

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

**Constitutional Petition No. D – 1528 of 2020**

Petitioner : Aijaz Hussain Jakhrani,  
through Mr. Makhdoom Ali Khan Advocate  
a/w M/S Mohsin Qadir Shahwani,  
Ghulam Hussain Shah, Fahad Khan  
and Sami-ur-Rehman advocates.

Respondents 1 & 2 : National Accountability Bureau and  
Director General (Sukkur) NAB,  
through Mr. Mujeeb-ur-Rehman Soomro,  
Special Prosecutor NAB a/w I.O.  
Mujtaba Khan, Deputy Director NAB.

Date of hearing : 30.05.2022.

**ORDER**

**NADEEM AKHTAR, J.** – This constitutional petition filed by the petitioner Aijaz Hussain Jakhrani seeking pre-arrest bail in Reference No.23/2020 filed against him by the respondents / National Accountability Bureau (NAB) was heard by a learned Division Bench of this Court composed of Mr. Justice Nazar Akbar (as he then was) and my learned brother Mr. Justice Muhammad Faisal Kamal Alam. Vide order dated 22.03.2021, Nazar Akbar, J. confirmed the interim pre-arrest bail granted to the petitioner on 15.12.2020 subject to his depositing the entire amount of the liability alleged against him in the aforesaid Reference ; however, Muhammad Faisal Kamal Alam, J. dismissed the petition and recalled the interim pre-arrest bail granted to the petitioner. In view of the difference in the opinion of the learned Judges, the matter was placed before the Hon'ble Chief Justice of this Court who was pleased to nominate me as the Referee Judge to resolve the difference.

2. The facts of the case have been meticulously stated in the order passed by Nazar Akbar, J., therefore, they need not be repeated here. However, it is necessary to state the facts that are relevant for resolving the difference in the opinion of the learned members of the Division Bench. On 24.09.2019, the present petitioner filed C.P. No. D-6040/2019 against NAB at the Principal Seat of this Court at Karachi praying, *inter alia*, that NAB be restrained from arresting him in any hidden inquiry or investigation including the investigation pertaining to the Provincial Highways Jacobabad and Education Works Department, and in Reference No.10/2019 wherein he was not arrayed as an accused, or in the alternate, pre-arrest bail be granted to him. An ad-interim order was passed in the said petition on 24.09.2019 by a learned Division Bench of this Court that he shall not be arrested

till the next date of hearing. Vide short order dated 17.12.2020 followed by reasons dated 19.12.2020, C. P. No. D-6040/2019 filed by the petitioner was dismissed by a learned Division Bench of this Court. The said dismissal of his above petition was not challenged by the petitioner before the Hon'ble Supreme Court. He, however, filed a review application on 02.01.2021 before the learned Division Bench seeking review of the said order of dismissal, which application was dismissed on 15.01.2021. Against the dismissal of his review application, he filed C.P.L.A. No.176/2021 before the Hon'ble Supreme Court on 23.01.2021, but withdrew the same on 10.03.2021.

3. Meanwhile, Interim Reference No.23/2020 was filed by NAB on 13.11.2020, and on 09.12.2020 a notice for appearance in the said Reference was issued to the petitioner by the Accountability Court at Sukkur. The petitioner filed the instant petition on 15.12.2020 before the Sukkur Bench of this Court seeking pre-arrest bail in Reference No.23/2020. Interim pre-arrest bail was granted to him on the same day. However, at the time of final hearing of the petition, the conclusion drawn by each of the learned members of the Division Bench hearing this petition was at variance as noted above, that is, Nazar Akbar, J. confirmed the interim pre-arrest bail granted to the petitioner subject to his depositing the entire amount of the liability alleged against him in Reference No.23/2020, whereas, Muhammad Faisal Kamal Alam, J. dismissed the petition and recalled the interim pre-arrest bail granted to the petitioner.

4. While confirming the interim pre-arrest bail, it was observed by Nazar Akbar, J. that the documentary evidence in the case had already been collected by the Investigating Officer ; there was no apprehension of tampering with the evidence as all the prosecution witnesses were official witnesses ; the Reference had already been filed against the petitioner before the Accountability Court at Sukkur wherein the charge had been framed and some of the prosecution witnesses had already been examined ; the petitioner was regularly attending this Court as well as the trial Court and did not misuse the concession of interim pre-arrest bail extended to him ; he had volunteered to deposit the amount of the liability alleged against him in the impugned Reference No.23/2020 ; and, the Hon'ble Supreme Court had granted bail in cases where the accused persons were ready to deposit the amount of the liability alleged against them. The objection raised on behalf of NAB that the present petition seeking pre-arrest bail in Reference No.23/2020 was not maintainable as C.P. D-6040/2019 filed by the petitioner seeking similar relief had already been dismissed by this Court, was rejected by Nazar Akbar, J. by holding that Reference No.23/2020 was not in existence when C.P. No.D-6040/2019 was filed by the petitioner ; in C.P. No.D-6040/2019 the petitioner did not seek bail in Reference No.23/2020 and he came to know about the said Reference during the

