

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

C. P No. D-6599, D-5835, D-5836 and 5837 of 2015

DATE

ORDER WITH SIGNATURE OF JUDGE

C. P No. D-6599/2015.

For hearing of CMA No.20969/16 (561-A)

C. P No. D-5835/2015

For hearing of CMA No.20971/16 (561-A)

C. P No. D-5836/2015

For hearing of CMA No.20972/16 (561-A)

C. P No. D-5837/2015

For hearing of CMA No.20970/16 (561-A)

07.04.2017

Mr. Abdul Moiz Jafri, Advocate for Petitioners.
Mr. Muhammad Altaf, ADPG NAB.

Muhammad Junaid Ghaffar J. All four Petitioners in these Petitions were initially granted Ad-interim Pre-arrest Bails vide Orders dated 21.10.2015, upon furnishing surety of Rs.10,00,000/- with PR bond in the like amount and deposit of their Original Passports, which were subsequently confirmed vide Order dated 30.06.2016 on the same terms. Through these Applications under Section 561-A Cr.P.C., the Petitioners have requested the Court to release their Passports and reduce the surety amount to Rs.300,000/- from Rs.10,00,000/-.

2. Learned Counsel for the Petitioners submits that the Petitioners' ad-interim bail was confirmed on the basis of an Order dated 18.02.2015 passed by a Division Bench of this Court, whereby, the other similarly placed co-accused were granted bails in the sum of Rs.300,000/- only, therefore, per learned Counsel these Petitioners are also to be treated alike and orders be passed to reduce the amount of surety and for return of Passports. In support he has relied upon an Order dated 08.03.2017 passed by the Hon'ble Supreme Court in Civil Petition No.28-K of 2017 in the case of ***Javed Iqbal and another v. Director General (Sindh) NAB and another.***

3. On the other hand, learned Special Prosecutor NAB submits that insofar as reliance on the Order of Hon'ble Supreme Court is concerned, in that matter there was no reference and it was only an enquiry, which was thereafter converted into investigation and therefore the said Order on facts is distinguishable. He further submits that bail granting order cannot be modified through subsequent applications in a Constitutional Petition.

4. We have heard both the learned Counsel and perused the record. At the very outset, it may be observed that these petitions were filed in respect of NAB Ordinance, 1999 and are not criminal proceedings emanating under the Criminal Procedure Code. These were Constitutional Petitions under Article 199 of the Constitution under which, on the basis of dicta laid down by the Honorable Supreme Court in the case ***Khan Asfandyar Wali & Others v Federation of Pakistan (PLD 2001 SC 607)*** and ***Abdul Aziz Khan Niazi v The State through Chairman NAB, Islamabad (PLD 2003 SC 668)*** and ***National Accountability Bureau v Khalid Masood & another (2005 SCMR 1291)***, the bail applications of the petitioners were entertained and granted. The reference was filed against the present petitioners and others by Chairman NAB under Section 18(g) read with Section 24(b) of the NAB Ordinance, 1999, whereas, in terms of Section 9(b) of the NAB Ordinance, no Court shall have the jurisdiction to grant bail to any person accused of any offence under this Ordinance. Section 9(b) of this Ordinance reads as under:-

"9. Corruption and Corrupt Practices:

(a)

(b) All offences under this Ordinance shall be non-bailable and notwithstanding anything contained in Sections [426, 491,] 497, 498 and 561-A or any other provision of the Code, or any other law for the time being in force no Court²[³*] shall have jurisdiction to grant bail to any person accused of any offence under this Ordinance.

From the aforesaid definition, it is clear that Sections 497, 498 and 561-A Cr.P.C. or for that matter any other provision of the Code, or any other law for the time in force are not applicable to the offences falling under the NAB Ordinance, 1999. Whereas, in terms of Section 3 of the NAB Ordinance, 1999 it has an overriding effect on any other law for the time being in force but the High Court under

Article 199 of the Constitution is exercising jurisdiction to grant bail or otherwise to an accused facing prosecution under the NAB Ordinance, 1999. Therefore, for all legal purposes no such application under Section 561-A Cr.P.C. is to be entertained in a Petition under Article 199 of the Constitution.

