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IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

C.P. No.D-1210 of 2016
Amjad Hussain

Vs.

Chairman NAB & another

Date of hearing:	29-03-2016 and 11,14 and 18.04.2016
Date of Order	27.04.2016
Petitioner:	Through Mr. Javed Ahmed Chhatari, Advocate.
Respondents:	Through Mr. Noor Muhammad Dayo, ADPGA NAB and Mr. Muhammad Aslam Bhutta, Special Prosecutor, NAB a/w I.O. Errol Philip Wingson.
On Court Notice	PGA assisted by DPGA, SC GOP, PG Sindh

ORDER

Mohammed Karim Khan Agha, J. By this order, we proposed to dispose of the above petition filed by the petitioner for grant of bail in National Accountability Bureau (NAB) Reference No.02/2015, which was filed before the Administrative Judge Accountability Court at Karachi on 29-12-2015.

2. The reference concerns bogus Sales Tax Refund against fake, flying and bogus sales tax invoices by the petitioner "M/s Akhtar Brothers".

3. Perusal of the investigation report reveals that the petitioner was running a manufacturing business in the name and style of "M/s Akhtar Brothers" who obtained an amount of Rs.11,504,101/- as sale tax refund during the period between September 2004 to December 2004 through two Sales Tax Refund claims on the basis of false, fake, bogus and flying Sales Tax Invoices.

4. The investigation report further reveals that Sales Tax Refund amounting to Rs.4,374,792/- was obtained by M/s Akhtar Brothers through use of sixty two fake, flying Sales Tax Invoices of M/s World Wide Impex. It has come on record that said company was not registered with Sales Tax Department by Mian Zar S/o Taoor Khan as per his own statement. Neither any supply was

made to M/s Akhtar Brothers by him nor any payment of supplies was received by him. In fact the aforesaid Mian Zar S/o Taoor Khan has been running Kiosk of Pan and Cigarette for the last twenty years. Syed Nusrat Nasir (Late) the then Deputy Director sanctioned the claim of M/s Akhtar Brothers in connivance with beneficiary petitioner and have caused loss to the national exchequer to the tune of Rs.4,374,792/-. That Syed Nusrat Nasir who was serving as Deputy Director of Sales Tax Department and sanctioned the aforesaid fake Sales Tax Refund claim died on 18.05.2013

5. The investigation report shows that the petitioner/accused being beneficiary in connivance with the deceased accused Syed Nusrat Nasir have caused loss of Rs.4,374,792/- to the national exchequer. Thus the petitioner/accused has committed the offence of corruption and corrupt practices as defined under section 9(a) of National Accountability Ordinance 1999 (NAO) and punishable under section 10 of the aforesaid Ordinance and schedule thereto which lead to NAB filing a reference against him on 29-12-2015 under the NAO.

6. Learned counsel for the petitioner contended that the petitioner is innocent and was running his own manufacturing business; the real culprits, who have practiced the fraud with the exchequer, have not been implicated as they are top bureaucrats and the petitioner has nothing to do with the deal in question; that there is no evidence against him and that he has no connection whatsoever with the offense and that NAB has malafidely and falsely implicated him in the matter and that even other wise the amount is alleged to have been embezzled is too low to attract the jurisdiction of NAB under the NAO

7. On the other hand learned ADPGA and Special Prosecutor on behalf of NAB have contended that the petitioner has been given a specific role in the reference and that there is sufficient evidence on record to prove beyond a reasonable doubt that the petitioner has committed the crime for which he has been charged.

8. Whilst hearing this post arrest bail application under the NAO the bench took note of the petitioners argument that the sum which had allegedly been embezzled i.e. around RS 43 lacs, seemed to be a rather small amount for probably the Country's

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premier anti corruption agency i.e. the NAB, to be dealing with bearing in mind that there were other anti corruption agencies which could potentially deal with such relatively lesser amounts and free up the NAB to pursue large scale corruption cases. This was more so since the bench had observed that such NAB cases involving relatively lesser amounts had quite often been coming before the bench for hearing and as such this was not an isolated instance.

