

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

**C.P. No. D-424 of 2016**

*(Shabbir Ahmed Malik V/S Chairman NAB & others)*

**C.P No.D-425 of 2016**

*(Abdul Ghaffar Kalwar V/S Chairman NAB & others)*

**C.P No.D-1626 of 2016**

*(Shabbir Ahmed Malik V/S Chairman NAB & others)*

**C.P. No.D-1627 of 2016**

*(Shabbir Ahmed Malik V/S Chairman NAB & others)*

Date	Judgment with signature of Judge
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Present:

Mr. Justice Aqeel Ahmed Abbasi &

Mr. Justice Muhammad Faisal Kamal Alam

Petitioners : Through M/s. Shahab Sarki, Zulfiqar Ali Sangi & Khan Muhammad Sangi, Advocates

Respondents : Through Mr. Abdul Karim Luhrani, Special Prosecutor, NAB along with Umesh Chawla, Assistant Director / I.O. NAB, Karachi.

Date of hearing : 03.06.2016

Date of Judgment : 03.06.2016

**J U D G M E N T**

**Muhammad Faisal Kamal Alam, J:** The above four Constitutional Petitions were decided by us vide a short order dated 03.06.2016 and it would be advantageous to reproduce the same herein under:-

*“For the reasons to be recorded later-on and by following the ratio of decisions of a Division Bench of this Court in the case of Mahesh Kumar & another Vs. Chairman, NAB and others reported as (PLD 2008 Karachi 38) and an unreported common order passed in C.P. No.D-7144 of 2015 Reg: Sohail Adeeb Bachani Vs. The State through DG NAB Sindh, (ii) C.P. No.D-7930 of 2015 Reg: Qazi*

*Mushtaq Ahmed Vs. Chairman, NAB and (iii) C.P. No.D-5180 of 2013 Reg: Allahdino Mirbahar Vs. Chairman, NAB, subject to furnishing port-dated cheques by both the petitioners along with solvent surety in the sum of Rs.9.377 million being the balance amount of V.R. in respect of petitioner namely Shabbir Ahmed Malik in C.P. No.D-1626/2016 and Rs.15.153 million being the balance amount of V.R. in respect of petitioner namely Abdul Ghaffar Kalwar in C.P. No.D-1627/2016, before the Incharge Additional Registrar of this Court to be paid to NAB Authorities within a period of six months from date of this order, in four equal installments, instant petitions are allowed along with listed applications and the proceedings pending before the Accountability Court, Sukkur in Reference No.17/2015 in respect of Shabbir Ahmed Malik and Reference No.18/2015 in respect of Abdul Ghaffar Kalwar, are hereby quashed.”*

2. These four Constitutional Petitions filed in respect of NAB References No.17 of 2015 and 18 of 2015, seeking, inter alia, relief of quashment of proceedings pending adjudication before the learned NAB Court at Sukkur. All these Petitions since have common facts and identical questions of law, therefore, they were decided by a short order passed on 03.06.2016 and the proceedings before the learned Accountability Court have been quashed. Following are the reasons for the short order:

3. Petitioner Shabbir Ahmed Malik through his titled Constitutional Petition No.D-424/2016 has sought the relief of pre arrest bail in view of the non-bailable warrants (NBWs) issued by the learned Accountability Court in respect of Reference No.17 of 2015, filed against him and pending adjudication in the said Court, whereas, by way of C.P. No.D-1627 of 2016, the said Petitioner sought primarily the relief of quashment of above NAB proceedings. Similarly, Abdul Ghaffar Kalwar has filed two Constitutional Petitions; in C.P. No.D-425 of 2016, he has sought pre arrest bail, in view of NBWs issued in Reference No.18 of 2015 filed against him by Respondent NAB, whereas, in the subsequent

C.P. No.D-1627 of 2016, the said Petitioner has mainly sought the quashment of proceeding sub judice in the above Court.

