

IN THE HIGH COURT OF SINDH AT KARACHI

Present:

Mr. Mohammad Karim Khan Agha

Mr. Justice Zulfiqar Ali Sangi.

Criminal Accountability Appeal No.22 of 2017.

Appellants: 1. Junaid Asad Khan S/o. Asad Abbas Khan,
2. Asad Abbas Khan S/o. Muhammad Ramzan Khan through M/s. Mehmood A. Qureshi and Mr. Khaleeq Ahmed, Advocates.

On court Notice; Ms. Naheed A. Shahid, Advocate for Bank Islami Pakistan.

Respondent/State (NAB) Mr. R.D. Kalhoro, Special Prosecutor NAB.

Date of hearing: 24.09.2020.

Date of Judgment: 07.10.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J.- Appellants Junaid Asad Khan S/o. Asad Abbas Khan and Asad Abbas Khan S/o. Muhammad Ramzan Khan were convicted by the learned Accountability Court No.II, Karachi in Reference No.20/2016 vide judgment dated 23.10.2017 whereby the appellants were convicted under section 10(a) of the National Accountability Ordinance, 1999 (NAO) and sentenced to suffer R.I. for ten (10) years and to pay fine of Rs.54.306 million in terms of section 11 of the NAO. In case of default in payment of fine, the appellants were ordered to undergo R.I. for a further period of two (02) years each. The appellants were also disqualified for a period of 10 years under section 15(b) of the NAO to be reckoned from the date of release after serving the sentence for seeking or from being elected, chosen, appointed or nominated as a member or representative of any public body or any statutory or local authority or in service of Pakistan or of any Province and obtain any financial facility in the form of loan or advance from any financial institutions controlled by Government for the period of 10 years.

2. The brief facts relevant for the purpose of disposal of these appeals are that a reference was forwarded by the Governor State Bank of Pakistan u/s 31-D of NAO, 1999 wherein it was alleged that Proprietor and Guarantor of M/s. Kohinoor Flour Mills (appellants) committed the offence of willful default of loan obtained from KASB Bank (now Bank Islami) and did not repay the same to M/s. Bank Islami. Subsequently inquiry was initiated and thereafter investigation was authorized by the D.G. NAB on 22.09.2015.

3. During investigation, it was revealed that M/s. Kohinoor Flour Mills located at Plot No.429-441 and 442, Main Korangi Creek Road, Karachi was incorporated on 09.07.2009 as a proprietorship firm which was dealing in grinding and milling of wheat and producing the flour, maida and its bi products.

4. It is alleged that accused Junaid Asad Khan, Proprietor of M/s. Flour Mills had applied for financial facility in the month of March 2010 to KASB Bank (now Bank Islami), Khalid Bin Waleed Road, Karachi. Accordingly a running finance facility of Rs.40 million was sanctioned vide KASB Bank on 03.06.2010 repayable on 31.03.2011. Accused No.2, Asad Abbas Khan was guarantor in respect of the said loan. The facility was disbursed on 20.09.2010 through pay order dated 20.09.2010 issued in favour of NIB Bank Ltd. for the sum of Rs.41,265,363/65. Intimation of swap transaction dated 20.09.2010 was also received by KASB Bank from NIB Bank Ltd.

5. During investigation it was also revealed that numerous securities were produced to KASB Bank (now Bank Islami) against numerous finance facilities.

6. It is further alleged that the terms and conditions were accepted by the borrower company through its proprietor, accused No.1 Juanid Asad Khan and thereafter the loan was accordingly sanctioned but accused Junaid Asad Khan and Asad Abbas Khan being proprietor and guarantor respectively, failed to repay the financing facility/loan availed from KASB Bank, therefore, KASB bank approached to the Banking Court No.II, Karachi and accordingly the Court passed decree dated 28.10.2014 for

Rs.39,996,646/- along with cost of funds from the date of default i.e. 12.10.2011 till realization of entire decretal amount in favor of KASB Bank. It is further alleged that despite the final decree passed by the Banking Court No.II, Karachi accused persons did not repay the decreed amount i.e. 39,996,649/-.