9. Under these circumstances on 29-3-16 this bench passed the following order:

"We have heard the learned counsel for the petitioner. It has been observed that in cases involving petty/minor amounts also, NAB has/had initiated inquiry/investigation while till date learned ADPG, NAB, has failed to place on record Standard Operation Procedure (SOP) or any other guideline to show as to what extent, especially in terms of pecuniary jurisdiction, NAB can initiate an inquiry or investigation. It has also been observed that apart from NAB, FIA, a federally controlled agency, and Anti-Corruption Establishment were primarily given role to conduct investigation into specialized and organized crime; white collar crime, alleged embezzlement and anti-corruption, etc. However, till date there is no such distinction as to what extent and in what matters FIA or Anti-Corruption Establishment or NAB can initiate inquiry/investigation, which itself is multiplying corruption, rather to eradicate and or minimize it.

In the given circumstances, we deem it proper to issue notice to the Prosecutor General, NAB, Prosecutor General, Sindh and Additional Attorney General for Pakistan to appear on 7.4.2016 and assist this Court, inter-alia, on the point of overlapping jurisdiction of federally controlled agencies"

10. As such learned PGA NAB, Standing Counsel and Prosecutor General Sindh appeared and assisted the Court on this issue of pecuniary jurisdiction of NAB and overlapping jurisdiction of other anti corruption agencies.

11. Learned PGA NAB on instructions from the Chairman NAB made written as well as oral submission's in order to assist the Court. He submitted that NAB was aware of this issue of pecuniary jurisdiction and in this respect had passed an SOP in respect of the monetary value of cases which NAB would pursue which is set out below for ease of reference.

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“Priority for Cognizance of Cases: The number of complaints received at NAB is way beyond the capacity to handle. Taking on all the complaints is rather impossible and can adversely affect the standard and quality of investigation. Therefore, it is important to sift the complaints according to the handling capacity and protect interest of state largely. To rule out misuses of discretion and standardize the selection procedure at NAB’s level, the consideration for cognizance of cases is defined as under:-

- i. Corruption cases against NAB officers/official/Law Officers/Experts of NAB.
- ii. Cases referred by Hon’ble Supreme Court of Pakistan, High Courts and Public Accounts Committee (PAC).
- iii. Cases of former/sitting legislators of National Assembly, Senate and Provincial Assemblies (including ministers/advisers etc.) and elected representatives of local bodies, where amount involved is more than Rs.100 million.
- iv. Cases involving interest of members of public at large where the numbers of defrauded person are more than 50 persons and amount involved is not less than Rs.100 million.
- v. Cases against public servants, whether serving or retired, Bankers, Businessmen and Contractors where amount involved is more than Rs.100 million.
- vi. Cases of willful loan default, loss to financial institutions as referred by State Bank of Pakistan (SBP).
- vii. Matters covered u/s 31 (a) of National Accountability Ordinance (NAO), 1999.
- viii. Cases of money laundering referred by FMU.
- ix. Any other case falling within the purview of NAB, irrespective of the amount involved and status of accused person, with prior approval of the Chairman”

12. He also submitted the following table with respect to overlapping jurisdiction:

JURISDICTION COMPARISON OF NAB & FIA	
FIA	NAB
FIA Act, 1974 is a general law, dealing with myriad of offences inter alia corruption.	NAO is special law, promulgated to: . Eradicate corruption. . Recover ill gotten wealth.
FIA takes cognizance of cases regarding Federal Government	NAO covers holders of public offices of Federal, Provincial

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Employees relating to corruption with certain limitations.	FATA, PATA, Gilgit Baltistan and Statutory Bodies, Cooperative Societies, Financial Institutions of any other institution established, controlled or administered by Federal and Provincial Government.
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JURISDICTION COMPARISON OF NAB & FIA	
FIA	NAB
FIA takes cognizance of offences of corruption through . Anti Corruption Wing (ACW) . Economic Crime Wing (ECW)	NAB in addition to other functions, comprehensively covers operations under section 9(a) of NAB, 1999 performed by both FIA Wings.
FIA Act is procedural law	NAO 1999 is both an adjective as well as substantive law, which provides mechanism for its enforcement.
No clear recovery mechanism	NAO provides comprehensive recovery mechanism of ill-gotten wealth under section 25.

