

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

Present:

**Mr. Justice Sajjad Ali Shah, C.J.**

**Mr. Justice Muhammad Junaid Ghaffar, J.**

**Cr. Bail Application No.696 of 2016**

**Abdul Hafeez-----Applicant/Accused.**

**v/s**

**The State-----Respondent.**

**Date of hearing: 24.10.2016.**

**Applicant: Through M/s. Ch. Waseem Akhter and  
Mallag Assa Dashti, Advocates.**

**Respondent: Through Mr. Muhammad Aslam Butt,  
DAG alongwith Inspector Fareed (FIA).**

**ORDER**

**Muhammad Junaid Ghaffar, J.** This is a second Bail Application of the accused before this Court on the ground of statutory delay by invoking the provisions of Section 497 Cr.P.C and the Provisos therein as the learned Trial Court vide Order dated 14.03.2016 has dismissed such Bail Application. Earlier, the Bail Application of the present accused was dismissed on merits by the Trial Court vide Order dated 03.08.2015 and so also by this Division Bench vide Order dated 22.09.2015 in Cr. Bail Application No.1015/2015. The accused has been arrested in Crime No.29/2013 by FIA under Sections 420, 468, 471 and 109 PPC for having committed fraud in a banking matter and the trial is pending before the Special Court (Offences in Banks) Sindh at Karachi under Offences in respect of Banks (Special Courts) Ordinance, 1984 (**Ordinance**).

2. Learned Counsel for the applicant submits that the present accused was arrested on 29.01.2015 and is behind the Bar for almost one year and nine months, whereas, not a single witness has been examined and has referred to the diary sheet of the case proceedings, which has been placed on record. Learned Counsel further submits that the learned Trial Court has erred in rejecting the Bail Application and has not considered the implication of a Full Bench Judgment of the Honourable Supreme Court in the case reported as **1992 SCMR 2192 (The State v. Syed Qaim Ali Shah)** . In the circumstances, he has prayed for grant of bail on statutory delay.

3. On the other hand, learned DAG has contended that earlier a three Member Bench of Honourable Supreme in the case reported as **1991 SCMR 599 (Allied Bank of Pakistan Ltd. v. Khalid Farooq)** had the occasion of considering the provisions of Section 5(6) of the Ordinance, and Speaking through *Rustam S. Sidhwa J.* as His Lordship then was came to the conclusion that Section 5(6) of the Ordinance does not completely oust the applicability of Section 497 Cr.P.C and therefore this Court is competent to consider the Bail Application of an accused under Section 497 Cr.P.C. He further submits that thereafter a Full Bench of Honourable Supreme Court in the case of ***Syed Qaim Ali Shah (supra)*** while considering the provisions of Section 7 of the Suppression of Terrorist Activities (Special Courts) Act (XV of 1975), which provision appears to be parimateria with Section 5(6) of the Ordinance has reconciled and reviewed the earlier view arrived at in the case of Allied Bank (Supra) and has been pleased to hold that Section 497(1) and its Provisos are available to this Court for granting bail in matters of Special Court(s). In short learned DAG has not opposed this bail application on jurisdictional grounds.

4. We have heard the learned Counsel for the applicant as well as learned DAG and have perused the record. Insofar as, the present Bail Application is concerned, it is only on the ground of

statutory delay and not on merits and admittedly the present accused is behind the Bar since his arrest i.e. 29.01.2015 for almost a period of one year and nine months, whereas, the maximum punishment for which accused has been charged is seven years. It further appears that the matter has not been proceeded with before the Trial Court by the prosecution and the diary sheet placed before the Court on behalf of present accused affirms such position as it appears that there are other co-accused in this matter, who are on bail and time and again the matter is being adjourned and so also because of proceedings against certain absconders, and therefore, insofar as the question of delay is concerned, the contention seems to be justified.