7. That investigation revealed that accused No.1 Juanid Asad Khan and accused No.2 Asad Abbas Khan being proprietor and guarantor of M/s. Kohinoor Flour Mills failed to repay the loan amount and thereafter KASB Bank approached to the Governor State Bank of Pakistan who after completion of all legal requirements of the law forwarded the Reference u/s 31-D to Chairman NAB for recovery of defaulted amount of approximately Rs.54.306 million

8. On 09.03.2016 this reference was transferred to the Accountability Court No.II, Karachi for disposal in accordance with law. As per Reference, accused Junaid Asad Khan and Asad Abbas Khan were shown on pre-arrest bail and accordingly notices were issued for their appearance. On 05.04.2016 accused persons joined trial and copies u/s. 265-C Cr.P.C. were supplied to them on the same date. Thereafter, a formal charge against both accused persons was framed on 22.04.2016 to which both the accused persons pleaded not guilty and claimed trial.

9. In order to prove its cases, the prosecution examined 07 witnesses who exhibited various documents in support of the prosecution case where after the prosecution closed its side. The appellants/accused recorded their statements under Section 342 Cr.P.C denying the allegations against them. Neither of the appellants gave evidence on oath nor called any DW in support of his defence case.

10. The trial court, after hearing the parties and assessing the evidence, convicted and sentenced the appellants through the impugned judgment dated 23.10.2017, against which the appellants have filed the instant appeal against their convictions.

11. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgment, therefore, the

same are not reproduced here so as to avoid duplication and unnecessary repetition.

12. Learned counsel for the appellants contended that the appellants were completely innocent; that there was no evidence against them; that the prosecution had not been able to prove that this was a case of wilful default as defined under the NAO and that this was a case of simple default for which the appellants were prepared to pay the amount decreed against them by the concerned Banking Court and for any or all the above reasons the appellants should be acquitted of the charge by extending to them the benefit of the doubt. In support of his arguments, the learned counsel relied upon the cases of **The State through Chairman NAB and others V Muhammad Asif Saigol and others** (PLD 2016 Supreme Court 62), **Syed Mushahid Shah and others V Federal Investment Agency and others** (2017 SCMR 1218) and **Alamdar Hussain V National Accountability Bureau through Chairman and others** (PLD 2017 Lahore 479).

13. On the other hand learned special prosecutor NAB has fully supported the impugned judgment and contended that the prosecution has proved its case of wilful default as defined in S.5 (r) of the NAO after the case was referred to the NAB under S.31 (D) of the NAO by the Governor of the SBP against the appellants beyond a reasonable doubt through reliable and trust worthy oral and documentary evidence and that as such the appeals be dismissed

14. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by learned counsel for the appellants and the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

15. At the outset it should be mentioned that both of the appellants are on bail granted by this court.

16. After our reassessment of the evidence we find that the prosecution has proved its case beyond a reasonable doubt against the appellants and as such the appeals are dismissed for the reasons mentioned herein after.

17. Interestingly, it appears that the appellants have never disputed the monies which they owe the KASB bank which repayment KASB bank was demanding. Even after the passing of the decree against them the appellants still however did not pay the amount decreed which has now obtained finality and now the execution application is only pending on account of this appeal.

18. The key issue in our mind in deciding this appeal is what actually amounts to wilful default and the date when the alleged wilful default occurred and whether the appellants are guilty of wilful default under the NAO.

19. Prior to amendments made to the NAO by Ordinance (IV) of 2002 dated 3rd February 2000 the definition of wilful default had not been clearly defined under the NAO which lead to the addition of S.5 (r) NAO in the definition section of the NAO through the aforesaid amendment. There were also no safe guards in the NAO to assist in distinguishing what amounted to simple default which could be dealt with by the banking courts through banking recovery legislation and wilful default which would fall under the purview of the NAO. Such safeguards in the form of S.31 (D) were added to the NAO after the case of **Khan Asfandiyar Wali V Federation of Pakistan** (PLD 2001 SC 607) which considered the constitutionality of the NRO in its entirety on 5th July 2000 vide NAO (second amendment) Ordinance 2000. These amendments however were not expressly stated to be retrospective and as such only applied from the day that the amendment Ordinances were promulgated as was held in the case of **Muhammed Asif Saigol** (Supra).