JURISDICTION COMPARISON OF NAB & FIA	
FIA	NAB
FIA has the jurisdiction to deal with offences taken place, in relation to bank frauds.	NAB in addition to bank frauds, deals with willful loan default with mandate of recovery of defaulted loans of banks through State Bank of Pakistan (SBP).
FIA Act 1974 provides no retrospective cognizance.	NAO 1999 has retrospective effect with effect from 1 st January, 1985.
No over-riding effect.	NAO takes precedence over FIA Act 1974 as well as all other laws having over riding effect as provided by section 3.
	NAB being Focal Anti Corruption Body directly empowered for Mutual Legal Assistance.

13. Learned Standing counsel submitted that the FIA had the powers to investigate all matters listed in the schedule to the FIA Act 1974 which did not include offenses under the NAO but included offenses under the Prevention of corruption Act 1947, the Foreign Exchange Regulation Act 1947, the Banking companies Ordinance1962, the Anti Money laundering Act 2010 as well as various sections under the PPC. It was observed that there was no monetary value linked to such crimes and that often the jurisdiction of the FIA would turn on whether or not a Government

official or public servant was involved in the offense especially in so far as it related to corruption.

14. The Prosecutor General Sindh submitted that with regard to matters of corruption the Provincial Government proceeded under the Anti Corruption Establishment Ordinance 1961, the Sindh Enquiries and Anti Corruption Act 1991 which had the powers to investigate offenses listed in the schedule to that Ordinance/Act which included offenses under the Prevention of Corruption Act 1947 and other offenses under the PPC but that such offenses generally involved offenses committed by Government officials or public servants.

15. We have considered the submissions of the learned counsel on the aspect of the pecuniary jurisdiction of NAB and the potential over lapping jurisdiction of other agencies involved in the investigation and prosecution of acts of corruption and the relevant law.

16. In our view in considering NAB's pecuniary jurisdiction we need to consider what the primary purpose of the NAO is.

17. The NAO is not the first piece of anti corruption legislation in Pakistan aimed at curbing corruption especially by Government and public officials. Indeed, the need to prevent corruption was pointed out by the founder of our nation as early as August 11th 1947 in his speech before the Constituent Assembly in the following terms.

..... "The first observation that I would like to make is this : You will no doubt agree with me that the first duty of a government is to maintain law and order, so that the life, property and religious beliefs of its subjects are fully protected by the State.

The second thing that occurs to me is this: One of the biggest curses from which India is suffering- I do not say that other countries are free from it, but, I think, our condition is much worse- is bribery and corruption. That really is a poison. We must put that down with an iron hand and I hope that you will take adequate measure as soon as it is possible for this Assembly to do so.....
The next thing that strikes me is this: Here again it is a legacy which has been passed on to us. Along with many other things, good and bad, has arrived this great evil- the evil of nepotism and jobbery. This evil must be crushed relentlessly. I want to make it quite clear that I shall never tolerate any kind of jobbery,

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nepotism or any influence directly or indirectly brought to bear upon me. Whenever I will find that such a practice is in vogue or is continuing anywhere, low or high, I shall certainly not countenance it." (bold added)

18. There after a long line of anti corruption legislation was passed mainly geared against Government officials and public servants such as the Prevention of Corruption Act 1947 (which is still applicable), Public and Representative offices (Disqualification) Act 1949 (PRODA) since repealed, Elective bodies (Disqualification) Order 1959 (EBDO) since repealed, Holders of Representative offices(Prevention of misconduct) Act 1976 since repealed, Parliament and Provincial Assemblies (Disqualification from membership) Act 1976 since repealed , Holders of Representative offices(Punishment for misconduct) Order (Presidents Post Proclamation Order) (PPPO 16 and 17) of 1977 since repealed, Ehtesab Ordinance 1996 since repealed, Ehtesab Act 1997 which was repealed by the National Accountability Bureau Ordinance 1999 (NABO) which later became the National Accountability Ordinance 1999 (NAO)

19. None of the anti corruption legislation mentioned above, including the NAO, had any specific pecuniary jurisdiction which could mean that in effect a proceeding could be commenced under them on account of corruption for as little as RS1.