It would be relevant to reproduce prayer clauses of above Constitutional Petitions No.1626 of 2016 and 1627 of 2016 herein under:-

C.P. No.D-1626 of 2016

- “(a) *To quash the proceedings of Reference No.17 of 2015 pending before the learned NAB Court Sukkur by declaring the same as illegal, unlawful and unconstitutional as the Anti Corruption department has taking cognizance of same offence and such proceedings are pending before the special Court Provincial Larkana and the present reference fall under the principle of double jeopardy.*
- (b). *To set-aside the order of NAB authorities for forfeiture the amount deposited by the petitioner as the same was passed without issuing any notice to the petitioner and without giving him any opportunity of hearing and still such order (if any) is not served upon the petitioner but the NAB authorities mentioned such facts in the reference.*
- (c). *To restrain the learned NAB Court Sukkur from further proceeding of the Reference No.17 of 2015 pending against the petitioner till final disposal of present petition.*
- (d). *To direct the NAB authorities for re-consider the rate of the wheat bags which they collected from other and add the entire amount paid by the petitioner.*
- (e). *To grant any other relief which this Honourable Court deems fit under the circumstances of the case.”*

C.P. No.D-1627 of 2016

- “(a). *To quash the proceedings of Reference No.18 of 2015 pending before the learned NAB Court Sukkur by declaring the same as illegal, unlawful, and unconstitutional as the Anti Corruption department has taking cognizance of same offence and such proceedings are pending before the special Court Provincial Larkana and the present reference fall under the principle of double jeopardy.*
- (b). *To set-aside the order of NAB authorities for forfeiture the amount deposited by the petitioner as the same was passed without issuing any notice to the petitioner and without giving him any opportunity of hearing and still such order*

*(if any) is not served upon the petitioner but the NAB authorities mentioned such facts in the reference.*

- (c). To restrain the learned NAB Court Sukkur from further proceeding of the Reference No.18 of 2015 pending against the petitioner till final disposal of present petition.*
- (d). To direct the NAB authorities for re-consider the rate of the wheat bags which they collected from other and add the entire amount paid by the petitioner.*
- (e). To grant any other relief which this Honourable Court deems fit under the circumstances of the case.”*

4. As per averments of the above petitions, on 24.04.2013 both the Petitioners were called by the District Food Controller in his office at Shikarpur and in presence of NAB Officials both Petitioners had signed the Voluntary Return documents including the agreement in terms of Section 25 of the National Accountability Bureau Ordinance, 1999, (NAB Law). This Voluntary Return Agreement was in respect of misappropriation detected by the Respondent NAB for Wheat Crop Season 2011-2012 when petitioner-Shabbir Ahmed Malik was incharge of Wheat Procurement Centre **WPC**, RD-22, Jacobabad, and the other petitioner, namely, Abdul Ghaffar Kalwar was food Inspector / Centre Incharge for **WPC**, RD-45, Kashmore (District Jacobabad). Primarily the prosecution case against these petitioners is that they by misusing their authority have committed misappropriation of large number of wheat bags (Bardana), which caused huge losses to National Exchequer and falls within the schedule offence of NAB Law in terms of its Section 9 and punishable under Section 10 ( of NAB Law). As per the agreement / affidavit of Voluntary Return, which is available in case file (C.P. No.D-1626 of 2016) as Annexure “A/2” along with Voluntary Return request, the Respondent NAB during inquiry assessed the loss of Rs.1,96,77,000/- (Rupees One Crore Ninety Six Lac Seventy Seven Thousand Only), out of which it is an admitted position that the Petitioner Shabbir Ahmed Malik paid an amount of Rs.1,03,00,000/-

(Rupees One Crore Three Lac Only). In case of other Petitioner Abdul Ghaffar Kalwar, the liability was determined as Rs.2,98,53,000/- (Rupees Two Crore Ninety Eight Lac Fifty Three Thousand Only) out of which the latter deposited an amount of Rs.1,47,00,000/- (Rupees One Crore Forty Seven Lac Only). Both Petitioners in terms of Voluntary Return Agreement were required to pay off the entire liability in three equal installments, which they failed to do, however, perusal of the subject Voluntary Return Agreements in the instant matters shows that there is no mention of any time frame or schedule for payment of the above three installments.

5. Reply has been filed by Respondent-NAB in all the above Petitions, wherein, material facts of the case as stated hereinabove are not disputed, particularly the fact relating to the total liability of above two Petitioners and the amount of part payments already made by them pursuant to Voluntary Return (V.R) Agreements as referred to hereinabove.