20. Thus, up to July 2000 whether a case of willful default was one which fell within the ambit of the NAO had to be determined by reference to the case law existing at that time.

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21. Thus, as pointed out in the case of **Muhammed Asif Saigol** (Supra) a case would only meet the requirement of wilful default if it met the requirements as set out as under at P.636 para 16;

*"The offence of wilful default in these cases was required to be considered in the light of the law at the time, which was **before** the insertion of clause (r) into section 5 of the NAB Ordinance. At that juncture to constitute the offence of wilful default the prosecution, in addition to establishing the subsistence of a default, had to also prove that the default was wilful. The aforesaid case law confirms that in order to constitute a wilful default, there must be a deliberate and calculated refusal to pay, i.e. a conscious and intentional act. The mere inability to pay did not constitute the offence of wilful default. The prosecution however made no attempt to establish that the default was wilful."* (bold added)

22. Thus, this was the standard/test to be applied to cases of wilful default under the NAO **before** the 2000 Amendment Ordinances referred to above. Since the default in this case was reported to the SBP by letter dated 10.01.2014 the authorities **before** 2000 in respect of wilful default will not be applicable in determining whether the appellants had committed wilful default under the NAO. Instead the new added provisions to the NAO as mentioned earlier would take effect in determining whether the default was wilful or not which provided protections to the defaulter in determining whether his default was wilful or not which were not present before the aforementioned amendments to the NAO as mentioned earlier as was recognized in the case of **Muhammed Asif Saigol** (Supra) in the following terms at P.628 as under;

*"The requirement to obtain a report from the Governor of the State Bank acted as a safeguard against the misuse by financial institutions of the NAB Ordinance to seek recovery of their outstanding amount and also acted as a check on overzealous officers of the NAB. However, the benefit of this important safeguard was not available to MAS as the effect of this provision was **not made retrospective**".* (bold added)

23. Under the amended scheme of the NAO dealing with potential cases of wilful default a bank or other financial institution could make a complaint to the State Bank of Pakistan (SBP) under S.31 (D) that one of its customers has committed wilful default by defaulting on its loans or other financial facilities and thereafter the SBP would investigate the matter and after giving the customer a show cause notice and considering the

customers defense it would determine whether in the opinion of the SBP the customer's case was one of wilful default or simple default. If it was a case of wilful default the matter would be forwarded to the NAB by the Governor SBP to be proceeded with under the NAO. If it was a case of simple default the case would be returned to the complainant bank informing it of its decision. There is no bar in law from recovery proceedings and proceedings for wilful default under the NAO proceeding in parallel.

24. For ease of reference S.5 (r) and 31 (D) of the NAO are set out below;

"5.(r) "Wilful default"; a person or holder of public office is said to commit an offence of wilful default under this Ordinance if he does not pay, or continues not to pay, or return or repay the amount due from him to any bank, financial institution, cooperative society, Government department, statutory body or an authority established or controlled by Government on the date that it became due as per agreement containing the obligation to pay, return or repay or according to the laws, rules, regulations instructions issued or notified by the State Bank of Pakistan or the bank, financial institution, cooperative society, Government of Pakistan, statutory body or an authority established or controlled by a Government, as the case may be, and a thirty days notice has been given to such person or holder of public office.

Provided that it is not wilful default under this Ordinance if such person or holder of public office was unable to pay return or repay the amount as aforesaid on account of any wilful breach of agreement or obligation or failure to perform statutory duty on the part of any bank, financial institution, cooperative society, Government department, statutory body or an authority established or controlled by a Government.

Provided further that in the case of default concerning a bank or a financial institution a seven days notice has also been given to "such person or holder of public office" by the Governor, State Bank of Pakistan:

Provided further that the aforesaid thirty days or seven days notice shall not apply to cases pending trial at the time of promulgation of the National Accountability Bureau (Amendment) Ordinance, 2001".