20. All the anti corruption legislation mentioned above were solely penal in nature except the Ehtesab Act 1997 which provided for the concept of voluntary return (VR) and NAO which provided under S.25 for the provisions of VR and Plea Bargain (PB). The concept of a PB was not provided in the Ehtesab Act of 1997. The question therefore arises why the legislature continued with the provision of VR and added for the first time the concept of a PB under the NAO

21. In our view a part of the answer can be provided by the circumstances then prevailing in October 1999 which to a large extent is reflected in the objects and purposes of the NAO.

Object and Purpose of NAO 1999 ✓

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22. In October 1999 the then Government was overthrown by General Musharraf which act was validated by the Hon'ble Supreme Court in the case of **Syed Zafar Ali Shah V General Pervez Musharraf** (PLD 2000 SC 869).

23. One of General Musharraf's alleged reasons for taking over the Country was the large scale corruption that was being committed and one of his main objectives after taking over the Country was to prevent further corruption and recover the wealth which had been plundered from the State through corruption. The Hon'ble Court Supreme Court in the above cited case gave him three years to achieve his objectives, including the elimination of corruption and recovery of ill gotten gain from the plunderers of the State.

24. This objective gave birth to the NABO of 1999, which replaced the Ethesab Act 1997, which was upheld subject to a few modifications by the Hon'ble Supreme Court in the seminal case of **Khan Asfandiyar Wali V Federation of Pakistan** (PLD 2011 SC 607)

25. In the case of **Khan Asfandiyar Wali (PLD 2001 SC 607)** this Hon'ble Court made the following observation at P.626.

"In Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869) the Supreme Court took notice of the pleadings of the parties, and after considering the adverse effects of the inaction etc. of all concerned to collect the looted wealth of the country from those who were responsible therefore, it was observed that the action taken on 12.10.1999 was justifiable and that the speeches of the Chief Executive dated 13.10.1999 and 17.10.1999 correctly spelt out the plan/scheme to be adhered to by him for the purposes of making recovery thereof. It was held that Chief Executive of the Islamic Republic of Pakistan is entitled, inter alia, to perform all such acts and promulgate all legislative measures as would establish or lead to the establishment of the declared objectives of the Chief Executive as spelt out in his speeches referred above. The Chief Executive in his speech dated 17.10.1999 clearly stated:

"Revival of economy is critical. Our economy is in deep trouble and revolutionary steps are needed to put it back on track. The Pakistani people were subjected to betrayal of their trust. Their hard-earned money was frozen or taxed in violation of State commitment. We need to restore this trust".....

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"The process of accountability is being directed especially towards those guilty of plundering and looting the national wealth and tax evaders. It is also directed towards loan defaulters and those who have had their loans rescheduled or condoned. The process of accountability will be transparent for the public to see. My advice to the guilty is to return voluntarily national wealth, bank loans and pay their taxes before the hand of law forces them to do so with penalty. As a last chance I urge all defaulters to come forth and settle their debts within a period of four weeks, after which their names will be published and the law will take its due course. They owe this to Pakistan and I expect their spirit of patriotism to guide them"

It was in the above backdrop that the Ordinance was promulgated and amendments made therein, subsequently." (bold added)

26. The primary object and purpose of the Ordinance as spelt out in the above 2 cases, **Zaffar Ali Shah (Supra)** and **Khan Asfandiyar Wali (Supra)**, appears to be to recover the money which had been looted from the State.