For the petitioner Abdul Ghaffar Kalwar, Respondents NAB took the stance that when the petitioners failed to pay the entire agreed amount of Voluntary Return then investigation was ordered against them and during investigation it came to light that actually the petitioner (Shabbir Ahmed Malik) caused loss of Rs.2,10,85,350/- (Rupees Two Crore Ten Lac Eighty Five Thousand Three Hundred Fifty Only), whereas the other petitioner (Abdul Ghaffar Kalwar) caused a loss of Rs.3,69,11,100/- (Rupees Three Crore Sixty Nine Lac Eleven Thousand One Hundred Only) by misappropriating 11662 wheat bags weighing 1230.370 Metric Ton.

6. The grievance of both the petitioners is that on the one hand, NAB authorities started coercive recovery proceedings from the

Petitioners and filed references in Accountability Court, whereas, on the other hand, in respect of the same offence, the Anti-Corruption Establishment, under Section 409 of PPC (Pakistan Penal Code) read with Section 5 (2) of Act-II of 1947 (The Prevention of Corruption Act) has also initiated proceedings against Petitioners, who, surrendered themselves before the concerned Special Judge Anti-Corruption (Larkana) and obtained bail before arrest which were subsequently confirmed as well by the Anti-Corruption Court. Relevant record of the Anti-Corruption Establishment has been placed on record as Annexures “**B**” and “**B-1**”. The order dated 29.06.2015 Annexure B/1, page 39-CP No.D-1626 of 2016 is of relevance here, wherein, the learned Anti-Corruption Court while confirming the earlier interim bail granted to the Petitioners / accused have also by way of reasons observed that the Anti-Corruption Establishment has submitted its report with the recommendation that the cases against the Petitioners should be disposed of in cancelled class subject to the approval of competent authority. However, since during the intervening period, the Respondents-NAB and the Accountability Court took cognizance of the matter, therefore, the above case pending before the Anti-Corruption Court could not be decided.

7. On the other hand, Mr. Rabait Ali Bhanbhro, special prosecutor NAB Sukkur has argued that both the above petitioners / accused are guilty of offence punishable under Section 9 of the NAB Law, therefore, the above mentioned References against the petitioners have been filed in the Accountability Court of competent jurisdiction. While controverting the arguments of petitioners’ counsel that both petitioners/accused are victim of double jeopardy, it is contended by the learned special prosecutor NAB, that a request has been made to the learned Anti-Corruption Court for transfer of such cases against the

above petitioners to the Accountability Court at Sukkur, therefore, Article 13 of the Constitution of Islamic Republic of Pakistan, 1973, relating to double jeopardy as well as Section 403 of Cr.PC does not lend any support to the case of petitioners.

8. In the intervening period both Petitioners were granted interim pre arrest bail subject to their furnishing surety in the sum of Rs.10,00,000/- (Rupees One Million Only) and P.R Bond in the like amount to the satisfaction of the Additional Registrar of this Court, which was accordingly complied with.

9. We have heard the learned counsel for the petitioners and special prosecutor NAB, and have also gone through the available case record with their assistance. It may be observed that upto the time of passing of the short order on 03.06.2016, proceedings sub judice before the Anti-Corruption Court were not transferred to the Accountability Court at Sukkur, therefore, the reply of special prosecutor NAB on the objection of petitioners' counsel regarding double jeopardy is not considered as tenable.

10. The bone of contention between the parties is subsequent filing of above References (No.17 and 18) owing to the default in making balance payment of amount determined under the Voluntary Return Agreement. The Respondents in their reply while questioning the maintainability of the present Constitutional Petitions have also stated that since number of witnesses in both references have been examined, whereas, after conversion of inquiry into investigation, the assessment of losses caused by petitioners to public exchequer has also enhanced. According to respondent-NAB, in the case of petitioner Abdul Ghaffar Kalwar the total liability now stands at Rs.3,69,11,100/- (Rupees Three Crore Sixty Nine Lac Eleven Thousand One Hundred Only), whereas in the case of

other petitioner Shabbir Ahmed Malik, the total liability now payable comes to Rs.2,10,85,350/- (Rupees Two Crore Ten Lac Eighty Five Thousand Three Hundred Fifty Only).

