

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No.D-3787 of 2021

Date

Order with signature of Judge

Present: **Muhammad Iqbal Kalhoro, &
Shamsuddin Abbasi, JJ.**

1. For orders on CMA No.22001/2021.
2. For orders on office objection.
3. For hearing of main case.

15.9.2021

Mr.Ali Wahid Kunwar, Advocate for petitioner.
Mr.Riaz Alam Khan, Special Prosecutor NAB a/w
Mr.Syed Amjad Ali Shah, DPGA NAB.
Mr.Irfan Memon, DAG.

Muhammad Iqbal Kalhoro, J:- Petitioner, arraigned in a Reference No.13A/2016, was arrested on dismissal of his application for pre-arrest bail before this Court on 29.11.2018. He then approached this Court through an application for post arrest bail but that too was dismissed vide an order dated 09.8.2019. He thereafter filed a Civil Petition No.3590/2019 in the Hon'ble Supreme Court for the same relief but did not succeed, and it was dismissed vide an order dated 08.11.2019. He then kept on striving to get the same relief through various applications before this Court and the Hon'ble Supreme Court but to no avail.

2. Notwithstanding, when this Court decided various petitions vide an order dated 26.4.2021 setting at rest the controversy regarding necessity of bail for an accused facing the NAB trial but against whom no warrant of arrest was issued in inquiry/ investigation in following terms:-

“28. To formalize the answers to the questions above, albeit not in the same order:

- (i) An accused under the NAO against whom the Chairman NAB has not issued any permission/ direction to arrest, but against whom a Reference is filed, when such accused appears or is brought before the Accountability Court pursuant to a process issued under Section 204, Cr.P.C. whether summons, bailable warrant or non-bailable warrant, he can be required by the Court to execute a bond with or without sureties under

Section 91, Cr.P.C. to assure his appearance before the Court.

- (ii) Section 91, Cr.P.C. is not available for an accused who appears before the Court on bail, except where he is on bail against the very warrant issued to compel his appearance in Court.
- (iii) If the accused under the NAO is denied pre-arrest bail, he is exposed to arrest by the NAB either under Section 24(a) NAO if such direction had been issued prior to the Reference, or under Section 24(c) NAO if a direction for his arrest is given after the Reference, and if the accused is so arrested then section 91, Cr.P.C. will not be available when he is brought before the Court.
- (iv) If on the rejection of the petition for pre-arrest bail there is no direction for arrest pending under Section 24(a) NAO nor is one subsequently issued under Section 24(c) NAO, the situation is the same as at serial (i) above with the same consequences.”

3. Petitioner, being aware of the fact that no warrant of arrest was issued against him during inquiry and investigation, filed an application under Section 91, Cr.P.C. before the trial Court in the light of aforesaid decision seeking permission to execute the bond for his release and attendance in the Court, which has been declined through the impugned order mainly on two grounds i.e. that the judgment rendered by this Court, as mentioned above, is not applicable to the case of the petitioner in view of the fact that his pleas for bail have been declined upto the Hon'ble Supreme Court and secondly all the PWs, meanwhile, have been examined and the trial is on the cusp of conclusion, which the petitioner has challenged by means of this petition mainly contending that his custody is illegal on account of non-issuance of warrant of arrest against him.

4. We have heard learned Counsel for parties, perused the material and judgment as referred above.

5. There is no dispute as far as non-issuance of warrant of arrest against the petitioner during investigation or inquiry is concerned. Examination of PWs has been conceded by learned Special Prosecutor NAB would not put any bar in exercise of jurisdiction under Section 91, Cr.P.C. The ground however, which learned Special Prosecutor NAB has emphasized to oppose the relief to the petitioner is that the ratio of the above

judgment is not applicable to the case of petitioner because his application for post-arrest bail has been declined upto the Hon'ble Supreme Court. However, he and Mr.Syed Amjad Ali Shah, DPGA NAB have not disputed that bail application of the petitioner was dismissed on merits without ever attending to the question as to whether the custody of the petitioner was required by NAB in the present case or not. Learned Deputy Attorney General in view of such fact has candidly stated that since warrant of arrest was not issued against the petitioner, and NAB never needed him in custody his custody is not justified under the law. We agree with his proposition and further clarify that dismissal of bail application of the petitioner was on merits of the case. The application under Section 91, Cr.P.C, filed by the petitioner seeking permission to execute a bond is, as decided in aforesaid judgment, not governed by the merits of the case and does not require a determination as to whether an accused is entitled to bail or not on the premise of further inquiry and there being no reasonable grounds to believe he is connected with a non-bailable offence. It is regulated by the underlying consideration as to whether the prosecution ever wanted custody of the accused in the investigation and issued a warrant of arrest against him. Since in this case it is admitted position that petitioner's custody was never needed by NAB during investigation or inquiry nor even thereafter in terms of section 24(c), NAO, 1999, in our estimation, the expressions rendered by this Court in the aforesaid judgment, particularly in para 28(i) read with (iv), are *mutatis mutandis* applicable in the case of the petitioner.

6. Having been able to form this view, we think that the impugned order is not sustainable and has been influenced by a view not in line with the ratio of judgment of this Court. We, therefore, set aside the impugned order and permit the petitioner to move a fresh application under Section 91, Cr.P.C, which the trial Court shall entertain and dispose of in the light of conclusion reached by this Court in para 28(i) and (iv) of the judgment in accordance with law.

7. The petition is disposed of in above terms.

JUDGE

JUDGE

Shakeel, PS.