"S. 31-D. Inquiry, investigation or proceedings in respect of imprudent bank loans etc. Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or re-scheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from the Governor, State Bank of Pakistan.

Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan”.

25. With regard to proving wilful default under S.5 (r) NAO in the case of **Mian Munir Ahmed V State** (2004 P.Cr.LJ 2012) it was held that the following ingredients must be proved at P.2018 Para 14 as are listed below;

“14. For attracting the above provisions of law, it is essential that the prosecution should prove the following ingredients:-

- (i) *There should be a person within the meaning of Ordinance, 1999.*
- (ii) *There should be a Bank, Financial Institution, Cooperative Society, Government Department, Statutory Body or an Authority established or controlled by a Government.*
- (iii) *There should be an amount taken by the person mentioned at S. No.(i) from any institution as mentioned at S. No.(ii).*
- (iv) *There should be dues.*
- (v) *That such persons did not pay, or continues not to pay, or return or repay such dues on the date it became due as per agreement containing an obligation to pay, return or repay the same according to law, rules, regulations or instructions issued or notified by the State Bank of Pakistan and other abovementioned institutions.*
- (vi) *That a period of 30 days has expired thereafter.*

15. If the above ingredients are proved, then the person will be held guilty of willful default. (bold added)

26. We have seen a letter on record dated 10.01.2014 where by the KASB bank made a complaint to the SBP that the appellants had committed wilful default and explaining the reasons why this was a case of willful default falling under the purview of the NAB. **This letter is reproduced below for ease of reference.**

PR/KASB/15/2014
January 10, 2014

E.D.(DF & BPRD)
Diary No.2884
Date: 15.1.2016

The Governor,
State Bank of Pakistan,
I.I. Chundrigar Road,
Karachi.

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Dear Sir,

SUBJECT: KOHINOOR FLOUR MILLS-FORMAL REQUEST FOR ISSUANCE OF 7 DAYS NOTICE FOR PAYMENT OF OUTSTANDING LIABILITIES TOWARDS KASB BANK LTD. AND IN CASE OF FAILURE FORWARDING REFERENCE TO NAB UNDER SECITON 5(R) OF THE NAB ORDINANCE, 1999.

We are formally reporting commission of offence of willful default, which is committed by the accused mentioned herein below and requesting you to issue 7 days' notice to the accused for payment of all outstanding liabilities to the bank and in case of their failure to forward reference to NAB for initiation of proceedings against the accused under NAB Ordinance 1999.

Total amount payment by the accused to the Bank is Rs.54,305,976.00 (Principal of Rs.39,996,649.00 and mark-up/cost of fund of Rs.14,309,328.00 calculated up to 31.12.2013).

The brief facts of the case are enumerated below:-

- 1) That the Bank is a financial institution under the meaning of Section 2(a) of the Financial Institution (Recovery of Finance) Ordinance 2001, having its principal office at Business & Finance Centre, I.I. Chundrigar Road, Karachi and doing business of banking under your supervision.
- 2) That the accused are 1) Mr. Junaid Asad Khan proprietor/mortgagor of Kohinoor Flour Mills, a proprietorship firm under whose name the facility had been allowed and 2) Mr. Asad Abbas Khan, who is the guarantor of the liability. Their office and residential addresses have been given in the notice issued to them on 11.10.2013. The copy of the notice is enclosed as Annexure A. The notices were received by the accused.
- 3) That at the request of the accused, the outstanding liability of Rs.41,265,363.65 was swapped from NIB Bank after the competent authority of the Bank had approved the limit of Rs.55.0 M (RF Rs.40.0 M, CF Rs.10.0 M, LG Rs.5.0 M) on 11.05.2010. Letter was issued to the accused on 02.06.2010, which was duly accepted by the accused on 09.06.2010. Copies of BBFS, Sanction, offer and acceptance, copy of PO and acknowledgement from NIB are enclosed as Annexure B.
- 4) That the facilities were swapped and enhanced against the mortgage of industrial properties bearing reference no.429,441& 442 situated at Main Korangi Creek Road, Near PARCO, Karachi, valued at Rs.84.724 M as per valuation carried out by Oriental Engineering Services on 14.04.2010. The copies of valuation along with vetting by lawyers are enclosed as Annexure C.