5. The provisions for grant of bail under the Ordinance and other matters by the Special Court is provided in Section 5 of the Ordinance, 1984 and subsection (6) is relevant insofar as present controversy for grant of bail or otherwise is concerned. The same reads as under:-

**5. Procedure of a Special Court. (1) .....**

(2) .....

(3) .....

(4) .....

(5) .....

(6) An accused person shall not be released on bail by a Special Court or by any other Court, if there appear reasonable grounds for believing that he has been guilty of a scheduled offence; nor shall an accused person be so released unless the prosecution has been given notice to show cause why he should not be so released.”

6. The provision of Subsection (8) of Section 5A of the Suppression of Terrorist Activities (Special Courts) Act (XV of 1975) (“**Act**”) (since repealed) is more or less analogous to the aforesaid provision which was under consideration before the Hon’ble Supreme Court in the case of **Syed Qaim Ali Shah (Supra)** and reads as under:-

“5-A.....

(8) An accused person shall not be released on bail by a Special Court or by any other Court, if there appear reasonable grounds for believing that he has been guilty of a scheduled offence; nor shall an accused person be

so released unless the prosecution has been given notice to show cause why he should not be so released.”

7. On perusal of the aforesaid provisions of the Act as well as the Ordinance, it appears that they are almost identical in wording and the Legislative Intent behind these provisions reflects that insofar as grant of bail under these Special Laws is concerned, the same are to be primarily governed by the aforesaid provisions. However, the Hon'ble Supreme Court in the case of **Syed Qaim Ali Shah (supra)** had the occasion to deal and interpret both these provisions and also considered the earlier view as ordained in the case of **Allied Bank (supra)** and in fact reviewed it to the extent of applicability of S.497(1) Cr.P.C. without the benefit of its Provisos to the accused. The Hon'ble Supreme Court after a threadbare examination of law and the precedents, came to the conclusion that since the Special Laws do not specifically exclude applicability of the provisions of Section 497 Cr.P.C, therefore, an accused, during pendency of his trial, is entitled to the benefit of Section 497 Cr.P.C. along with its Provisos, if otherwise the accused qualifies for such benefits. Insofar as the **Allied Bank Case (Supra)** is concerned, in that case the Hon'ble Supreme Court had dealt with two cases; one relating to an accused whose trial was pending, and the other in respect of a convict whose appeal was pending and bail was being sought through suspension of judgment. The cases were admittedly under the Ordinance and the basic consideration was of the implication of S.5(6) of the Ordinance as against the provisions of S.497 and S.498 Cr.P.C. However, insofar as instant bail application is concerned, it is only the finding in relation to S.497 Cr.P.C. which is relevant. The Court in the case of **Allied Bank (Supra)** speaking through *Rustam S. Sidhwa J.*, as his lordship then was, held as under;

"Therefore, whilst the provisions of the first and third provisos to subsection (1) of section 497 of the Code may be treated as not available to the Special Court or the High Court, such a situation would not apply to subsections (2) to (5) of section 497 of the Code, as they do not affect the rule stated in subsection (6) of section 5 of the Ordinance. These provisions would not stand excluded, whether expressly or by necessary intendment or implication. In the final analysis, it is not possible to subscribe to the view that section 5(6) of the Ordinance constitutes a complete Code for the grant of bail to persons, accused of

offences mentioned in the Schedule to the exclusion of all provisions in the Code relating to the same subject."

8. The Hon'ble Supreme Court in the **Allied Bank Case (Supra)** also discussed a question that whether on the ground of delay the Court can release an accused person on bail under S.561-A, Cr.P.C. in view of the dicta laid down by the Hon'ble Supreme Court in the case of **Raisat Ali v. Ghulam Muhammad (PLD 1968 SC 353)**, however, the question was left open to be examined in an appropriate case and no definite finding or conclusion was drawn. Subsequently a full bench of the Hon'ble Supreme Court in the case of **Syed Qaim Ali Shah (Supra)** in which incidentally the author of **Allied Bank Case (Supra)** was also on the bench and appended his additional note by reviewing the earlier decision he had authored in the **Allied Bank Case (Supra)** came to the conclusion that an accused is entitled to the benefit of provisos to S.497(1) Cr.P.C. in seeking bail for an offence under the Ordinance. At the relevant time when the judgment in the case of Qaim Ali Shah was delivered, the provision of S.497 Cr.P.C. and its provisos read as under;

