

IN THE HIGH COURT OF SINDH, KARACHI

Before:-

Mr. Justice Muhammad Iqbal Kalhoro, J.

Mr. Justice Mohammad Karim Khan Agha, J.

Petition number, name of the petitioner and their counsel.

C.P. No.D-7216 of 2015 Abdul Munaf (petitioner) V/s. Chairman NAB through Mr. Shaukat Hayat Advocate.

Counsel for the Respondents

Mr. Yassir Siddiqi, Special Prosecutor, NAB.

Date of hearing: 16.05.2018 and 29.05.2018

Date of order: 06.06.2018

ORDER

Mohammed Karim Khan Agha, J: By this order, we propose to dispose of the above petition filed on behalf of petitioner Abdul Munaf (the petitioner) for confirmation of his pre-arrest bail which was granted to him vide order of this court dated 16-11-2015 in respect of **Reference 26 of 2016 (State Vs. Haroon Iqbal and others)**.

2. The brief facts of the case are that the National Accountability Bureau (NAB) received a complaint from the Chairman Security and Exchange Commission of Pakistan (SECP) against M/s ACE Securities Pvt. Ltd (Brokerage House) regarding fraud, embezzlement and cheating public at large where upon an inquiry was authorized which was subsequently converted into investigation.

3. That the investigation report revealed that the SECP commenced an inquiry into the affairs of M/s ACE Securities Pvt. Ltd and in particular its dealings, business transactions in securities by the aforesaid brokerage house and the handling of securities entered in the sub-accounts mentioned under the brokerage house participant ID without authority of the sub-account holders in violation of relevant statute, rules and regulations.

4. That the investigation further revealed that accused No.1 Haroon Iqbal (Absconder) and accused No.2 Iqbal Ismail (now deceased) were Directors/Shareholders of M/s ACE Securities Pvt.

Ltd while the petitioner Abdul Munaf was a shareholder and Manager Operations of the said brokerage house. The accused No.1 and 2 and the petitioner were the authorized signatories on behalf of the Brokerage House for operating Bank Accounts who were also authorized and empowered to operate the Participant Account No.03863 maintained with Central Depository Company of Pakistan Limited (CDC) who illegally and by unauthorized movements of shares of investors, obtained financial facilities from Bank Al-Falah by pledging shares of clients/investors without their consent/authority and thereafter allowed the bank to exercise pledge call option to settle the outstanding liability of the brokerage house with the bank.

5. That the investigation revealed that the verification of claims of affectees were conducted by Pakistan Stock Exchange with the help of a reputed chartered accountant firm for maintaining fairness and avoiding any discrimination. The total claims approved / verified turned out to be 531 with aggregate amount of Rs.409.866 Million.

6. That the investigation further revealed that accused No.1, 2 and the petitioner in their aforesaid capacity in the Brokerage House deprived the claimants / investors of their investment to the tune of Rs.409.8 million. Hence they committed the offense of cheating public at large and criminal breach of trust as defined u/s section 9(a) of the National Accountability Ordinance, 1999 (NAO) and hence the aforesaid reference was filed against them by the NAB before the accountability courts in Karachi.

7. Learned counsel for the petitioner submitted that accused No1 had absconded, whilst accused No.2 had died and that he was the sole accused facing the reference; that it was neither a case of cheating the public at large nor of criminal breach of trust as none of the required ingredients for the offense were present; that the petitioner was at liberty to operate the account of the effectees and pledge shares on their behalf as per the terms and conditions of the account opening form which the effectees had all signed; that the effectees first port of call was to settle the dispute under arbitration and not to invoke criminal proceedings; that he was a humble employee and was not aware of any criminality even if there was any which he denied; that it was a case of pick and choose as another shareholder who held the same number of

shares as the petitioner had not been included in the reference and for all the above reasons he was entitled to the confirmation of his pre arrest bail. In support of his contentions he placed reliance on **Rai Riasat Ali v. The State** (2010 SCMR 1415), **Rafiq Haji Usman v. Chairman, NAB** (2015 SCMR 1575), **Muhammad Fakhar Javed Khokhar v. National Accountability Bureau** (2018 P Cr.L J 477) and an unreported judgment passed in the case of **Muhammad Hanif and others v. Chairman, NAB** dated 14.05.2018.

