

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

Before:-

Mr. Justice Ahmed Ali M. Shaikh, C.J.

Mr. Justice Mohammed Karim Khan Agha, J.

C.P. No.D-2310 of 2017 Tahir Jameel Durrani V NAB through its Chairman & another.

through Mr. Raj Ali Wahid Kunwar, Advocate.

**Counsel for the Respondents.**

Mr. Muhammad Altaf, Special Prosecutor, NAB.

Dates of Hearing: 22.09.2017.

Date of Order: 01.11.2017

**ORDER**

**Mohammed Karim Khan Agha, J.** The petitioner seeks post arrest bail in Reference No.27 of 2015 (State v. Fareed Ahmed Yousufani).

2. The prosecution case as alleged in the Reference No.27 of 2015 are that the investigation reveals that Tahir Jameel Durrani, Ex-Project Director LARP (accused No.2)/petitioner was involved in illegal bifurcation of 32 sq. yard plots for Plot No.C-2/9, measuring 1333 sq. yds. and illegally allotted 40 plots of 32 sq. yards each to fictitious allottees in the garb of hardship cases through forged/maneuvered note sheet containing fake/fictitious signatures of the then DCO/Administrator KMC in sector 1 Lines Area which was never in existence. Investigation further reveals that Sindh Disposal of Urban Land Ordinance 2002 specifies that, "...no plot or flat shall be disposed of except by open public auction at a price not less than the market price". The area designed as C2 admeasuring 7.024 sq. yards in the approved Master

Plan of LARP was allotted at throwaway price of rs.200 per sq. yard in the shape of 32 sq. yard plots instead of open auction at the minimum reserve price of Rs.50,000/- per sq. yard against the rules to numerous beneficiary accused persons and resultantly caused a huge loss of Rs.363,300,000/- to the government exchequer.

3. Learned counsel for the petitioner expressly only pressed the petition on the grounds of hardship. According to learned counsel the petitioner has been approximately 17 months in jail and the last time he had applied for bail on hardship grounds it had been declined by this court vide order dated 31.03.2017 passed in CP No.D-5792, 3177 and 6290 of 2016, whereby this court in declining the post arrest bail of the petitioner on hardship grounds had directed that the trial be completed within three months of the date of the order and since the trial had not yet been completed as per court directions and its completion was not likely in the foreseeable future, the petitioner should be granted bail on the ground of hardship. According to learned counsel no delay had been caused by him in completing the trial and that co-accused Rashid Hussain Rizvi had also been granted bail on hardship grounds by the Hon'ble Supreme Court in Civil Petition No.17 of 2017 (**Syed Rashid Hussain Rizvi v. Chairman NAB**) dated 12.07.2017 and as such he should also based on rule of consistency be granted bail on hardship grounds.

4. Learned counsel for the NAB vehemently opposed the grant of bail on hardship grounds since the petitioner had only been in jail for approximately 17 months, that the crime was very serious in nature which has caused a huge loss to the government exchequer and that the trial was now close to completion as only four witnesses remained to be examined and that there were now only 17 accused left in the Reference out of original 39 accused persons which meant that the trial could be completed soon if another direction was given by this court in order to expedite the case. He pointed out that failure to comply with a direction of a High Court to conclude the matter within a given period of time did not amount to a fresh ground for applying for bail. In this respect, he relied on **Nisar Ahmed v. The State & others** (PLD 2016 S.C. 11) and **Amir Masih v. The State & another** (2013 SCMR 1524). He further pointed out that since his bail was rejected by this court on hardship ground by order dated 31.3.2017 the petitioner had been responsible for many of the delays in the completion of the trial and as such for all the above reasons the petitioner was not entitled for the grant of bail on the ground of hardship.

5. We have heard the parties, considered the record and the case law cited by them at the bar.

6. This court in the recent case of **Shahid Umer v. The Chairman NAB** CP No.D-5369 of 2017 by order dated 12.10.2017 (unreported) had gone into considerable detail in considering how hardship cases ought to be dealt with under

the NAO and discussed the most recent authorities on the issue. The aforesaid case which arose out of the same reference had granted the petitioner Shahid Umer bail on the grounds of hardship based on the recent Hon'ble Supreme Court's decision in **Syed Rashid Hussain Rizvi's case** (Supra) and the particular facts and circumstances of that case.

7. We would reiterate that the grant of bail on hardship ground is for the court to determine by exercising its discretion rather than of right as in the case of statutory bail u/s 497 Cr.P.C.

8. Firstly we find that non-compliance of a direction given by the High Court to a trial court to conclude a trial within a given period of time **may** not on its own be a fresh ground for grant of bail. In this respect reliance is placed on the case of **on Nisar Ahmed v. The State & others** (PLD 2016 S.C. 11) which held as under at para-4 (P.13).