27. This is also reflected to a large extent in the Preamble of the NAO which reads as under:

"WHEREAS it is expedient and necessary to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse or abuse of power or authority, misappropriation of property, taking of kickbacks, commissions and for matters connected and ancillary or incidental thereto;

AND WHEREAS there is an emergent need for the recovery of outstanding amounts from those persons who have committed default in the repayment of amounts to Banks, Financial Institutions, Governmental agencies and other agencies;

AND WHEREAS there is a grave and urgent need for the recovery of state money and other assets from those persons who have misappropriated or removed such money or assets through corruption, corrupt practices and misuse of power or authority.

AND WHEREAS there is an urgent need to educate the society about the causes and effects of corruption and corrupt practices and to implement policies and

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procedures for the prevention of corruption in the society;

AND WHEREAS there is an increased international awareness that nations should cooperate in combating corruption and seek, obtain or give mutual legal assistance in matters concerning corruption and for matters connected, ancillary or incidental thereto;

AND WHEREAS it is necessary that a National Accountability Bureau be set up so as to achieve the above aims; (bold added)

28. From the Preamble of the NAO and taking into account the prevailing circumstances when it was promulgated it would appear that the primary object and purpose of the NAO was to recover ill gotten money which had been looted from the State as opposed to prosecuting public officials or others who had violated the NAO where it was not possible to recover ill gotten money and that its penal use was secondary in nature.

29. A number of particular facts (including some of the provisions of the NAO) give rise to this conclusion.

(a) In S.25 for the first time in corruption orientated legislation there was included the concept of both voluntary return (VR) and plea bargain (PB). In the case of VR an accused can avoid any kind of prosecution if he returned all the ill gotten money. The Courts permission for a VR is not required.

(b) In the case of a PB which could be taken at any time after an investigation had been authorized, during trial or even after conviction a person could return the ill gotten money in return for a deemed conviction, disqualification from holding public office and taking bank loans for a given period of time with the permission of the Court

(c) section 25 (A) which deals with willful default of bank loans enables the defaulters even after arrest to reconcile their liability with the State Bank of Pakistan (SBP) and avoid prosecution if they agree to return the willfully defaulted amount via a suitable arrangement.

(d) Not only do the above provisions of the NAO clearly indicate that its primary aim is recovery of ill gotten gains rather than prosecution but so to does simple logic by comparing the provisions of the NAO with other anti corruption legislation prior to the NAO and currently in existence which is geared to the

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prosecution of offenders only and not the recovery of ill gotten gains.

30. It is also significant that when the concept's of VR and PB and the creation of a new criminal offense of will default were challenged before the Hon'ble Supreme Court in the **Khan Asfandiyar Wali Case (Supra)** such novel provisions were upheld by the Hon'ble Supreme Court largely on account of them falling within the primary objects and purpose of the NABO i.e. the recovery of ill gotten gain.

31. With regard to PB the Hon'ble Supreme Court in the **Khan Asfandiyar Wali Case (Supra)** found as under at P.931

PLEA BARGAINING

265. Question No. (xiii) relates to "plea bargaining". It reads thus:

"Whether the case of voluntary return (plea of bargaining) under section 25 of the impugned Ordinance is derogatory to the concept of independence of judiciary is so far as where the trial has commenced the Court cannot release the accused without 'consent' of the Chairman NAB?"

266. A perusal of the Preamble of the NAB Ordinance shows that it is a composite and an extensive law and its interpretation has to be done in a manner different from the normal interpretation placed on purely criminal statutes. This law deals with, among others, setting up of the National Accountability Bureau, which is an executive as well as administrative authority and an investigating agency; which deals with several aspect of 'corruption', etc. **The NAB does not merely deal with crimes of corruption, it also deals with their investigation and settlement out of Court. Bargain out of Court is now an established method by which things are settled in several developed societies. It was necessary in cases where the criminal is a potential investor and is inter-linked with the economy of the society, he should be given an opportunity to play his role in the society after he has cleared his liability. There appears to be nothing amiss in so far as it does not oust the jurisdiction of the Accountability Courts to exercise their judicial power in appropriate proceedings. Rather this is in the nature of a facility provided to the accused. There is nothing wrong with the NAB Ordinance providing for a procedure of bargaining.**

