

**IN THE HIGH COURT OF SINDH BENCH AT SUKKUR**

Present: **Mr. Justice Mehmood A. Khan**  
**Mr. Justice Mohammad Karim Khan Agha**

**C.P. No.D-5212 of 2016**

**Nadeem Rajput**

v/s

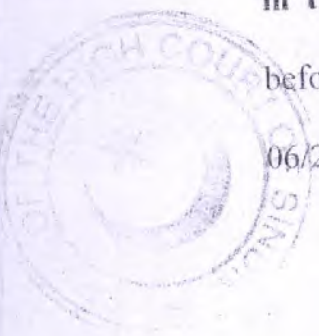
**Chairman NAB**

Date of hearing	20-02-2017
Date of Order	07-03-2017
Applicant	Through Mr.Rana Hafiz Tanveer Ahmed, advocate.
Respondent	NAB through Mr. Muhammad Zubair Malik, A.D.P.G.A, NAB Sukkur
On Court Notice	Mr. Nisar Ahmad Abro, D.A.G.

**ORDER**

**Mohammad Karim Khan Agha, J:** By this order we proposed to dispose of the above petition filed by the petitioner(Nadeem Ahmed Rajput) against order dated 25<sup>th</sup> November 2011 passed by the learned Judge of Accountability Court Sukkur whereby the petitioner's application for plea bargain under S.25 (b) of the National Accountability Ordinance 1999 (NAO) was declined (the impugned order)

2. The brief facts of the case are that the petitioner has been arrayed as accused No.13 in National Accountability Bureau (NAB) Reference No.6/21016 in the case of Muhammad Arif Teevno and 62 others which is proceeding before the Accountability Court at Sukkur. In essence the aforesaid reference 06/2016 concerned corruption committed by officials of the District Accounts



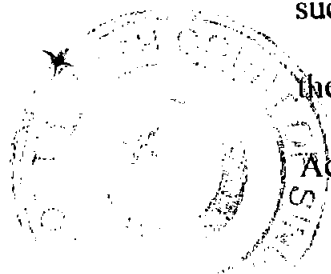
Office Naushehro Feroze, NBP and UBL Bank officials, agents and beneficiaries who had colluded and connived with each other in terms, amongst other things, of paying unauthorized government funds into the bank accounts of persons who were not entitled to receive such money. As per reference the petitioner who is a non-pensioner was fully involved in such corrupt activities as a beneficiary.

3. The petitioner made an application to the concerned Accountability Court to enter into a plea bargain under S.25 (b) NAO in connection with his role in the aforesaid reference which was forwarded to the NAB for consideration. Such offer was accepted by the NAB and thereafter the petitioner moved the Accountability Court for approval of the plea bargain. The Accountability Court however declined the plea bargain through the impugned order since in the view of the learned Judge the amount which NAB had agreed to was less than the liability of the petitioner.

4. Learned counsel for the petitioner submitted that the learned Judge had erred in passing the impugned order since his share of the liability had been correctly worked out by the NAB and his plea bargain ought to have been accepted and as such the impugned order should be set aside and his plea bargain be accepted. In support of his submissions learned counsel placed reliance on the case of **Muhammad Islam Khan v/s Zarati Taraqiati Bank Ltd** (PLJ 2013 Islamabad 17).

5. Learned ADPGA for the NAB also contended that the plea bargain had been correctly worked out by the NAB in terms of the petitioner's liability and as such the trial court had erred in declining the application for plea bargain and that the impugned order should be set aside and this court direct that the Accountability court accept the plea bargain of the petitioner which had been

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rejected by the impugned order. In support of his contentions ADPGA placed reliance on the case of **Bank of Punjab V Accountability Court No.1 Lahore** (PLD 2014 Lahore 92) and **Shamraz Khan V The State** (2005 P.Cr.LJ (Quetta) 192)

6. In our view since both the petitioner and NAB had a common interest in supporting the plea bargain and striking down of the impugned order we put the learned DAG on Court notice and sought his independent view. Learned DAG adopted the arguments of the petitioner and the NAB and stated that in his view the impugned order should be set aside as the plea bargain amount due from the petitioner had been correctly calculated by the NAB

7. We have heard the parties, perused the record, considered the relevant law along with the case law cited at the bar.

8. At the outset it would be useful to set out section 25(b) of NAO which it seems this controversy largely revolves around. S.25 (b) NAO provides as under in respect of plea bargain:

“(b) Where at any time after the authorization of investigation, before **or after the commencement of the trial** or during the pendency of an appeal, **the accused offers to return to the NAB the assets or gains acquired or made by him** in the course, or as a consequence, of any offence under this Ordinance, the **Chairman, NAB, may in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary**, and if the accused agrees to return to the NAB the amount determined by the Chairman, NAB, the Chairman, NAB, **shall refer the case for the approval of the Court**, as the case may be, the Appellate Court and for the release of the accused.”(bold added)

9. In this case it would seem from the reference that the loss caused by the petitioner as per para 16 of the reference was RS 44 lacs 81,000. Out of this amount RS 23 lacs 10,000 was transferred into the account of Ghulam Asghar

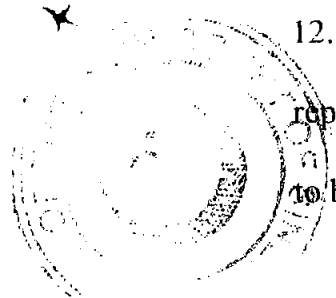


Rajpur who is also an accused in this reference and as such will be liable for this amount of RS 23 lacs 10,000. As such prima facie it would appear that the petitioner's total liability is RS 21 lacs and 70,000.

10. NAB however had agreed to enter into a plea bargain with the petitioner for RS 10 lacs and 85,000. This figure was around half of the amount of RS 23 lacs 10,000 which the learned trial judge was of the view should have been the amount of the plea bargain. According to the NAB during the embezzlement the petitioner was hand in glove with the manager of NBP Bhiria Branch Mohammed Arif Teevno who is accused No.1 in the reference and as such in their view it was fair that the liability should be split 50/50 between the petitioner and the aforesaid accused No.1 since accused No.1 benefited financially out of the transaction and to take any other course would have left accused No.1 who is one of the main accused in the reference to escape without having hardly any financial liability in respect of his illegal transactions which he conducted in league with the petitioner and in effect this was the rationale for determining this level of the plea bargain through the DG NAB's speaking order dated 17-11-2016 whereby he accepted the plea bargain at RS 10 lacs 85,500 being approximately 50% of the loss caused by the petitioner.

11. It may be mentioned at this point that the authority cited by the petitioner is of little, if any, assistance to him since that case concerned a voluntary return under the NAO which is a different concept to that of plea bargain and contains different requirements and from which different legal consequences flow.

12. We now need to examine the wording of S.25 (b) NAO which section was reproduced earlier in this order. In terms of this case the key wording appears to us to be as under:



**"the accused offers to return to the NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary.**

13. The questions in our view which need to be considered are as under:

**(A) What assets and gains did the accused offer to return to NAB.**

(a) It appears from his undated application to the Accountability Court which was forwarded to the DG (Sukkur) for consideration that the petitioner accepted that RS 44 lacs and 81,000 had illegally been paid into his account and that 23 lacs and 10, 000 had been transferred to Ghulam Asghar Rajpur's account, but for the balance amount (RS 23 lacs 10,000) accused No.1 took blank cheques from him.

(b) Prima facie it would seem that the offer of plea bargain is defective as it contains no specific amount as an offer. It seems to indicate that the maximum liability which the petitioner may have is RS 23 lacs 10,000 but he should not be accountable for this entire amount since accused No.1 could also move some of these funds around through his use of blank cheques given to him by the petitioner. The amount accused No.1 moved around is unspecified.

(c) In our view the petitioner in his application should have offered the precise amount of his liability which he was prepared to pay. Logically this amount could only have been increased by the NAB since as a rule a person is unlikely to come forward and offer more than he is liable for. Even if he does so the wording of S.25 (b) NAO restricts him to the amount of his gains (nothing more and nothing less) which may however include interest earned on such gains and the cost of funds if the borrowing is from a bank.

**(B) The next issue which we need to consider is whether the NAB without receiving a definitive offer could have increased or decreased that offer and accepted it with the agreement of the petitioner.**

(a) In this regard the language of the S.25 (b) provides as under:

**"the Chairman, NAB, may in his discretion, after taking into consideration the facts and circumstances of the case, accept the offer on such terms and conditions as he may consider necessary,"**

(b) The first point to note is that the Chairman NAB's power to accept the offer is entirely discretionary. Namely, he is under no obligation to accept it even if in his view it covers the full amount of the gain. He may in his discretion after recording reasons reject it and let the matter proceed to trial with such exercise of discretion being subject to judicial review in appropriate cases.