**497. When bail may be taken in case of non-bailable offence,** (1) When any person accused of any non-bailable offences is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of <sup>2</sup>[an offence punishable with death or <sup>3</sup>[imprisonment for life or imprisonment for ten years]

<sup>9</sup>[Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail;]

<sup>10</sup>[Provided further that <sup>11</sup>\* \* \* \* a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released.

<sup>12</sup>[Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail--

- (a) who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year and whose trial for such offence has not concluded; or
- (b) who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and whose trial for such offence has not concluded]<sup>13</sup> [;

Provided further that the provisions of the third proviso to this sub-section shall not apply to a previously convicted offender or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal].

(2) .....

[(3) .....

(4) .....

[(5) .....

Subsequently by Act No.8 of 2011 the aforesaid proviso(s) 3 & 4 were omitted and presently the provision read as under;

**497. When bail may be taken in case of non-bailable offence,** (1) When any person accused of any non-bailable offences is arrested for detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of <sup>2</sup>[an offence punishable with death or <sup>3</sup>[imprisonment for life or imprisonment for ten years]]:

<sup>4</sup>[Provided that the Court may direct that any person under the age of sixteen years <sup>5</sup>[or any woman] or any sick or infirm person accused of such an offence be released on bail:]

<sup>6</sup>\* \* \* \* \*

<sup>7</sup>[Provided further that <sup>8</sup>\* \* \* \* a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released <sup>9</sup>[:]

<sup>10</sup>[Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail—

- (a) who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or
- (b) who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of a woman exceeding one and whose trial for such offence has not concluded:

Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the Court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.]

The relevant finding of the Hon'ble Supreme Court in the aforesaid case speaking through *Ajmal Mian J.* as his Lordship then was is as under:-

"21. I may now advert to the question, whether provisos 1 and 3 to subsection (1) of section 497, Cr.P.C. can be pressed into service by the Special Court. In this regard, it may be pertinent to observe that, the main object of subsection (8) of section 5-A of the Act seems to be that it has done away with the distinction between bailable and non-bailable offences by substituting the same with the expression of scheduled offences. All the scheduled offences have been

made non-bailable, though some of the offences included in the Schedule are bailable offences under Cr.P.C. To this extent, there is inconsistency between subsection (8) of section 5-A of the Act and subsection (1) of section 497, Cr.P.C. But there is nothing in above subsection (8) of section 5-A of the Act which may be construed as inconsistent to provisos 1 and 3 to subsection (1) of section 497, Cr.P.C. Even in Allied Bank case, it has been held that section 5(6) of the Ordinance does not constitute a complete Code for the grant of bail to persons accused of offences mentioned in the Schedule to the exclusion of all provisions in the Code relating to the same subject and, because of that, it has been held that subsections (2) to (5) of section 497, of the Code remained available to the Special Court and the High Court. In my view, by above parity of reason provisos 1 and 3 to subsection (1) of section 497, Cr.P.C. can be pressed into service by the Special Court. (Emphasis supplied)

It may be pertinent to point out the original section 497 of the Code as was enacted in 1898 did not contain above provisos 1 and 3 to subsection (1) of section 497, Cr.P.C. However, with the passage of time, it was felt that an exception to the rule contained in subsection (1) of section 497 should be made in respect of a person below the age of 16 years, a woman and a sick or infirm person, so in 1923 proviso 1 to subsection (1) of section 497, Cr.P.C. was added by the Code of Criminal Procedure (Amendment Act, 1923 (Act XVIII of 1923) in order to enable the Court to grant bail to any person under the age of 16 years or to any woman or to any sick or infirm person who otherwise on merits would not be entitled to bail.