267. Moreover, the scheme for exploring the possibility of settlement during

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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)**

32. By way of comparative analysis a review of the following Acts/Ordinances, Codes etc are instructive.

1. The Pakistan Penal Code 1860
2. The Prevention of Corruption Act 1947
3. The Foreign Exchange Regulations Act 1947.
4. The Pakistan Criminal law (Amendment) Act 1958
5. The Anti Corruption Establishment Ordinance 1961
6. The Federal Investigation Agency Act 1974
7. Offenses in Respect of Banks (Special Courts) Ordinance 1984
8. The Financial Institutions (Recovery of Finances) Ordinance 2001

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9. The Sindh Enquiries and Anti Corruption Act 1991

33. Not all of these Acts deal with corruption but in none of them is there the ability to recover ill gotten gains and avoid prosecution. These Acts are specifically geared to prosecution which is their sole objective.

34. S.9 of the NAO sets out the offenses which amount to corruption and corrupt practices under the NAO. It is pertinent to note that most of these offenses are already covered either by the general law or other special laws which are punitive in nature. It would however not be practicable for NAB to take up every potential case falling under the purview of NAB largely because it is unlikely either to have the capacity in terms of human resources or budget to do so.

35. The following questions therefore emerge.

(a) in which cases covered by other laws should NAB take cognizance.

(b) who decides which cases to take up if they fall under other laws.

(c) What should be the guiding consideration for NAB in deciding which case to take up and which case not to take up if such cases fall both within NAB's mandate and the mandate of another piece of legislation.

36. This point came up for decision by a Divisional Bench of this Court in the case of **Rauf Bakhsh Kadri V The state and others (MLD 2003 777)** where although the issue was primarily that of discrimination under A.25 vis a vis which person was tried under the NAB Ordinance as opposed to other Ordinances for a similar offense which amounted to a pick and choose exercise it also answered who may make such decision in NAB and the factors which would influence him in making such decisions bearing in mind that the law seeks to preserve different statutes and not make any part of them redundant.

37. It is significant that this case has not been overturned and was decided **after** the **Khan Asfandiyar Wali case** (Supra) which through a Full bench Judgment spanning approx 350 pages dealt with nearly all aspects of the NAO vis a vis its Constitutionality.

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38. In Rauf Bakhsh Kadri's case (Supra) the following was held on the issue of pecuniary jurisdiction at P.791 from Para 28.

"28.Learned Prosecutor General himself conceded that each and every instance of corruption of a small functionary of the state or acceptance of a small amount of illegal gratification might not be triable under the Ordinance. Even otherwise the observations of the Honourable Supreme Court in Khan Asfandiyar Wali's case indicate that the Legislation was intended to deal with large scale corruption of public officers and others that they had indulged in during the recent past. We can also take notice of the fact that in most cases references have been filed in respect of white-collar crime of a large magnitude. Moreover, it must be kept in view that one of the objects of the Ordinance which distinguishes it from previous laws is return of assets acquired through corrupt means, corruption or corrupt practices through the process stipulated in sections 25, 25-A and 26. Obviously commencement of proceedings under the Ordinance could be justified upon rationale hypothesis if it is found that it would be in the national interest to allow the accused to secure a pardon if the amount likely to be recovered is fairly substantial.