5. However, notwithstanding this, in the interest of justice, we have even otherwise entertained such application(s) as application(s) supplemental to the petition and have heard the Counsel for the Petitioners in this regard. In these matters ad-interim pre-arrest bails were granted to the Petitioners vide orders dated 21.10.2015. The relevant portion of the order reads as under:-

“Let notice be issued to the Respondents as well as DAG NAB. In the meanwhile, without dilating upon the merits of the case, petitioner Muhammad Imran is granted ad-interim pre-arrest bail subject to his furnishing solvent surety in the sum of Rs.10,00,000/- (Rupees One Million only) with PR Bond in the like amount to the satisfaction of Nazir of this Court. Simultaneously, petitioner to deposit his original passport with the Nazir of this Court. Secretary, Minister of Interior, Government of Pakistan, to ensure that petition is not issued new or duplicate passport without obtaining prior permission of this Court.”

6. It appears that thereafter when these Petitions were finally heard, the Counsel for the Petitioners relied upon an Order dated 18.12.2015 passed in C.P No.3790/15, and others through which another learned Division Bench had granted bails to all other Co-accused and apparently the role of these petitioners was same as that of other petitioners. Accordingly vide Order dated 30.06.2016 ad-interim bails granted to all these Petitioners were confirmed and the operative part of the said Order reads as under:-

“3. Keeping in view the earlier orders already passed by a Division Bench of this Court in the aforesaid petitions, there seems no impediment if ad-interim pre-arrest bail granted to the petitioners may be confirmed in similar terms, as the reference has already been filed and the matter is proceeding before the Accountability Court, whereas, petitioners are also attending the Accountability Court regularly. Accordingly, the ad-interim pre-arrest bails granted to the petitioners, namely, Muhammad Imran, Nadeem Ayub, Zeshan, Amir Amin Thara and Muhammad Ashraf vide order dated 21.10.2015 are hereby confirmed in similar terms as contained in the ad-interim orders passed in respect of petitioners.

7. Perusal of the Order granting interim pre-arrest bails reflects that these Petitioners were granted such bail on furnishing solvent surety in the sum of Rs.10,00,000/- with PR bond in the like amount to the satisfaction of the Nazir of this Court with further directions to

deposit their original Passports and instructions to Secretary Minister of Interior, Government of Pakistan to ensure that Petitioner(s) are not issued new or duplicate Passport(s) without obtaining prior permission of this Court. When these interim bails were confirmed, the learned Division Bench was pleased to do the same in similar terms as contained in the ad-interim orders passed in respect of the Petitioners. To us the confirmation of bail on the same terms and conditions on which ad-interim pre-arrest bails were granted was a conscious and deliberate decision by not taking into consideration the amount of surety, which was ordered to be furnished to other co-accused/petitioners in C.P No.3790/2015 vide Order dated 18.12.2015. In our considered view the Court was cognizant of the fact that the conditions regarding furnishing of surety and deposit of Passport was very much there in the case of Petitioners, whereas, it had not been asked for from other co-accused in their bail orders on the basis of which the present petitioners were granted bail. In our view on subsequent application(s) like these, the said order cannot be interfered with so as to review it or otherwise modify, which has been passed by the Court after due care and by exercising its own discretion in the matter so vested in it. In our understanding the appropriate remedy to the Petitioners was to further challenge the said portion of the order by which they were aggrieved. In fact reliance placed on the order of Hon'ble Supreme Court dated 08.03.2017 as above also depicts the same factual position, wherein, the Petitioners being aggrieved by imposition of such condition had directly approached the Honorable Supreme Court by filing a Civil Petition for Leave to Appeal. By entertaining these applications subsequently, we would be either amending the order or modifying it after disposal of these petitions, which we are afraid, cannot be done through such applications.

8. A learned Division Bench of Lahore High Court in the case of ***Tariq Masood v. Director General, National Accountability Bureau, Lahore and another (PLD 2012 Lahore 287)*** had the occasion to decide a miscellaneous application, in a matter under the NAB Ordinance, whereby, the Petitioner was though granted bail in the sum of Rs.200,000/- with two sureties each in the like amount, however, additionally was also ordered to deposit a security of Rs. 25,00,000/- as well. The Petitioner had subsequently moved an

application which was initially dismissed, whereafter it was challenged before the Honorable Supreme Court but was withdrawn. Thereafter the petitioner filed another application in respect of the condition of deposit in the bail order. The Petitioners' contention was that the condition of deposit of cash security was not in accordance with law and while referring to Sections 497 and 499 Cr.P.C reliance was placed on a number of citations as mentioned in Para-4 of the said Judgment. This application was opposed on behalf of NAB on the ground that a white collar crime by misappropriating funds was committed, and therefore, keeping in view the spirit of NAB Ordinance, the Court had rightly directed the Petitioner to deposit the cash security. The said application was dismissed by the learned Division Bench of the Lahore High Court and the relevant observation reads as under:-