pendency of C.P. No.D-6040/2019 which was not amended to include any relief against Reference No.23/2020 ; the observations given by the learned Division Bench of this Court in relation to Reference No.23/2020 while dismissing C.P. No. D-6040/2019 could not have any bearing on the instant petition ; the interim pre-arrest bail granted in the present petition could not be considered as vacated by the order of dismissal passed in C.P. No.D-6040/2019 ; and, the dismissal of C.P. No. D-6040/2019 was not an impediment in the relief of pre-arrest bail sought by the petitioner in the present petition.

5. Muhammad Faisal Kamal Alam, J. did not agree with the above conclusion drawn by Nazar Akbar, J., and dismissed the present petition and recalled the interim pre-arrest bail granted to the petitioner by holding that the concession of bail in Reference No.23/2020 was declined to the petitioner in C.P. No.D-6040/2019 by this Court, whereafter the review application filed in the said petition by the petitioner was also dismissed by this Court ; once the concession of pre-arrest bail in Reference No.23/2020 had been declined by a Division Bench of this Court, the learned Division Bench seized with the present petition could not grant such relief in the same Reference unless some new grounds had been agitated by the petitioner ; and, the question of pre-arrest bail to the petitioner had already been decided by a learned Division Bench of this Court in C.P. No.D-6040/2019.

6. It is well-settled that the Referee Judge does not have the jurisdiction to hear or decide the whole case as the whole case is not before him, and his jurisdiction is limited to the extent of resolving the difference between the learned members of the Division Bench who continue to retain the jurisdiction over the matter ; and, it is the duty of the Referee Judge to remit his opinion to the learned Division Bench for disposal of the case by announcing the final order / judgment based on the majority opinion, including the divided opinions of the original members of the Division Bench and the opinion of the third / Referee Judge. The above view is fortified by the authoritative pronouncement of the Hon'ble Supreme Court in Muhammad Sayyar V/S Vice-Chancellor, University of Peshawar and others, **PLD 1974 SC 257**, wherein it was held, *inter alia*, as under :

*“ Now, coming to the question on which leave was granted in this case it seems to us that, so far as Clause 26 of the Letters Patent of the High Court is concerned, the practice of the Lahore High Court is clearly to the effect that, in a case in which the members of a Division Bench are equally divided, they must either deliver dissenting judgments bringing out the points of difference or formulate the points of difference for reference to a third Judge, and the third learned Judge must then decide the point or points of difference and return his opinion to the Division Bench to enable it to announce its judgment, as held in the Full Bench case of the Royal Calcutta Turf Club v. Lala Kishan Chand Manchanda (1) This is also the procedure prescribed by the Lahore High Court Rules : vide rule 5, Chapter 4-H, Volume V.*

*These provisions, according to the Privy Council decision in the case of Bhaidas Shivdas v. Bai Gulab (1), prevail over the provisions of Section 98 of the Code of Civil Procedure, at any rate, in the case of a difference of opinion within the High Court itself, in any original matter or in a Letters Patent Appeal. The High Courts in this Sub-continent have predominantly held that only the point of difference is to be referred and not the whole case, and that in such a reference the referee Judge should return the case to be disposed of to the Division Bench with his opinion on the point of difference; vide the observations of Sulaiman, C.J. in Mst. Akbari Begum v. Rehmat Husain (2), with reference to Clause 27 of the Letters Patent of the Allahabad High Court, which is equivalent to Clause 26 of the Letters Patent of the Lahore High Court.*

*Even in a criminal case, the Madras High Court in the case of A.K. Gopalan v. The District Magistrate Malabar (2), took the same view, after holding that the reference in the case of a difference of opinion in a proceeding under Section 491 Cr.P.C. had to be under clause 36 of the Letters Patent. There, too, on a difference of opinion between Subba Rao and Mack, JJ. the point of difference was referred to Satyanarayana Rao, J., and the opinion of the latter was sent back to the original Division Bench, which, pronounced the following order :*

*“Pursuant to the opinion expressed by Satyanarayana Rao, J., we direct that the detenu A.K. Gopalan be set at liberty forthwith.”*

