial court hearing this reference which shall decide the case solely on merits based on the evidence before it.

53. **In summary.**

1. The petition for post arrest bail by petitioner No.1 Gorahullah is dismissed.
2. The petition for pre arrest bail by petitioner No.2 Sohail Akbar Shah is hereby dismissed and order dated 22-08-2016 granting him ad-interim pre-arrest bail is recalled with immediate effect.
3. The petition for pre arrest bail by petitioner No.7 Abdul Rasheed Solangi is hereby dismissed and order dated 16-12-2016 granting him ad-interim pre-arrest bail is recalled with immediate effect.
4. The petition for pre arrest bail by petitioner No.3 Faqir Khan Khoso, petitioner no.4 Hafeez Ur Rehman, petitioner No.5 Haji Abdul Razzaik and petitioner No.6 Shakeel Ahmed Khan is hereby dismissed and order dated 16-12-2016 granting each of them ad-interim pre-arrest bail is recalled in respect of each of them with immediate effect.
5. The Accountability Court hearing this reference 52/2016 is directed to decide the same within a period of 6 months from the date of this order and the office is directed to transmit a

copy of this order immediately to the concerned Accountability Court for compliance. MIT II is directed to submit reports on the progress of the trial of this reference after every two months for the consideration of this Court.

Karachi.

Dated: 31-01-2017