5) That the accused signed the following documents as evidence towards their repayment obligations:

- a. Agreement for Financing for Short/Medium/Long Terms on Mark-up Basis (Running Finance) executed on 09.06.2010.
- b. Demand Promissory Note dated 09.06.2010.
- c. Letter of hypothecation on movables, book debts and receivables dated 09.06.2010.
- d. Letter of pledge of goods dated 09.06.2010.
- e. Personal guarantees signed by both the accused dated 09.06.2010.

(Copies of these documents are enclosed with the relevant Annexure 6).

6) That the accused also provided the Bank with the following original documents of property through NIB Bank in order to secure the facilities:-

- a. Three Sale Deeds of properties along with mutation and search certificates bearing plot No.429,441 & 442, situated at Main Korangi Creek Road, Near PARCO, Karachi.
- b. Memorandum of Deposit of Title Deeds

(Copies of these documents are attached with the relevant Annexure 6).

7) That the accused failed to complete the registered mortgage formalities after the liability was taken over and the Bank issued a notice to the accused on 23.12.2010 to settle the liability.

- Another notice was issued by the Bank on 22.08.2011 against demanding the settlement of liability.
- On 27.08.2011, our lawyers informed us that extracts and NOCs given to the Bank seemed fake/bogus.
- On 03.10.2011 the accused were served with another notice advising them of dishonor of cheques given for mark-up adjustment and informing them of certain bogus documents given to the Bank.
- On 03.11.2011 yet another notice was served on the accused. In reply the accused on 19.11.2011 informed the Bank that they were in the process of swapping the liability with another Bank.
- On 24.11.2011 a legal notice was served on the accused. In reply the accused on 03.12.2011 reconfirmed that the liability would be swapped with another Bank.
- When no progress took place, the accused were given another opportunity to submit a suitable proposal for settlement vide our letter dated 29.05.2012. On 05.07.2012 the Bank demanded adjustment of overdue mark-up.
- Another legal notice was issued to the accused on 27.07.2011 by our advocate. The copies of all above documents are enclosed as Annexure D.

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- 8) **That the Bank initiated legal proceedings by filing a recovery suit on 27.11.2012 in the Banking Court. Copies of plaint, LTD Application and Replication are enclosed as Annexure-E.**
- 9) **That considering the wilful default and non-cooperative behavior, our lawyer also filed an application under Section 16 of the Recovery of Finances Act for attachment of property before judgment on 24.04.2013. The copy of the application is enclosed as Annexure F.**
- 10) That the cases are still at the stage of LTD hearing and rehearing of application.
- 11) **That no positive response has come from the accused in reply to our notice of 11.10.2013.**
- 12) **That it is evident that the accused are wilful defaulters based on the following grounds:**
- I. The accused have acted from the inception with malafide intentions and have not been able to pay the amount which were taken over from NIB Bank.
 - II. The accused in their defence application have admitted certain liability but failed to come forward with any settlement.
 - III. The accused have deliberately failed to create registered mortgage, although they had accepted the condition in the letter of offer that the formalities would be completed within 30 days.
 - IV. The accused have also been involved in submitting the incorrect documents pertaining to the properties.
 - V. The accused are still in business and operating the mill as visit report from our officials discloses as per Annexure G.**
 - VI. The accused have not responded positively to our requests to settle the account amicably.
- 13) That the Bank has obtained a legal opinion in terms of BPD Circular Letter NO.36 of 2004, which is enclosed as Annexure H.

In the light of the above facts; total disregard to the return of bank's money; taking undue advantage of lengthy judicial process, withholding sizeable public funds and using them for the purpose other than the intended and declared purposes all clearly demonstrate that the accused have intentionally, willfully defrauded the Bank and have deliberately failed to pay the outstanding liability.

We, therefore, request you to serve 7 days' notice on the accused for payment of total outstanding liabilities to the Bank and in case of no response, forward the reference to the NAB for initiation of proceeding under the provision of NAB Ordinance. (bold added)

Yours faithfully,
Sd/-
Bilal Mustafa
President & CEO.