29. At the same time an important feature of this Ordinance which distinguishes it from all previous laws is that it provides for recovery of assets acquired through corruption or misuse of power as well as outstanding dues of financial institution and Government agencies through the mechanism of plea-bargaining. The creation of the offence of "willful default" has been upheld by the Honourable Supreme Court. However, an Accountability Court can take cognizance of an offence only upon a reference being made by the Chairman, NAB or an officer duly authorized by him. **These provisions tend to show that only when the amount involved is substantial and it is considered worthwhile to employ the coercive methods of recovery that a reference under the Ordinance would be justifiable.**

30. For the foregoing reasons we are inclined to hold that the qualifications laid down in clause (ix) will also have to be read in the other clauses of section 9(a). In other words the discretion of the Chairman, NAB or an officer authorized by him to file a reference before the Accountability Court is not absolute or arbitrary. **Such reference could be filed only when the Chairman or the Authorized Officer is satisfied that the amount involved is of large magnitude and resort to the facility of plea-bargaining to the accused would be in the national interest. In the absence of such**

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satisfaction a case could only be triable under the ordinary law.

31. As regards the new offences created by the Ordinance we are constrained to observe that strictly speaking, it is not possible for us to declare them ultra vires the Constitution. **Nevertheless, it is expected that the Chairman, NAB will keep in view the spirit of the law in accordance with the guidelines referred to in para 29 and file references only when the amounts involved are large enough and it is worthwhile in the public interest and some mens rea on the part of the defaulter is involved.**

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)

39. It would therefore seem that, keeping in view the objects and purposes of the NAO on promulgation and the decision of the Hon'ble Supreme Court in **Khan Asfandiyar Wali's case (Supra)**, that this Court has already found that:

- (a) The NAO should only apply to large scale cases of corruption in terms of monetary value
- (b) The possibility of PB is present and
- (c) It is for the Chairman NAB to decide whether the scale of corruption justifies the filing of a reference bearing in mind the ability to secure a PB.

40. We agree with such finding and taking into account the above discussion on the pecuniary jurisdiction of NAB including NAB making the best use of its human resources, equipment, office space etc and budget limitations we hereby endorse by way

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of judicial order the NAB's SOP for dealing with pecuniary jurisdiction which is set out at para 11 of this order which in our view meets the guidelines already set out by this Court in **Rauf Bakhsh Kadri's Case (Supra)** as we consider the figure of RS 100 M to be significantly large to justify the intervention of the NAB being the premier anti corruption body in the Country provided that when a case does not fall within the SOP and is to be transferred to another agency the reasons for so doing are recorded in writing by the Chairman NAB. For avoidance of doubt we also endorse (ix) of the SOP which reads as under:

"Any other case falling within the purview of NAB, irrespective of the amount involved and status of accused person, with prior approval of the Chairman"

41. This is because there may be cases falling below RS 100M which cannot be prosecuted by any other agency and as such rather than letting the culprit off scott free he/it should be prosecuted by NAB at the discretion of the Chairman. However in cases below RS 100M which can be dealt with by other agencies such as FIA, ACE we would expect NAB to send such cases to such alternate agencies for prosecution by virtue of S.18 (d) of the NAO which reads as under:

"S.18(d). The responsibility for inquiry into and investigation of an offence alleged to have been committed under this Ordinance, shall rest on the NAB to the exclusion of any other agency or authority, **unless any agency or authority is required to do so by the Chairman (NAB) or by an officer of the NAB duly authorized by him.**" (bold added)

42. We have been informed by the learned PGA NAB that this new SOP in terms of pecuniary jurisdiction has only been in place since 1-1-2016 and as such there is likely to be a large number of inquiries and investigations launched prior to this time which are still to be dealt with by NAB. We would therefore direct the Chairman NAB to sift through all these inquiries and investigations and if they do not fall under the new SOP on pecuniary jurisdiction and can be tried by another agency to consider transferring such inquiries and investigations upon giving reasons to that other agency.

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43. We do not consider such action as retrospective in effect as in our view this was the legal position since the inception of NAB as discussed above i.e. only to deal with large scale and mega corruption cases in terms of monetary value as was spelt out in **Rauf Bakhsh Kadri's Case (Supra)** which was based on the Hon'ble Supreme Court decision in **Khan Asfandiyar Wali's case (Supra)** in so far as it dealt with pecuniary jurisdiction

44. Likewise, if it is legally permissible, we also direct the Chairman NAB to consider, transferring those references that have already been filed in Accountability Courts which fall below the threshold of the SOP to other relevant courts provided that there is no prospect of a PB and the reference is not in the advanced stages as indicated in Para 32 of **Rauf Bakhsh Kadri's Case (Supra)** as reproduced in Para 38 of this order.