It seems that the superior Courts in some of the cases held that inordinate delay in prosecution of a criminal case amounts to abuse of process of Court/law warranting grant of bail on the above ground. In this regard, reference may be made to the case of Riasat Ali v. Ghulam Muhammad and another PLD 1,968 SC 353, the case of Ahrar Muhammad and others v. The State PLD 1974 SC 224, and the case of Malik Ghulam Jilani v. Station House Officer, Police Station, Gulberg, Lahore and 2 others PLD 1975 Lahore 210. It appears that the Legislature took notice of the above judicial dictum and in order to give statutory recognition to the above ground and also probably on account of overcrowding of jails, has enacted proviso 3 to subsection (1) of section 497 through Code of Criminal Procedure (Second Amendment) Ordinance, 1979 (Ordinance LXXI of 1979), (gazetted on 22-12-1979) providing the statutory delay mentioned therein as a ground for admitting an accused person to bail in respect of non-bailable offences. It may also be stated that proviso 4 was incorporated by Code of Criminal Procedure (Second Amendment) Ordinance, 1983 (Ordinance XXXII of 1983) providing exception to above proviso 3 by laying down that the provision of the third proviso shall not apply to a previously convicted offender or to a person who, in the opinion of the Court is hardened or dangerous criminal. In my opinion, the above provisos 1 and 3 contain independent grounds for bail in respect of non-bailable offences and, therefore in the absence of express exclusion of section 497, Cr.P.C. in subsection (8) of section 5-A of the Act, the above grounds shall be available to the Special Court as well. (Emphasis supplied)

25. The upshot of the above discussion is that since I have held that provisos 1 and 3 to subsection (1) of Section 497, Cr.P.C. are available to the Special Court and the High Court in a case in which an accused person may be facing trial under the Act before the Special Court, the view of this Court to the above extent in the Allied Bank case is required to be modified. The orders appealed against are in consonance with the above view and, therefore, the above appeals are liable to be dismissed and, thus they are dismissed.

9. The aforesaid findings of the Hon'ble Supreme Court very clearly provide that there is nothing in subsection (8) of Section 5A of the 1975 Act (which provision is analogous to Section 5(6) of the Ordinance), which may be constituted as inconsistent to the Provisos to subsection (1) of Section 497 Cr.P.C and has reaffirmed the earlier view taken by the Hon'ble Supreme Court in the **Allied Bank case (supra)**, wherein, it was held that Section 5(6) of the Ordinance does not constitute a complete Code for the grant of bail to persons, accused of offences mentioned in the Schedule to the exclusion of all the provisions in the Code relating to the same subject and because of that subsection (2) to (5) of Section 497 Cr.P.C. remained available to the Special Court as well as High Court. The Court further went on to hold that in their view by above parity of reasons *Provisos (1) & (3) of Sub-Section (1) to Section 497 Cr.P.C. can be pressed into service by the Special Court.* The discussion at Para 21 of the said judgment though has dealt with the repealed / substituted provisos, but in substance, it does not have any material change inasmuch as the present / current provisions are almost analogous with a minor change in the manner they have been placed. The conclusion drawn as referred to hereinabove is that an accused / applicant is entitled for claiming concession of bail in terms of the provisos to S.497(1) Cr.P.C. for delay in conclusion of trial even if the accused / applicant is being tried under the Ordinance, and further this Court is not divested of its jurisdiction to entertain and grant such bail.