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(c) It seems that the petitioners offer in effect is anything between RS 1 and 23, lacs 10,000. In our view the correct amount prima facie would be RS 23 lacs and 10,000.

(d) Ordinarily in our view the Chairman NAB must receive a definitive precise offer which he could only review downward in exceptional circumstances. Each case will of course turn on its own particular facts and circumstances and thus we have to consider the particular facts and circumstances of the instant case as was emphasized by the Hon'ble Supreme Court in deciding Civil Petition No. 3912/2016 **Khalid Humayun V NAB** (unreported) dated 21-02-2017 which directly concerned the issue of plea bargain under S.25 (b) NAO.

(e) In this case the petitioner did not walk away with around 44 lacs as it is already clear that RS 23 lacs and 10,000 was paid to Asghar Rajput. It would then seem that accused No.1 also had access to the account and as such could have taken money from it which would have amounted to gain. In our view it is clear from the nature of the entire scam as set out in the reference when considered in a holistic manner that accused No.1 in connivance with other accused was moving funds between bank accounts to benefit certain persons. It therefore in our view appears most likely that based on the facts and circumstances of this case other funds would also have been moved out of the petitioners account by accused No.1 who is one of the main accused in the case.

(f) We are of the view that these background factors, based on the particular facts and circumstances of this rather unusual case, can be taken into account in a case such as this where the precise amount of the gain to a given applicant for plea bargain is unclear. It also needs to be observed that the other 50% of the loss has not been written off but has been apportioned to accused No.1 who was moving the funds around and would have been one of the larger beneficiaries of this scam and as such it may be appropriate that he be held responsible for some of the loss that has been caused and illegal gain which he has made

(g) Once these background facts are taken into account we then need to consider whether the acceptance of the plea bargain by the Chairman NAB is soundly reasoned and on a fair and equitable basis on a case by case basis. The DG NAB in this case has passed a speaking order which we do not consider to be arbitrary, whimsical or totally unreasonable. It seems to be well reasoned and based on logic and is in line with the requirement of a reasoned speaking order as set out in the case of **Khalid Humayun V NAB (Supra)**. As such we consider that the learned trial judge ought to have accepted the petitioners plea bargain and his reasons for not so doing seem to have failed to appreciate or consider the reasoning behind NAB's calculations (perhaps NAB's calculations and rationale for accepting the amount of the plea bargain was not adequately explained to the learned judge at the time of the hearing by the Counsel for the NAB). Perhaps such manner of calculating the alleged amount owed by the petitioner is fortified by the term, "plea bargain" which itself indicates the ability to bargain.

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(h) Indeed whilst up holding the concept of plea bargain in the NAO the Hon'ble Supreme Court in the case of **Khan Asfandiyar Wali V Federation of Pakistan** (PLD SC 2001607) found as under at P.931

#### PLEA BARGAINING

267. Moreover, the scheme for exploring the possibility of settlement during investigation/inquiry stage by the Chairman NAB cannot be ignored straight away. At the outset, most of the lawyers tend to consider the question of settlement out of Court. There is need to focus attention on this significant facet of the matter. The rationale behind the Ordinance is not only to punish those who were found guilty of the charges leveled under the Ordinance but also to facilitate early recovery of the ill-gotten wealth through settlement where practicable. The traditional compromise, settlement, compoundability of offence during the course of proceedings by the Court after protracted litigation is wasteful. Viewed in this perspective, a power has been vested in the Chairman NAB to facilitate early settlement for recovery of dues through 'plea bargaining' where practicable. Lawyers are often interested in settling the disputes of their clients on just, fair and equitable basis. There are different approaches to settlement. Plea bargaining is not desirable in cases opposed to the principles of public policy. Chairman NAB/Governor, State Bank of Pakistan, while involved in plea bargaining negotiations, should avoid using their position and authority for exerting influence and undue pressure on parties to arrive at settlement. However, in the interest of revival of economy and recovery of outstanding dues, any type of alternate resolution like the 'plea bargaining' envisaged under section 25 of the Ordinance should be encouraged. An accused can be persuaded without pressure or threat to agree on a settlement figure subject to the provision of the Ordinance. Establishing this procedure at the investigation/inquiry stage greatly reduces determination of such disputes by the Court. However, as the plea bargaining/compromise is in the nature of compounding the offences, the same should be subject to approval of the Accountability Court. Accordingly, section 25 of the Ordinance be suitably amended. (bold added)