45. In passing this judicial order in terms of NAB's SOP's in respect of pecuniary jurisdiction our intention is to ensure that NAB fulfills the function that was envisaged for it by the legislature i.e. pursue large scale monetary and mega corruption cases where there is a possibility of recovery through VR or PB, rather than keeping it bogged down in small scale monetary value cases which could be more appropriately dealt with under purely penal legislation. This judicial order in our view would also help in ensuring that NAB's human resources and budget are freed up to pursue the large scale and mega cases of corruption in terms of monetary value and since there would probably be fewer of such cases enable the Accountability Courts to deal with them more expeditiously.

46. With regard to jurisdiction we are of the view that the NAO being a special law as per S.3 NAO will prevail over all other anti corruption laws which view is fortified by S.16 (A) NAO which enables the Chairman to apply for the transfer of any case pending before any other court of law or tribunal provided it is dealing with an offense under the NAO in which case such court/tribunal must transfer the case to an Accountability Court. The NAO is also to some extent much wider than the other anti corruption legislation as it relates to all persons, not just Government officials and public servants, as was held by the Hon'ble Supreme Court in the case of **Abdul Aziz Memon V NAB** (PLD 2013 SC 594). The importance

and significance of NAB in the anti corruption hierarchy through Pakistan is also recognized through it being the focal body for the implementation of the United Nations Convention Against Corruption (UNCAC) of which Pakistan is a signatory. As such we find that NAB has primary jurisdiction over any matters falling within S.9 NAO to the exclusion of all other anti corruption agencies/bodies

47. Notwithstanding such overriding jurisdiction, scope and significance of NAB in the Country's anti corruption hierarchy however we expect the Chairman NAB to act judiciously in fulfilling his functions to ensure that the full intentions behind the promulgation of the NAO namely to pursue large scale mega corruption cases in terms of monetary value and the recovery of ill gotten gain through VR and PB is prioritized and cases which do not fall within this ambit are, in so far as legally permissible, transferred to the appropriate agency under S.18(d) NAO provided that it has jurisdiction to deal with the matter. In our view it would also be prudent for the NAB, FIA and ACE to share information regarding the targets of their inquiries and establish inter anti corruption agencies co-ordination cells in each organization to ensure that there is as little overlapping of inquiries/investigations as possible and that cases can be transferred under S.16 (A) NAO at the earliest if deemed appropriate by the Chairman NAB or if legally permissible sent from NAB to the appropriate agency with the relevant jurisdiction if the Chairman deems this appropriate

48. Reverting back to the bail application which is the subject matter of this petition.

49. We have considered the submissions of the learned counsel for the parties and perused the record.

50. We would like to make it clear that as per settled law on the grant of bail we have only made a tentative assessment of the material placed before us and that this order shall not prejudice the case of any party at trial whose case shall be decided on merits based on the evidence produced before the trial court.

51. NAB have in our view through the opening of the proprietorships bank account form, bank statements and cheques

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paid to the proprietorship, other documents on record (including banking) and S.161 statements especially that of Mian Zar, been able to produce sufficient material to show that there are reasonable grounds to link the accused to the offense. With regard to the question of pecuniary jurisdiction in that the amount involved is only approx RS 43 lacs and below the amount generally specified in the new SOP in our view this aspect is covered by paragraph ix of the SOP. As such the post arrest bail application of the petitioner is dismissed. However the Accountability Court hearing this reference is directed to complete the trial expeditiously keeping in view the provisions of S.16 (a) NAO and report compliance through MIT II.

52. The office shall also immediately send a copy of this order to both the Accountability Court hearing this reference and the Chairman NAB for their attention and compliance.

Dated 27-4-2016