*From the above review of the decisions, it would appear that there is a consensus of opinion in all the High Courts. In a case of this nature, it is only the point of difference that is referred to the third Judge, and the third Judge merely resolves the difference between the Judges of the Division Bench, who continue to retain jurisdiction over the matter. The final decision in the case was to be on the basis of the majority opinion including the Judges who constituted the Division Bench. Therefore, it is manifest that a referee Judge has no jurisdiction to decide anything else besides the point on which there is difference of opinion, as the whole case or appeal is not before him. What the learned Chief Justice of the Peshawar High Court did in the present case was, therefore, wholly without jurisdiction. He decided a point, on which there was no difference of opinion at all. Neither of the Judges of the Division Bench had taken the view that there was no valid notification or order governing the grant of concessional marks to examinees.”*

7. I have heard learned counsel for the petitioner and learned Special Prosecutor NAB and have also examined the record. I have also had the benefit and privilege of pursuing the orders passed in the instant petition by the learned members of the Division Bench. They have recorded separate orders, but they have not expressly stated the point or points on which the difference of opinion arose between them. In such a situation, the Referee Judge can refer the matter back to the Division Bench for formulating the point(s) of difference or he may formulate such point(s) on his own. In *Maher Alavi V/S Pakistan and 5 others*, **PLD 1980 Karachi 609**, and *Muzamil Niazi and others V/S The State*, **PLD 2003 Karachi 526**, the learned Referee Judges of this Court had proceeded to formulate the point in

difference after perusing the orders and examining the questions on which the learned members of the Division Bench had disagreed. As the separate orders passed in the instant case by the learned members of the Division Bench clearly indicate the point of difference between them, I deem it unnecessary to remit the matter back to the learned Division Bench for the formal formulation of the point(s) in difference. Accordingly, the following points in difference are formulated :

1. Whether the question of grant of pre-arrest bail to the petitioner in Reference No.23/2020 was considered and decided conclusively by a learned Division Bench of this Court in C.P. No.D-6040/2019 ?
2. What is the effect of the order of dismissal of C.P. No.D-6040/2019 on the present petition ?

8. As noted above, C.P. No.D-6040/2019 filed by the petitioner was dismissed by a learned Division Bench of this Court vide short order dated 17.12.2020 followed by reasons dated 19.12.2020, the relevant portions whereof are briefly discussed below :

- I. In paragraph 5, the contention of the petitioner was recorded by the learned Division Bench that two References viz. Reference No.02/2020 and No.23/2020 had been filed against him by NAB on identical facts and accusations in violation of Article 13 of the Constitution which was sufficient to show the malafide on the part of NAB ; during investigation in the said two References, he was never issued any call-up notice on purpose so that he could be arrested unguarded ; due to his timely approach to this Court, he was able to obtain a restraining order against his arrest ; in Reference No.02/2020 he was already on bail ; and, in Reference No.23/2020, as an alternate relief, he may be extended the concession of pre-arrest bail.
- II. In paragraph 7, it was observed by the learned Division Bench that the fact of filing of Reference No.23/2020 against the present petitioner and other co-accused was brought on record on 10.12.2020 by the Special Prosecutor NAB who had requested to transmit the petitions of all the accused, including the present petitioner, to the Sukkur Bench of this Court in view of the Circular issued by the Hon'ble Chief Justice of this Court. It was further observed that all had agreed, but the petitioner's learned counsel resisted such request and at his request C.P. No.D-6040/2019 was retained at the Principal Seat of this Court at Karachi.
- III. In paragraph 8, it was observed by the learned Division Bench that Reference No.02/2020 had been filed against the petitioner and his family

members on the basis of the investigation instituted in the wake of receiving various complaints against him for accumulating assets disproportionate to his known sources of income that spiked only after he entered politics in the year 2001 ; whereas the investigation culminating in Reference No.23/2020 against the petitioner and others started on the directions of the Hon'ble Supreme Court in Human Rights Case No.66523-S/2018 and was in respect of allegations of misuse of authority, misappropriation of funds in the Annual Development Program of Machinery and Maintenance Division of Districts Shikarpur and Jacobabad.