11. On a query of this Court as to whether after approval of Voluntary Return option as offered by Respondent-NAB, which was duly approved by the Chairman NAB in terms of Section 25 of the NAB Law, and was also acted upon by executing the agreement / affidavit of Voluntarily Return and making part payments in pursuance thereof, as available on record of Court's file, the afore-referred References could have been filed by the Respondent-NAB against the petitioners. The response of special prosecutor NAB was in affirmative, who tried to justify the filing of references on the ground that when Petitioners despite notices and reminders did not come forward to pay the balance amount of Voluntary Return (V.R.), the NAB authorities had no option but to file the References in Court. However, no such notices or reminders as mentioned by the learned counsel in NAB's Written Reply and referred to in his arguments, have been placed on record to show that Petitioners were ever served with such notices or called upon to make the payments of balance amount. Conversely, petitioners counsel represented by M/s. Shahab Sarki and Zulfiqar Ali Sangi (ASCs), vehemently argued that in case of any default in payment of amount of V.R., the NAB authority, in terms of Section 33 (E) of the NAB Ordinance, 1999, authority has ample remedy to recover the balance amounts in the shape of arrears of land revenue. In support of their contention, both the learned counsel have relied upon the reported Judgment of a Division Bench of this Court in the case of Mahesh Kumar and another Versus Chairman, National Accountability Bureau, Islamabad and others reported in PLD 2008 Karachi 38 and Haji Khan versus Government of Pakistan reported



in 2013 Pakistan Criminal Law General 1571, besides an unreported decision of a learned Division Bench of this Court given in the case of Sohail Adeeb Bachani Versus the State-C.P No.D-7144 of 2015.

12. It was further contended on behalf of the petitioners that they have not committed any default, as no specified time frame for payment was agreed or mentioned in the subject Voluntary Agreements.

13. We have gone through the above cited case law, which have exhaustively interpreted Section 33 (E) of NAB Law. However, in the above mentioned leading Judgment of Mahesh Kumar the subject issue was of plea bargain and in present petition it is the voluntary return. In case of plea bargain under Section 25, the final approval is given by the Court and once the amount has been approved then as per the above case law, the same would fall within the ambit of above Section 33 (E). In the above reported decision of Mahesh Kumar, the proceedings pending under References No.27 and 49 of 2007 before the Accountability Court at Karachi, were quashed while holding that it was an abuse of the process of law. In the other reported Judgment (Supra), the learned Division Bench of Baluchistan High Court by way of Permanent Injunction had restrained NAB authorities to charge 15% towards interest over and above the amount determined in terms of Section 25 (Plea Bargain).

14. Précis of the above cited decisions is that amount once assessed / determined by the NAB authorities themselves as envisaged under Section 25 of NAB Law, either at the stage of inquiry or investigation, then in case of any default the recourse should be made to executory provision of NAB Law, viz. Section 33 (E). The above Mahesh Kumar case also answers the main contention of Respondent-NAB that since both Petitioners are guilty of willful default, therefore, subject

References have been rightly filed against them. This argument from Respondent-NAB is misconceived, as it has been held in the cited case (ibid) that if a person did not pay the entire agreed amount as determined by the Court, then such a default will not fall within the mischief of 'willful default' as mentioned in Section 5 (r) of the NAB Law but remedy of NAB in such an event lies in invoking Section 33 (E), which has been termed as a special provision to execute the recovery of the amount due under the NAB Law. Since, both the petitioners have agreed to pay back the amounts as determined by Respondent-NAB itself, by signing subject Voluntarily Return Agreements, therefore, subsequent filing of NAB References against the Petitioners, was not justified and appears to be tainted with malice. If an act of a Government functionary is based on mala fides then it loses legal sanctity and amounts to abuse of authority. It is one of the cardinal principles of Administrative law that Government functionaries should act fairly, justly and reasonably and the same principle has now been enacted as Section 24-A of the General Clauses Act, 1897. In a celebrated Judgment given in the case of Independent Newspapers Corporation (Pvt.) Ltd. Versus Chairman, Fourth Wage Board and Implementation Tribunal for Newspaper Employees reported in 1993 SCMR 1533, the Hon'ble Supreme Court has even gone to the extent of holding that excessive use of power is itself unlawful. In addition to what has been observed herein above, from the time of institution of the present proceeding upto the passing of above short order referred in these petitions, the Respondent NAB has not done anything in pursuance of its application filed before Special Judge Anti-Corruption (Larkana), under Section 16 of NAB Law, seeking transfer of afore referred pending case before the Anti-Corruption Court to the learned Accountability Court at Sukkur.