10. It may also be further noted that the judgment in the case of **Allied Bank (Supra)** was authored by his lordship Rustam S. Sidhwa (as he then was) who was also incidentally a member of the 5 member bench in the case of **Syed Qaim Ali Shah (Supra)** and has observed that after having given deep thought to the matter, I have come to the conclusion that the view taken in **Allied Bank Case (Supra)** requires review for reason which I propose to set out below but which are totally different from that advanced by the learned Counsel before us. The relevant finding is at Para 10 to 15 of his additional note which reads as under;



10. The first matter to be seen is which provision of the Act permits the Special Court or the High Court to release or admit a person to bail. There is no section in the Act relating to the grant of bail. There are a series of sections in Chapter XXXIX of the Code dealing with bail; which include sections 496 to 498 dealing with the grant of bail. What is contained in section 5-A (8) of the Act is not a provision relating to the grant of bail, but a provision detailing circumstances prohibiting the grant of bail.

11. Section 7 of the Act does not exclude section 497 of the Code. On the basis of the rule laid down in the Allied Bank's case (supra), section 497 of the Code is therefore, applicable to the Act. If this be, so, section 5-A (8) of the Act, can only act as a partial limitation to the rule laid down in section 497 of the Code.

12. Now what does subsection (1) of section 497 of the Code say? It says that when any person accused of any non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years: Provided that ... ..(and here follow the four provisos). Now what section 5-A(8) of the Act attempts to do is to provide a substitute to a part of the rule stated in subsection (1) of section 497 of the Code. Subsection (1) of section 497 of the Code deals with non-bailable offences, whereas there is no concept of a bailable or non-bailable offence in respect of bail in the Act. May be the difference still prevails in the realm of investigation. What the Act deals with, regarding bails, is scheduled offences. Subsection (1) of section 497 of the Code deals with a bar to bail if there appear reasonable grounds to believe that the accused is guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years, whereas section 5-A (8) of the Act deals with a bar to bail if there appear reasonable grounds to believe that the accused is guilty of a scheduled offence. The heinousness or severity of the punishment is not relevant to the bar. Since subsection (1) of section 497 of the Code specifically deals with the grant of bail and subsection (8) of section 5-A of the Act deals with the bar or limitation to the grant thereof, the only inference that one can derive is that the latter acts as a bar or limitation to the rule stated in the former, or to put it in other words, the latter provision, to the extent to which it conflicts with the former, displaces the former, leaving everything else intact. Subsection (1) of section 497 of the Code can also be read in another manner that if in a noncognizable case these appear reasonable grounds for believing that the accused, not being a person under the age of sixteen years or a woman or a sick or infirm person, or one who has been detained for a continuous period exceeding one year in respect of any offence not punishable with death and whose trial for such offence has not concluded, or one who has been detained for a continuous period exceeding two years in respect of any offence punishable with death and whose trial for such offence has not concluded, except where the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, has been guilty of an offence punishable with death or imprisonment for life, or imprisonment for ten years, shall not be so released on bail. Subsection (8) of section 5-A of the Act, to the extent to which it conflicts with the former, would displace the former, leaving everything else intact. Thus, subsection (8) of section 5-A would not displace the provisos appearing in subsection (1) of section 497 of the Code. The provisos are intended to relax the severity of the rule stated in subsection (1) of section 497 of the Code and are based on grounds of humaneness, compassion and social justice, to prevent the abuse of the process of the Court and to prevent undue oppression working against the sick, the infirm, the weaker sex and those immature in age. The conflict between the two provisions 'cannot be resolved by eliminating the provisos. Penal provisions must be construed strictly to

maintain the relief giving provisions, unless the strict intention to eliminate them is clear and unequivocal. In the event of a somewhat conflicting or defective drafting, where such a clear intention cannot be spelt out, the benefit of the provisos cannot be allowed to be dropped.