- IV. It was further observed in paragraph 8 that in the investigation in Reference No.23/2020, huge sums of money, the details whereof were mentioned in the Reference, were allegedly found deposited in the bank accounts of the petitioner over staggered time by different contractors ; and, it was held that the relevant evidence in the shape of documents was available on record which vouches for accusations and which, *prima facie*, connects the petitioner with the alleged offence.
- V. In paragraph 9, it was observed that in Reference No.23/2020 some of the properties purchased by the petitioner had been identified which, among others, were the subject matter of Reference No.02/2020 filed against him and his family members. It was held that not only the subject matter of the two References was altogether different from each other, but the accusations against the petitioner were quite distinctive and distinguishable from each other in both the References ; Reference No.02/2020 was the outcome of the complaints against the petitioner spotting unusual spike in his assets after his foray into politics ; whereas Reference No.23/2020 was not only against the petitioner, but also against the officials of the Machinery and Maintenance Division and was the outcome of the directions issued by the Hon'ble Supreme Court for inquiring into the allegations of misappropriation of funds in that department.
- VI. The last / concluding paragraph of the reasons (paragraph 12) is reproduced below for ease of reference and also as it goes to the root of the points of difference formulated by me :

*“ 12. In the facts and circumstances, we do not find the petitioner entitled to any of the reliefs sought by him by means of this petition or to extend him extra ordinary concession of pre-arrest bail in Reference No.23/2020 in presence of prima facie evidence against him. Particularly so, when there is no malafide on the part of NAB in filing this reference against him. Needless to reiterate that relief of pre-arrest bail is only meant to protect an innocent person from arrest and concomitant humiliation and disgrace in the wake of his apparent false*

*implication in the case out of malafide and ulterior motives either on the part of complainant or the police. In the present case, as we have discussed above, no such material is available to entitle the petitioner to such an extraordinary relief. Resultantly, the petition is dismissed and interim orders passed earlier are recalled. These are the reasons for our short order which was announced on 17.12.2020 dismissing the above petition.” (emphasis added)*

9. After the dismissal of his C.P. No.D-6040/2019 in the above terms, the petitioner filed therein a Review Application bearing C.M.A. No.83/2021 seeking review of the orders dated 17.12.2020 and 19.12.2020 whereby his aforesaid petition was dismissed. His main ground for review was that the merits of Reference No.23/2020 were not considered at all and the bail was declined to him mainly on the question of attraction of the principle of double jeopardy in the case, and he was granted ad-interim pre-arrest bail in the said Reference by the Sukkur Bench of this Court. His said Review Application was dismissed by the learned Division Bench vide order dated 15.01.2021, paragraphs 4 and 5 whereof, being relevant, are reproduced here for ease of convenience :

*“4. As to recalling and restoring the ad-interim relief to the petitioner in this petition in the wake of pendency of C.P. No.D-1528/2020 filed for pre-arrest bail in Reference No.23/2020 at Sukkur and argument of learned defence counsel that relief of pre-arrest bail to the petitioner was declined without any consideration to merits of the case, we do not find ourselves subscribing to such a view. In para No.8 of the impugned order, we have tentatively discussed evidence available against the petitioner in Reference No.23/2020 and relevant documents supporting such accusation and connecting the petitioner prima facie with the alleged offence, as was required under the law. In addition, since the petitioner was asking for extra-ordinary relief of pre-arrest bail in the said reference, we also looked at the element of malafide on the part of the NAB to extend such relief to him and discussed it in para No.12 of the impugned order, but finding none, declined such concession to him.*

*5. Neither factum of pendency of some other petition before this Court at Sukkur Bench for same relief was brought to our notice, nor we suspect fact of this petition and the interim relief already extended to petitioner was informed to the Bench at Sukkur at the time of hearing of the petition. We do not want to make any comment on the manner and way, the petitioner has tried to press for same relief before the two benches of this Court, least, it may have any prejudicial repercussions on merits of his case. But to put it simply, such approach cannot be approved. We see no ground to disagree to the ratio laid down in the case cited by learned defence counsel for maintaining an application for review in a criminal case on the grounds and for the purpose of giving effect to any order passed under the Code of Criminal Procedure, preventing abuse of the process of any Court and or for otherwise securing the ends of justice, but at the same time are clear in our mind that petitioner’s case does not fall in any of the aforesaid categories to warrant a different view than the one already taken by us in the impugned order. Resultantly, we do not find any other merits in the listed application (CMA No.83/2021), and dismiss it accordingly in limine.”*

(emphasis added)