27. Thereafter vide letter dated 7th February 2014 the SBP sent a show cause notice to the appellants under S.31 (D) in respect of will full default under S.5® NAO which is set out below for ease of reference.

State Bank of Pakistan
Karachi.

ASHRAF M. WATHRA
GOVERNOR (Acting)

No.BPRD/BLD/NAB-31D/KASB-Kohinoor/2014/2069

07th February, 2014

Mr. Junaid Asad Khan
Proprietor of Kohinoor Flour Mills
Mortgagor

- (i) Plot NO.429, 441 & 442,
Main Korangi Creek Road
Karachi.
- (ii) House No.B-54, Street No.18,
Khayaban-e-Badban
Phase 1, DHA,
Karachi.
- (iii) House No.B-54, Street No.18,
Khayaban-e-Badban
Phase 1, DHA,
Karachi.

SHOW CAUSE NOTICE UNDER SECITON 31-D OF THE
NATIONAL ACCOOUNTABILITY ORDINANCE, 1999 M/S.
KONINOOR FLOUR MILLS.

In terms of section 5(r) and 31-D of the National Accountability Ordinance, 1999, M/s. KASWB Bank Ltd (KASB) has filed a complaint, alleging that you have willfully defaulted on the repayment of around Rs.54.306 million (Rupees Fifty Four Million, Three Hundred Sixty Thousand only) due and payable by you to them on 30.12.2013.

2. KASB served you a thirty-day notice dated 11.10.2013 for payment of around Rs.53.566 million (Rupees Fifty Three Million, Five Hundred Sixty Six thousand only) due and payable by you to them on 30.09.2013.

3. You are hereby called upon to show cause, within seven (7) days of receipt of this notice, as to why you should not be proceeded against as a "wilful defaulter", under the National Accountability Ordinance, 1999.

Sd/-
(Ashraf M. Wathra)

28. On 18.02.2014 the appellants replied to the show cause notice through their lawyers as under;

AFTAB HUSSAIN SOOMRO
Advocate High Court

SOOMRO LAW ASSOCIATES
104-106, Tahir Plaza, Near
City Courts,
Karachi.

Ref No.SLA/04/14

Mr. Ashraf M. Wathra,
Governor (Acting)
State Bank of Pakistan,
KARACHI.

REPLY OF SHOW CAUSE NOTICE

Our client Mr. Agha Asad Abbas Khan S/o. Muhammad Ramzan, R/o. 28-B, 4th East Street, Phase-I, D.H.A. Karachi has placed your letter No.BPRD/BLD/NAB-31/KASB-Kohinoor/2014/2070 dated 07th February, 2014 we have to reply the same as under:-

1. That the entire contents of your Notice under reply as framed are false, baseless, misconceived and concocted and are vehemently denied. It seems from the contents of your notice under reply that your M/s. KASB Bank Ltd. (KASB) with malafide intention and ulterior motives has misguided you and not disclosed the true facts before you but the entire story narrated by your (KASB) Bank to you is false and baseless and contrary to the actual facts. The true facts of the case are that it is important to point out you that our client neither customer nor stood as guarantor in the alleged matter as mentioned in the letter mentioned hereinabove.

2. That from the contents of the your show cause notice, it seems that you have assumed powers of courts and NAB authority and having supervisory financial authority over the banking institutions, started acting upon on National Accountability Ordinance, 1999 by overthrowing the NAB Authority at your own will and wish, which acts are of course not permissible under the law, particularly when KASB Bank has already adopted a lawful course of recovery of loan facilities awarded to its Customer Kohinoor Flours Mills Limited which facts are not disclosed before you.

3. That your such notice is nothing, but an act of harassment to our client and malign our client for which our client reserves his rights to sue against you and KASB Bank in competent court of law including claiming special damages and other available remedies

permitted by law of land, if the said show cause notice is not withdrawn by you forthwith unconditionally.

In the light of the above facts and circumstances, you are therefore, requested to advise the KASB Bank to desist from taking any reckless and ill founded act, action on the contrary and to withdraw their notice under reply. Failing which the same shall be countered with all the legal force at the sole risks and as to costs of our client, which please be noted carefully.