13. In order to know what a statute does not mean, Pollock C.B., in *Attorney-General v. Sillem* (1864, 2 H. & C. 431 @. 515) stated: " In order to know what a statute does mean, it is one important step to know what it does not mean; and if it be quite clear that there is something which it does not mean, then that which is suggested or supposed to be what it does mean must be in harmony and consistent with what it is clear that it does not mean. What it forbids must be consistent with what it permits." Section 497 of the Code is not excluded by section 7 of the Act. It applies fully. Subsection (1) of section 497 of the Code relates to the grant of bail and limitations to its grant. Subsection (8) of section 5-A of the Act relates to conditions which bar the grant of bail. Section 497 of the Code is a composite section dealing with a host of matters including the grant of bail and conditions barring such a grant and the cancellation of bail. Subsection (8) of section 5-A of the Act is limited in its scope and only deals with conditions barring the grant of bail. This subsection which is limited in its scope ex facie cannot displace section 497 or subsection (1) thereof, which have a larger scope. The view that subsection (8) of section 5-A of the Act displaces the provisos under subsection (1) of section 497 of the Code, would not be in harmony with the intent. Subsection (8) of section 5-A of the Act only displaces that part of subsection (1) of section 497 of the Code which is in conflict with it. The provisos are therefore not eliminated. They continue to exist because of any lack of conflict. What subsection (8) of section 5-A of the Act forbids, i.e. not to permit the grant of bail to a person where reasonable grounds exist that he is guilty of a scheduled offence, is in 'harmony with what it permits under sections 7(1) and 10 i.e. to treat the retraining provisions of subsection (1) of section 497 of the Code which have not been displaced, as applicable. It must not be forgotten that subsection (2) of section 497, also permits the grant of bail in cases where there are reasonable grounds to believe that the accused is guilty of a non-bailable offence, if it appears to the Court that there are sufficient grounds for further inquiry into his guilt. Subsection (8) of section 5-A of the Act cannot displace this r i t in respect of the scheduled offences.

14. Looking at the case differently, one notes that the Special Court has to decide the case, speedily under subsection (1) of section 5-A of the Act and not to adjourn the case, unless necessary in the interest of justice and that too for not more than two days, under subsection (2) of the same section. In this background, delay in the disposal of the case by the State would be a clear abuse of the process of the Court, entitling the accused to seek bail under the third proviso to subsection (1) of section 497 of the Code, if not under section 561-A thereof. How could tire third proviso be avoided, is difficult to understand. Thus, the view that subsection (8) of section 5-A of the Act does not permit the view that the provisos should be treated as deleted, is in harmony with the view that section 7 of the Act treats section 497 of the Code as fully applicable, to the extent to which it is not displaced, thus permitting the provisos to operate and remain effective.

15. For the foregoing reasons, both the Special Court and the High Court can grant bail to an accused being tried for a scheduled offence on medical grounds.

11. It may also be relevant to observe that it is not the case of respondents presently that the accused / applicant is a habitual offender, previously convict or a dangerous criminal, whereas, as

discussed hereinabove, he is otherwise entitled to Proviso 3(a) of Section 497 Cr.P.C. It may also be observed that the applicant accused is not charged for an offence punishable with death or imprisonment for life or imprisonment for ten years. Moreover, insofar as the applicant's entitlement for claiming the benefit of the proviso to the effect that there has been considerable delay in the trial is concerned, no effort has been made by FIA/respondents to rebut such contention.

12. In view of hereinabove facts and circumstances of this Court, it appears that the learned Trial Court did not take into consideration the above said dicta laid down by the Full Bench of Hon'ble Supreme Court in the case of **Syed Qaim Ali Shah (Supra)** and has in fact relied upon some other Judgment earlier in time and further while dealing with second bail application on statutory ground also dealt with merits of the case in respect of which the earlier Bail Application stood dismissed by the Special Court as well by this Court and therefore, the learned Trial Court while dealing with second bail application on statutory ground was not justified in refusing the bail to the present applicant/accused. In such circumstances, by means of a short Order dated 24.10.2016, the applicant/accused was granted bail by us subject to furnishing surety in the sum of Rs.2,000,0000/- (Rupees Two Million) and P.R. bond in the like amount to the satisfaction of the Nazir of this Court and above are the reasons thereof.

**Judge**

**Chief Justice**

Ayaz P.S.