"4. We have scanned the material placed on record and are unable to subscribe to such submissions of the learned ASC. Neither non-compliance of the directions issued to the trial Court to conclude the trial expeditiously or within some specified time can be considered as valid ground for grant of bail to an accused, being alien to the provisions of section 497, Cr.P.C., nor filing of direct complaint will have any bearing as regards earlier bail refusing orders, which have attained finality, unless some fresh ground could be shown by the petitioner for consideration of his request for grant of bail afresh, which is lacking in the present case".

9. On this ground alone the petition could have been dismissed but we have also in the interests of justice and in

our discretionary jurisdiction considered whether this ground could amount to hardship especially as the rule of consistency has been relied upon which appears to be a new ground.

10. We have also observed that the order relied upon by the petitioner in the case of **Syed Rashid Hussain Rizvi** (Supra) dated 12.7.2017 mainly granted bail because the petitioner's role in the NAB reference was on a similar footing to another co-accused who had already been granted bail in the same reference and that the petitioner had already served 2 years in jail and the failure in completing the trial was through no fault of the petitioner and the conclusion of his trial was not in sight which would tilt the matter in his favour.

11. We consider that the instant case is distinguishable from the case of **Syed Rashid Hussain Rizvi** (supra) and **Shahid Umer** (supra). This is because the petitioner's role as mentioned in paragraph 4 of the reference in the commission of the crime is much greater than the other petitioners in the same case who had already been granted bail on the grounds of hardship. Furthermore in both the other cases, **Syed Rashid Hussain Rizvi** (supra) and **Shahid Umer** (supra) the petitioners had both spent well over two years in jail whereas in this case the petitioner has only served 17 months in jail. **Most significantly** a review of the order sheets from the date on which the petitioner's bail was last declined on hardship grounds i.e. diary sheets between 22.3.2017 to 07.08.2017 being approximately four months which is roughly the period

the court directed the trial to be concluded reveal that **the reference came up for hearing 11 times and on 06 occasions (over 50%) the defense counsel for the petitioner was called absent.** In our view such a casual attitude by the defense counsel of the petitioner indicates that he had no genuine desire to proceed with the case and was simply passing time until the time given in the direction to complete the trial by the High Court expired so that he could again apply for bail on hardship grounds with the high possibility of such bail being granted.

12. We consider that such tactic on the part of the petitioner was a deliberate attempt to abuse the concept of the grant of bail on hardship grounds as well as to defeat the directions of the court to complete the case within a timely manner and we consider that when exercising our discretion that such conduct cannot be ignored and goes against the petitioner.

13. We also observe that since the above referred two earlier cases **Syed Rashid Hussain Rivzi** (supra) and **Shahid Umer** (supra) there are now only 17 accused persons out of 33 as a number of earlier accused have entered into plea bargains and only 4 PW's remain to be examined and as such there is a greater possibility of the trial being concluded in the near future with an appropriate direction given to the trial court to complete the case within a given period of time. We also note from the order sheets that there appears to be a strategy

amongst the numerous accused to deliberately delay the trial on one pretext or another which also needs to be discouraged.

14. Thus, for all the reasons mentioned above we find the case of the petitioner distinguishable from the cases of **Syed Rashid Hussain Rizvi** (Supra) and **Shahid Umer** (supra) which although arising out of the same reference are distinguishable on, amongst others, the following grounds and as such the rule of consistency is **not** applicable:

(a) That the petitioner played a far greater role in the offence which caused colossal loss to the State.

(b). That the petitioner has spent 17 months in jail being 10 months less than the other co-accused who were granted bail on hardship grounds.

(c). That since the date of the direction of this court to the trial court to complete the trial within a period of three months on **more than half the dates in which the reference was called the petitioner's counsel remained absent** which in our view was a deliberate tactic on the part of the petitioner to enable the petitioner to file another petition on hardship grounds within a short period of time and to defeat the directions to conclude the trial given by this Court to the Accountability Court within a three month period.

(d). That now there are only 17 co-accused and four PW's left to be examined and the conclusion of the trial is within sight.

15. Thus in our discretion based on the particular facts and circumstances of this case we hereby dismiss the bail application on the grounds of hardship and the rule of consistency and simultaneously direct the trial court to proceed with the case on a day to day basis and not adjourn the trial on any flimsy ground and complete the trial within four months from the date of this order. It being made clear

that if either the petitioner or counsel for the petitioner is called absent on any dates or seeks an adjournment either singly or along with other defense counsel when the reference is called for hearing this will adversely affect any prospect of the petitioner being granted bail on the ground of hardship or any ground if a new ground arises and he applies again on this ground as in this case the new ground was the rule of consistency not failing to complete the trial within the time given in earlier directions of this court which as referred to above in **Nisar Ahmed's case** (Supra) does not constitute a new ground. It being observed that generally speaking hardship cannot be pressed into service a second time as a new ground as was held recently by the Supreme Court in the case of **Malik Naveed Khan V DG NAB** (unreported) dated 30-03-2016 as referred to in the case of **Saifullah V State** (PLD 2017 IHC P.143) which fully reviewed the law of bail on the grounds of delay in NAB cases. The office shall immediately transmit a copy of this order to the concerned Accountability Court for compliance /