Yours' Sincerely
For M/s. Soomro Law Associates
Sd/-
Advocate.

29. In our view the reply to show cause notice gives no reasons why this was not a case of wilful default and appears to be evasive rather than of assistance in explaining why the loan had not been repaid on time.

30. The SBP forwarded the reply to the complainant bank, KASB which replied as under;

PR/KASB/044/2014
April 15, 2014

Mr. Rao Ahmed Mukhtar,
Deputy Director,
Banking Policy & Regulation Department,
State Bank of Pakistan,
I.I. Chundrigar Road,
Karachi.

Dear Sir,

Complaint for Filing Reference u/s 31-D of National
Accountability Ordinance 1999 against Kohinoor Flour
Mills.

We refer to your letter BPRD/BLD-04/NAB-31-D/KASB-Kohinoor/5775/14 dated April 11, 2014, received by us on April 14, 2014. Your letter has sought our comments on the letter of 18.02.2014 from Aftab Hussain Soomro Advocate acting on behalf of Asad Abbas Khan, the Guarantor of Kohinoor Flour Mills.

The letter from the above advocate comprises of threats and comments of no legal value. There are no substantial questions of law raised except that Asad Abbas Khan is not a guarantor to the account. We have the following facts:-

- 1) At the time of allowing the facilities, letter of offer was issued on June 03, 2010, wherein collateral included personal guarantee of Mr. Asad Abbas Khan. No objection was raised.
- 2) A legal notice was served to the firm, its proprietor and Mr. Asad Abbas Khan on July 25, 2012 by our advocate

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Mr. Muhammad Zubair Quraishy & Co. Neither the firm replied nor did the guarantor contest it.

- 3) The recovery suit was filed on 27.11.2012 that included Mr. Asad Abbas Khan as Guarantor. The defence was filed by the firm and its proprietor Mr. Asad Abbas Khan did not contest it.**
- 4) Mandatory notice of 30 days under NAB Ordinance was sent on October 11, 2013 that was also addressed to and included Mr. Asad Abbas Khan. He did not contest it.**
- 5) It is worth noting that Mr. Asad Abbas Khan lives in the same house and reportedly is the father of the proprietor, meaning he has been fully aware of the case and has received all notices.**
- 6) Your letter was also sent on the same address and was duly received by the guarantor. Only this time he opted to contest it.**

The facts of the case and legal ramifications are not in favor of the guarantor. The matter may kindly be forwarded to NAB.

Yours Sincerely,
Sd/-

M Pervaiz Siddiqui
Senior Executive-SAMG.

31. After analyzing the complaint of KASB bank, the appellants reply to show cause notice, reply of the KASB bank to the appellants reply to show cause notice and considering the document and facts before it the Governor SBP vide letter dated 11.06.2014 referred the matter to the Chairman NAB. The Governors letter is set out below for ease of reference.

**State Bank of Pakistan
Karachi.**

**ASHRAF M. WATHRA
GOVERNOR**

No.BPRD/BLD/NAB-31D/KASB-Kohinoor/2014/10175 11th June, 2014

REPORT AND REFERENCE BY THE GOVERNOR, STATE BANK OF PAKISTAN PURSUANT TO SECTION 31-D OF THE NATIONAL ACCOUNTABILITY ORDINANCE, 1999 (THE "ORDINANCE").