"A bare perusal of the aforementioned provision of law would reveal that sections 497, 498 and 561-A, Cr.P.C, or any other provision of the Code, or any other law for the time being in force, are not applicable to the offences falling under National Accountability Ordinance, 1999. Even otherwise, according to section 3, the provisions of the National Accountability Ordinance, 1999, have an over-riding effect notwithstanding anything contained in any other law for the time being in force. However, High Court, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, has the jurisdiction to grant bail to an accused facing prosecution for an offence under the National Accountability Ordinance, 1999. In the case of **Abdul Aziz Khan Niazi v The State through Chairman, NAB, Islamabad** (PLD 2003 Supreme Court 668), it was pronounced that High Court has the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497, Cr.P.C. Needless to observe that ouster of jurisdiction of High Court to grant bail in scheduled offences has been done away by amendment in section 9(b) of National Accountability Ordinance, 1999, after omission of the word "including the High Court". The High Court, while considering the question of bail in its Constitutional jurisdiction, in the interest of safe administration of justice, can examine the nature of allegations on the basis of tentative assessment of the evidence in hands of prosecution to ascertain, prima facie, the question of guilt or innocence of an accused for the purpose of grant or refusal of bail and without expressing any opinion on merits of the case, lest it should prejudice the accused or prosecution. The rule of departure from the provisions of section 497 Cr.P.C. in presence of the special enactment is enunciated in the case of **Chaudhry Shujat Hussain v. The State** (1995 SCMR 1249), wherein, it has been observed that in case of conflict between the provisions of the Offences in Respect of Banks (Special Courts) Ordinance of 1984, and the provisions of the Code of Criminal Procedure regarding scheduled offences, the Ordinance, 1984, being a special law, would prevail. Therefore, the provisions of sections 497 and 499, Cr.P.C. will not stricto sensu apply to the cases falling under the National Accountability Ordinance, 1999, in view of sections 3 and 9(b) of the Ordinance *ibid*. In the case of **The State v. Muhammad Hasham Babar** (PLD 1997 Lahore 605), ***it was held that the area of asking security from the accused, who is allowed bail, is vacant and the Court is not enjoined under the law to mathematically follow the system of securities, provided in the Code of Criminal Procedure.*** In the case *supra*, it was laid down that under the new dispensation, i.e. Ehtesab Ordinance (XX of 1997), which was an earlier enactment on the subject of accountability, the Court has ample power to ask for cash security in appropriate cases." (Emphasis supplied)

9. It may also be observed that the amount of surety along with deposit of Passport is not a conditional bail, which admittedly per settled law is not valid. However, securing Passports is in fact itself a surety, and neither a conditional bail, nor a condition required to be incorporated in the bail bond itself. It is just like having 2 (two) sureties instead of 1 (one), which is a normal practice otherwise, keeping in view the peculiar facts of the case. Therefore, in this matter the question that whether it is a conditional bail or not does not arise. In the circumstances, as already observed the procedure as well as the case law regarding procurement of a bail bond and putting any other condition as provided under Section 499 Cr.P.C would also not apply.

10. It is also of pivotal importance to note that the idea behind seeking surety while granting a bail is to secure the attendance of the accused before the Trial Court. Now what is that will ensure such attendance is for the Court granting bail to decide keeping in view the peculiar facts and circumstances of each case independently. Once such security or surety of whatsoever nature has been incorporated in the bail granting order, no further deviation is permissible for another Division Bench of the same Court to take on a subsequently filed miscellaneous application. If this is permitted as a routine and barring exceptions, then it will disturb the entire spirit, procedure and process of the Court and will never put an end to these proceedings which specially in these matters pertaining to NAB Ordinance, are only confined to the grant of Bail or otherwise. This Court is not the trial Court which normally grants bail and ensures the attendance of the accused. This difference has to be kept in mind while entertaining any such application. In our considered view when bail was granted to the petitioners, it was felt necessary by the Court to procure passports, as the Court while granting bail is duty bound to prescribe the type of surety it needs for securing the attendance of the accused. Even a routine bail order contains certain conditions between the lines. In this matter in our view the order for surrendering passports was done as a practice and routine being followed in bails pertaining to NAB matters and we do not find any illegality otherwise so as to upset it, as it would be an impediment in the proper administration of justice which the learned Division Bench thought it to be fit and just in fact and law. Courts are not required

to pass mechanical orders; rather it has to take into consideration the status of sureties, their validity as well as circumstances which would provide satisfaction to the Court that the order of concession of bail would not be misused.