Consequently, in these peculiar facts, the plea of Petitioners about double jeopardy cannot be brushed aside and has substance.

15. Now we may advert to another pertinent aspect of the matter of instant case, that is, absence of any payment schedule or any cut-off date for payment in the Voluntary Return Agreement. In this regard, Petitioners cannot take advantage of any lapse (if any), on the part of Respondent-NAB and even if the stipulated time frame is not given for making payments of the three installments, the same should have been paid within reasonable time and the matter cannot be kept pending to the advantage of the Petitioners. After giving our thoughtful consideration to address such an eventuality, we have in the short order provided a time frame mechanism, which was admittedly missing in the subject Voluntary Return (V.R.) Agreements (of the instant case).

16. The above cited decisions are applicable to the facts of the present case, whereas, the rigor of Section 25(a) relating to Voluntary Return is far less than that of Section 25 (b), relating to plea bargain, which *inter alia*, has the effect of conviction, as envisaged in Section 15 of NAB Law. Applying the principle of stare decisis, which was expounded by the Honourable Supreme Court in one of its leading decisions given in the Agriculture Workers' Union, Balochistan Versus Registrar of Trade Unions, Balochistan reported as 1997 SCMR page-66, the above cited decision of Mahesh Kumar is squarely applicable to the present case as the same is not only holding the filed, but the learned author Judge Mr. Justice Rehmat Hussain Jaferi (as his lordship then was of the said cited decision of Mahesh Kumar) was subsequently elevated to the Honourable Supreme Court and unless a different view is taken by the Apex Court, judgments authored by those learned Judges, who are subsequently elevated to the Honourable Supreme Court, have to be

given highest consideration. In the above referred reported judgment relating to stare decisis, the Hon'ble Supreme Court, inter alia, has held as under:

***“We may incidentally mention here that the decision in A.F. Ferguson & Co. was rendered by a Division Bench of High Court of Sindh which consisted of Dorab Patel and Muhammad Haleem, JJ. (as their Lordships then were). Employees’ Union, Jamia Karachi’s case was also decided by another Bench of Sindh High Court consisting of Zaffar Hussain Mirza (as he then was) and Saleem Akhtar, JJ. while the case of K.G. Old was decided by Shafiur Rehman J.(as he then was) Sitting single in the Lahore High Court. All the learned Judges who decided the abovementioned three cases were subsequently elevated to this Court and one of them (Saleem Akhtar, J.) is still a Judge of this Court. As this Court neither approved nor disapproved specifically the views expressed in A.F. Ferguson & Co., Employees’ Union of Jamia Karachi and K.G. Old they are entitled to the highest considerations and respect as and when these cases come up for consideration before this Court.” (emphasis added)***

17. Before parting with this Judgment, we are unable to restrain ourselves from observing that one of the basic purposes of NAB Law is to curb corruption, specially in the form of white-collar crimes. That is why in terms of Section 18, sub-section (d) of NAB Law, the NAB authorities have been given a preferential status as an investigation agency. However, this status is coupled with a sense of greater public duty and requires complete transparency that NAB functionaries should demonstrate by observing law and following the required procedure. However, it has been observed that NAB is getting involved in trivial matters for which already different special laws, regulations and fora already exist to deal with such matters and situations. It has been further observed that some times, the NAB functionaries do not even follow their own Circulars and SOPs (Standard Operating Procedures) and indulge in fishing and roving inquiries on fictitious complaints in the absence of any material or evidence, which creates serious doubts about

propriety and validity of such proceedings, as it violates the principles of Natural justice and fair trial. Consequently, the cognizance by the NAB in cases where already a complete legal mechanism exists and forum is provided for arresting such situations, is counterproductive. This would also be contrary to the spirit of Section 33 (C) of NAB Law, inter alia, concerning various measures that NAB should adopt for effectively implementing its statutory mandate. Office is directed to send a copy of this Judgment to the Chairman NAB for his information and necessary action in this regard.

These are the reasons for our short order dated 03.06.2016.

JUDGE

JUDGE