8. Learned Special Prosecutor NAB has opposed the petition for pre arrest bail. He submitted that there had been no malafides by NAB. He took the court through various documents which according to him showed that there was sufficient material on record to connect the petitioner to the offense for he had been charged in the reference and as such the pre arrest bail granted to the petitioner should be recalled with immediate effect.

9. We have considered the submissions of learned counsel for the parties, perused the material available on record and the case law cited at the bar.

10. As is usual in the case of bail we have only made a tentative assessment of the material on record and not gone into a deeper appreciation of the same. This order will have no effect on the proceedings before the trial court which shall be decided on merits by the trial court based on the evidence before it.

11. It is now well settled law that pre arrest bail is an extraordinary relief and is only available in cases where there has been malafide on the part of the complainant or the investigating agency. In this regard reference may be made to the case of **Rana Mohammed Arshad V Muhammed Rafique** (PLD 2009 SC 427) and the more recent Supreme Court case of **Mukhtar Ahmad v. The State and others** (2016 SCMR 2064, relevant page 2066). We have found no malafides on the part of NAB.

12. With respect to merits in our view this is a clear case of cheating public at large under the NAO where over 500 people have been illegally deprived of their shares/savings through the illegal acts of the petitioner and the other co-accused. The case may have some civil overtones but in our view it is mainly criminal in nature; the petitioner was not only a share holder but was also the Chief

operating officer of the brokerage house and as such this was not a case of pick and choose as Mr. Ruaf was simply a shareholder who had no role in the day to day running of the company; the petitioner was fully involved in the companies affairs as chief operating officer and had full authority to operate the companies accounts **singly** (see S.161 Statement of Muhammad Tauseef); that the petitioner authorized and signed the pledge call which led to the sale of the illegally pledged shares; that the material on record prima facie shows that the petitioner and other co-accused illegally pledged the shares of the effectees with bank Al-Fallah for the purpose of obtaining a running finance facility for their personal use and benefit of the company including the petitioner and not to shore up the effectees shares without any authorization whatsoever (See S.161 Statement of Muhammed Khurram and Muhammad Tauseef); that when the company defaulted the pledged shares were sold by the bank causing a huge loss to the effectees.

An extract of the SECP's inquiry report found as under at 6.3

"6.3.Observations

The Brokerage House was maintaining two sets of records namely; (i) Back Office Record and (ii) CDC Record. The shares claimed by the clients were appearing in available balance as per "Client's Securities Balance Report". The said reports were provided to the Enquiry Team by KSE which were submitted by the claimant alongwith their claims. **However, the said shares were not available in the respective CDC sub-accounts.**

The record reviewed by the Enquiry Team revealed that clients' shares were used / misappropriated from their respective account by ASPL in the following manner;

- The shares purchased in KATS terminal were entered in respective ledgers. However, the same quantity was sold at KATS **without authorization** to square up the position resultantly shares never came into the sub account of respective clients.
- The shares were **unauthorizedly sold** at KATS terminal and no entry was made in respective ledger.
- **The back office record showing sale/purchase of shares, however, no trading activity was witnessed at KATS.**
- **The shares were moved from sub account without authorization to house account and sold in the market.**
- Counter entries for transactions, for which sale / purchase entries were posted in back office but no activity was witnessed at KATS, were posted in an account titled BAFL Client Suspense A/c.
- **The clients were receiving SMS, ledgers and securities balance reports showing positions as per their portfolios and were not aware of the fact that**

their shares/funds had been used by the brokerage house.

- The clients' were receiving SMS from the back office system and not from CDS because when the CDC imposed requirement of entering cell numbers of clients for receiving SMS, ASPL obtained various SIMs in the name of various employees of the house and those numbers enter in CDC set up report of all clients in order to avoid receiving SMS by clients from CDS system and to conceal illegal activity being carried out in clients' accounts (bold added).

6.4. Details of Claims.

The review of back office record and its comparison with NCCL data and CDC record revealed un-authorized trading activity and unauthorized movement of clients' shares from their CDC sub account. The observations of the Enquiry Team in respect of each claim are given under the relevant details of each selected claimant.....