10. It is an admitted position that in his C.P. No.D-6040/2019 the petitioner had prayed that NAB be restrained from arresting him in any hidden inquiry or investigation, or in the alternate, pre-arrest bail be granted to him. It is a matter of record that Reference No.23/2020 was placed on record in the proceedings of C.P. No.D-6040/2019, but the petitioner did not raise any objection that the said Reference was not the subject matter of C.P. No.D-6040/2019 or was the subject matter of another petition (the instant petition) wherein he was granted ad-interim pre-arrest bail. A perusal of the order of dismissal of C.P. No.D-6040/2019 shows that in the said petition the petitioner himself had requested the learned Division Bench to grant him the concession of pre-arrest bail in Reference No.23/2020 as an alternate relief. The said order of dismissal further shows that Reference No.23/2020 was not only discussed and examined in C.P. No.D-6040/2019 by the learned Division Bench, but specific findings in respect thereof were also recorded, that is, the relevant evidence in the shape of documents was available on record that vouched for the accusations and *prima facie* connected the petitioner with the offence alleged against him, and that the petitioner was not entitled to any of the reliefs sought by him in C.P.No.D-6040/2019 or the extraordinary concession of pre-arrest bail in Reference No.23/2020 in view of *prima facie* evidence against him. Such specific findings by the learned Division Bench clearly show that the question of grant of pre-arrest bail to the petitioner in Reference No.23/2020 was decided against him in C.P. No.D-6040/2019. This view finds further support from the fact that the Review Application filed by the petitioner on the ground that the merits of Reference No.23/2020 were not considered while declining him pre-arrest bail in the said Reference and dismissing his C.P. No.D-6040/2019, was also dismissed by the learned Division Bench by holding that the evidence available against the petitioner in Reference No.23/2020 and relevant documents supporting such accusation and connecting the petitioner *prima facie* with the alleged offence had been tentatively discussed while declining him pre-arrest bail in the said Reference. The point No.1 is, therefore, answered in the above terms.

11. It is significant to note that the petitioner did not challenge before the Hon'ble Supreme Court the dismissal of his C.P. No.D-6040/2019 and or rejection of his pre-arrest bail therein, and C.P.L.A. No.176/2021 filed by him before the Hon'ble Supreme Court against the dismissal of his Review Application was withdrawn by him. Thus, the orders of the dismissal of his C.P. No.D-6040/2019, rejection of his pre-arrest bail in Reference No.23/2020 and dismissal of his Review Application attained finality long ago for all legal intent and purposes. Accordingly, the point No.2 is answered in these terms. It was for the petitioner to challenge the order of the rejection of his pre-arrest bail in Reference No.23/2020 passed in C.P. No.D-6040/2019 before the Hon'ble Supreme Court, which he admittedly did not. The

questions whether the pre-arrest bail in Reference No.23/2020 could be declined to him in C.P. No.D-6040/2019 and or whether the order of rejection of his pre-arrest bail in the said Reference passed in C.P. No.D-6040/2019 was sustainable or not, could be decided only by the Hon'ble Supreme Court. Needless to say, such questions could not be agitated before or decided by the learned Division Bench of this Court hearing the instant petition as the said learned Division Bench could not sit in appeal against the order passed by another learned Division Bench of this Court.

12. In the light of the discussion in the preceding paragraph, I respectfully disagree with the conclusion drawn by Nazar Akbar, J. that the observations given by the learned Division Bench of this Court in relation to Reference No.23/2020 while dismissing C.P. No.D-6040/2019 could not have any bearing on the instant petition or that the dismissal of C.P. No.D-6040/2019 was not an impediment in the relief of pre-arrest bail sought by the petitioner in the instant petition. In view of my opinion on the points in difference, I agree with the view taken by Muhammad Faisal Kamal Alam, J. that the instant petition is liable to be dismissed.

13. The matter shall now have to be placed before the learned Division Bench for announcing the final order based on the majority opinion. Since one of the learned members of the Division Bench viz. Nazar Akbar, J. is not available due to his retirement, let the matter be placed before the Hon'ble Chief Justice for constituting a Division Bench for announcement of the final order.

---

J U D G E

IN THE HIGH COURT OF SINDH AT KARACHI  
**Constitutional Petition No. D – 1528 of 2020**

Aijaz Hussain Jakhrani V/S National Accountability Bureau & another

18.07.2022 :

**ORDER**

In view of the divided opinion expressed in this petition vide order dated 22.03.2021 by the learned members of the Division Bench viz. Mr. Justice Nazar Akbar (as he then was) and Mr. Justice Muhammad Faisal Kamal Alam, the Hon'ble Chief Justice of this Court, vide administrative order dated 16.09.2021, was pleased to appoint me as the Referee Judge to resolve the difference. The matter was heard and reserved by me on 30.05.2022. I have expressed my opinion and have handed over the original opinion / order, duly signed by me, to the learned Registrar of this Court.

The matter shall now have to be placed before the learned Division Bench for announcing the final order based on the majority opinion. Since one of the learned members of the Division Bench viz. Nazar Akbar, J. is not available due to his retirement, let the matter be placed on priority basis before the Hon'ble Chief Justice for constituting a Division Bench for announcement of the final order.

JUSTICE NADEEM AKHTAR  
Referee Judge