(i) In the case of **Rauf Bakhsh Kadri V The state and others** (MLD 2003 777) when considering the pecuniary





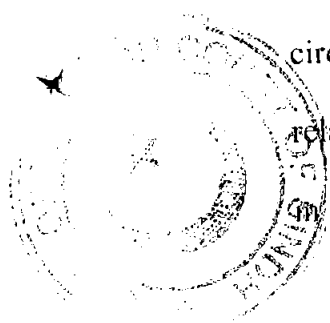
jurisdiction of NAB when determining whether or not to file a reference it was held as under at Para 32:

32. Since filing of a reference is essentially the function of the Chairman, NAB (though it may be amenable to judicial review in proper cases) **and since he in view of the experience of the Institution is in a better position to determine whether the amount involved in these cases could be classified as large or otherwise. We would remand these matters to the Chairman, NAB to re-examine these cases from the above stand-point. In case he is satisfied that the amounts involved are large enough to justify proceedings under the Ordinance, they may continue before the Accountability Courts. In case he is not so satisfied the cases may be transferred to the appropriate Courts and such Courts may proceed with them from the stage they had reached without recalling witnesses.** A definite decision is expected to be taken within one month from today and till such time the interim order passed earlier will continue. The petitions stand disposed of in the above terms."(bold added)

(j) Thus, as with pecuniary jurisdiction, based on his knowledge, experience and assistance by a legal team, investigative team and financial crimes advisory wing we consider that the chairman NAB is in the best position to determine the amount of a plea bargain subject to such a decision being based on well reasoned grounds. In the event that such grounds are completely unreasonable arbitrarily or whimsical the Accountability Court may chose to reject the plea bargain as in effect the trial court is a watch dog to ensure that the Chairman NAB is exercising his powers reasonably and fairly

(k) Indeed, as was made clear in the case of **Bank of Punjab V Accountability Court No.1 Lahore** (PLD 2014 Lahore 92) it is the duty of the Chairman NAB to exercise his discretion fairly and reasonably otherwise the Court may decline the same.

14. Thus, based on the above discussion especially when we consider the reasons behind the NAB's decision, based on the particular facts and circumstances of this case and in particular bearing in mind that the amount is relatively small in terms of NAB's mandate to investigate mega corruption cases in the interests of justice and acting in our discretionary constitutional jurisdiction



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in order to do complete justice in this case we hereby set aside the impugned order and up hold the amount of plea bargain as proposed by the Chairman NAB in the plea bargain application before the Accountability Court and direct the Accountability Court to accept the amount of plea bargain as agreed with the NAB and release the petitioner if he is in custody within 3 days of receipt of this order. A copy of this order shall immediately be sent by the office to the Accountability Court for compliance.

15. Before parting with this order however we would however like to make it clear that based on the facts and circumstances of this case it was to a certain extent an exceptional case and generally **unless exceptional circumstances exist** every offer of a plea bargain must be of a definite and precise amount which may then be considered by the Chairman NAB keeping in view the facts and circumstances of the case and with NAB giving a strong justification in writing if it chooses to reduce the amount offered and accepted a lesser amount which in appropriate cases would be subject to judicial review. This is because in our view the proper approach in plea bargain cases under S.25 (b) is for the accused to make a definitive and precise offer which may or may not be accepted by NAB through a speaking order which if not accepted by NAB may lead to a further offer which again may or may not be accepted by NAB. In our view the words in S.25(b) "**on such terms and conditions as he may consider necessary**" do not relate to the amount of the plea bargain but to the method and mode and manner of payment including installments within given dates which may be necessary if the accused does not have the full amount of the agreed plea bargain amount to hand (although a very large % of the amount as down payment would be expected to be made) and may need to sell properties in order to make up the balance which may take



some reasonable but definite and precise amount of time to be recorded in writing in the plea bargain agreement.

16. In any event if any further guidance is required vis a vis the Chairman NAB's role, functions and duties in dealing with a potential plea bargain reference may be made to the case of **Khalid Humayun V NAB (Supra)** which has elaborately and precisely considered this issue.

17. This petition stands disposed of in the above terms.

Sd/-  
MOHAMMAD KARIM KHAN AGHA,  
JUDGE.

Sd/-  
MAHMOOD A.KHAN,  
JUDGE.

Sukkur  
Dated: 07-03-2017

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COMPARED BY

READ BY

ASSISTANT REGISTRAR