11. In the case of **MUHAMMAD AYUB Versus Mst. NASIM AKHTAR AND ANOTHER (1984 P Cr. L J 160)** the Hon'ble Supreme Court of the Azad Jammu & Kashmir had the occasion to examine the condition attached to a bail granting order. The relevant finding reads as under;

13. The provision of section 498 of the Criminal Procedure Code confers vast discretionary powers on the High Court and the Sessions Court (District Criminal Court). If the High Court and the District Criminal Court has the powers to pass the bail order in a fit and a proper case then surely it has the competency to pass any conditional bail order if in its estimation circumstances of the case so warrant. Though of course the Courts normally would not and should not pass any conditional order beyond those normal conditions visualised under section 499 of the Criminal Procedure Code but to hold that the Court has no power to pass a conditional bail order in a non-bailable case under any circumstance would be a wrong exposition of law. The provisions of sections 498 admit no such limitation. In *Emperor v. H. L. Hutchinson* (A I R 1931 All. 365) a Division Bench case, it was observed that the High Court's power of granting bail is conferred on it under section 498 and is entirely unfettered by any condition. The Legislature has given the High Court and the Court of Sessions discretion to act under section 498 unfettered by any limitation other than that which controls all discretionary powers vested in a Judge viz. that the discretion must be exercised judicially. In this case the learned Division Bench while allowing bail ordered as: -

"We direct that the applicant Mr. H. L. Hutchinson be admitted to bail to the satisfaction of District Magistrate who will of course see that the bail is adequate but not excessive. Before the applicant be admitted to bail they must give an undertaking in writing to the District Magistrate that they will not take part in any public demonstration or agitation."

In A I R 1958 Tripura 34, the petitioner alleged to be a Pakistani was arrested and charged under section 3 read with section 12 of the Official Secrets Act. While allowing the bail the learned Judge passed the order in the following terms: -

"There is no reason as to why the bail should be refused to the petitioner but there appears to be some justification in the request of the learned Government Advocate that in case bail is allowed some safeguard may be imposed to prevent the petitioner froth quietly leaving this territory."

So the learned Judge apart from requiring the bail bond of Rs. 5,000 with two sureties in the like amount also ordered the petitioner not to leave the Municipal bounds of Agartala without written permission of the District Magistrate.

14. In: *re Saradamana and others* (A I R 1965 Andh. Pra. 444), it was held that the Court allowing bail in a non-bailable case if feels necessary has power to, impose condition. Bail in that case was allowed with, the condition that the accused were to stay at a particular place during the whole period of trial whereas the home town of accused was some 200 miles away, While considering the point the learned Judge in the High Court observed that the conditional bail order could legally be passed while allowing bail in a non-bailable case though in that case the condition imposed was considered to be unreasonable and exceptionally hard so it was

modified. For the above stated reasons we find that the District Criminal Court had the powers to pass a conditional bail order so therefore, the order passed by the District Criminal Court on 7th August, 1982 requiring the surety to be a Mehram was in accordance with law. The impugned judgment passed by the Shariat Court could not, therefore, be sustained.

15. The order dated 7th August, 1982, passed by the District Criminal Court was to the effect that the respondent was to be released on the surety of Mehram. Broadly speaking the order could be termed as a bail order with a condition precedent yet however, it is different from the conditional bail orders generally passed. Conditions whether incorporated in bail bond or otherwise generally operate after the release and if found violated those may entail either in the forfeiture of the bond or cancellation of the bail. In the present case the position is however different. On the surety of any one from among the class of Mehram the respondent was to be released. After the release neither the surety nor the respondent were bound by any condition except those visualised under section 499. So the order passed by the District Criminal Court was really a choice of proper surety under the circumstances. We are unable to agree with the arguments advanced by the learned counsel for the respondent that the object of asking for the sureties and the furnishing of bonds is only to ensure the presence of the accused before the Court and beyond that no other condition could be attached.

12. In the case of ***Hakim Ali Zardari v The State (PLD 1998 SC 1)***, the order of learned Lahore High Court whereby while granting bail a condition for furnishing deposit of Rs.10 Million and surrender of passport was made in case emanating from the Ehtesab Act, 1997 (predecessor law of NAB Ordinance), was maintained by the Hon'ble Supreme Court by a majority decision of two is to one.

13. Though not required but before parting we may observe that it is not the case of the any of the petitioners through their applications and supporting affidavits that as to why the passports are needed as no specific details of intended travel have been disclosed nor the learned Counsel has made any submission to that effect. Whereas, nothing has been pleaded as to the petitioners inability to continue with the amount of surety already furnished by them while seeking bails.

14. In view of hereinabove facts and circumstances of the case, we are of the view that all these applications are misconceived; therefore, they are accordingly dismissed.

Judge

Judge

Ayaz P.S.