The perusal of record disclosed that the said shares included clients shares shifted into the house account by unauthorizedly selling at KATS terminal and buying the same quantity for house account. It is pertinent to mention that no entries for the said sale were posted in the ledger accounts of respective clients. **The Enquiry Team prepared the trail of 76,000 shares of Atlas Insurance Limited (ATIL) comprising 95% of the shares in respect of which pledge call option was exercised by BAFL.**(bold added)

8.3. Trail of 76,000 shares of clients pledged with BAFL

It was observed that 65,000 shares of ATIL shifted into the House Account of ASPL on May 16, 2014 belonged to a client namely Tahir Ali Khan bearing code "45603" which were subsequently pledged with BAFL. On September 16, 2014 further 4,000 shares were shifted from the same account to house account and again pledge with the same Bank. Similarly, 7,000 shares of another client Tasneem Sheikh (Code 46015) were shifted in the same manner on September 16, 2014 and pledged with BAFL. Total 76,000 shares of ATIL were pledged in respect of which call option was exercised by BAFL on April 21, 2015.

MOVEMENT OF 76,000 SHARES OF ATIL

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It is evident from the above that out of 76,000 shares of ATIL in respect of which pledged call option was exercised by BAFL were actually the property of clients of ASPL.(bold added)

Statements under S.32 of the SECP Act

"It is pertinent to mention that for ensuring attendance of the clients phone calls were made at the cell numbers entered in the Account Setup Report dated May 4, 2015 obtained from CDC vide letter SMD-/SSED-C&IW-ENQ) 34(64)/2015 dated May 4, 2015.

Surprisingly, all numbers were either switched off or were not attended. The calls were then made at the cell numbers given by the clients in the Claim Forms submitted with KSE.

Subsequently, when the clients appeared before the Enquiry Team were required to verify the information entered in their account set up reports. **All of them confirmed that the cell numbers entered in those reports were incorrect and they have not received messages from the system of CDC. They also denied receiving CDC balance statements from the brokerage house.**

The clients informed that they were receiving SMS for order confirming at their cell numbers which were entered in a back office system instead of CDS. The clients were receiving SMS, ledgers and securities balance reports showing position as per their portfolios and were **not** aware of the fact that their shares/funds had been used by the brokerage house.

The Enquiry Team enquired from the employees of the ASPL that why SMS from CDC were not being received by the clients. **It was revealed that fake cell numbers were entered in the data base to avoid delivery of SMS to clients to conceal the illegal activities being carried out in their sub accounts.** In this connection relevant extract from the statement of Mr. Mohammad Asif Alam, Manager Settlement as under:

"The reason that clients' were not received SMS from CDC was that when the CDC imposed requirement of entering cell numbers of clients for receiving SMS, we were told by Haroon Iqbal to get issued various SIMs in the name of various employees of the house and enter in the CDC set up report of all clients in order to avoid receiving SMS by clients from CDS system."

The selected claimants appeared before the enquiry team were not aware of the fact that their shares/funds were misappropriated by ASPL."

13. The above is corroborated by the S.161 statement of Mohammed Tanveer who was a member of the inquiry team who prepared the above report and other illegalities in the use of the effectees shares by the petitioner and the other co-accused.

14. It would also not be out of place to mention that accused No.2 Iqbal Ismail (who is now deceased) offered a plea bargain on behalf of himself and the **other** co-accused including the petitioner which was rejected by the NAB and petitioner No.1 has absconded and is now reportedly residing in Canada.

15. The petitioner was not a low level humble employee of the company. He had experience in dealing with shares, was aware of the CDC Act and how the Stock market functioned and as such was fully aware of the illegalities. He was chief operating officer and as such was operating the sub accounts through the CDC, making the transfer of shares and pledging the shares of the effectees and as such was fully aware of and involved in the scam which cheated 100's of effectees to whom he owed a fiduciary duty of trust and deprived them of their precious savings.

16. Thus, since we have found no malafide on the part of NAB and based on the above discussion we are of the view that there is sufficient material on record to prima facie connect the petitioner to the offense for which he is charged and as such the pre arrest bail earlier granted to petitioner Abdul Munaf is recalled with immediate effect.