Dear Mr. Chairman,

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1. As provided in Section 5(r) of the National Accountability Ordinance, 1999 (the "Ordinance"), KASB Bank Limited, has called upon M/s. Kohinoor Flour Mills (referred to as "Borrower"), vide notice dated October 11, 2013 for payment of around Rs.53.566 Million (Rupees Fifty Three Million, Five Hundred Sixty Six Thousand) along with cost of funds, within period of 30 days from the issuance of said notice. Copy of the notice is attached as Annexure "A".
2. As per Bank, no response to 30-days notice was received from the Borrower.
3. KASB Bank, in January 2014, approached SBP for issuance of 7-days notice to the Borrower. This letter is placed at Annexure "B".
4. Pursuant to the second proviso contained in Section 5(r) of the Ordinance, the Governor State Bank of Pakistan ("SBP") had issued show cause notice No.BPRD/BLD-4/NAB-31D/KASB-Kohinoor/2014/2068-2070 dated February 7, 2014 (referred to as "show cause notice"), calling upon the Borrower, to show cause within seven (7) days as to why he should not be proceeded against as "willful defaulter" under the Ordinance for willfully not paying an amount of around Rs.54.306 Million (Rupees Fifty Four Million Three Hundred Six Thousand) to the Bank, due as on December 30, 2013. Copy of the show cause notice is annexed and marked as Annexure "C".
5. No reply was received to the 7-days show cause notice from the obligors, except from the Guarantor (Mr. Asad Abbas Khan). This reply and response of the bank to this reply is attached herewith as Annexure "D" and Annexure "E" respectively.
6. **Considering the documents referred to above, other papers furnished in support and the contents of KASB Bank and the Borrower; prima facie, the Borrower has not repaid and continues not to repay the amount due to the Bank. Further, the Borrower has not been able to substantiate or to show his inability to repay the amount due from him, due to any breach of agreement on part of the Bank. Therefore, the Borrower appears to have committed the offence of "willful default", as provided in Section 9(a) read with section 5(r) of the National Accountability Ordinance, 1999. In this regard, no order of the Court of Law restraining the initiation of proceedings under the Ordinance has been placed on record by the Borrower.**
7. For the reasons mentioned above, the case is referred to NAB under Section 31-D of the National Accountability Ordinance and it is recommended that appropriate investigation and proceeding in respect of the defaulted amount be initiated by NAB against the borrower for recovery and settlement of the defaulted liabilities.(bold added)

Warmest regards,
Yours sincerely,
Sd/-
(Ashraf M. Wathra)

Maj (Rtd) Qamar Zaman Chaudhry
Chairman
National Accountability Bureau,
Atta Turk Avenue, G-5/2,
ISLAMABAD.

32. As such it can be seen that the test of will full default under S.5 (r) NAO had prima facie been made out and that the procedure provided in S.31 (D) had been followed, that the appellants gave no satisfactory reply to the SBP's show cause notice as to why their default was not wilful and hence the Governor SBP referred the case to the NAB.

33. NAB still however had a duty to inquire and investigate under the NAO whether the referred case under S.31 (D) was in fact a case of wilful default to be prosecuted under the NAO. NAB cannot in our view simply regard a reference sent by the Governor of the SBP under S.31 (D) as definitive evidence that the referred case constitutes the offence of wilful default under the NAO. The reference made by the Governor of the SBP in our view is a very strong indication that a case of wilful default has been made out against the defaulters but it is by no means definitive. The NAB under the NAO will then have to inquire and investigate to see if indeed a case of wilful default has been made out and if so only then file a reference on account of willful default under the NAO.

34. In our view NAB needs to distinguish between a case of "simple default" and "wilful default" i.e with deliberate intent to default. For example, if a person is trying his best to pay back his liabilities to the bank but is simply unable to do so because his business is collapsing due to no fault of his own. For example, due to a down fall in demand for his goods on account of say COVID 19 or some other commercial or business factor beyond his control then this is likely to be a case of simple default rather than willful default which should not be proceeded by the NAB under the NAO but instead through the usual banking courts for recovery. However if the default can be deemed to be willful i.e. deliberate say because the borrower is using the loan for some other purpose rather than his business

for which the loan was taken or not using the loan properly or judiciously and the business collapses due to lack of investment, wastage of the loan or poor business management etc then this would almost certainly amount to willful default under the NAO. To treat all default as "willful" would lead to all such cases of default as being prosecuted under the NAO and would certainly deter businesses from taking loans from banks keeping in view the penal clauses in the NAO which may have the knock on effect of stifling economic growth. Yes, the procedure under S.31 (D) of the NAO is a good filter but a reference under S.31 (D) is not definitive of wilful default but only a very strong indicator of the same. It is still the obligation of the NAB under the NAO to inquire and investigate the reasons for such default and determine based on the evidence provided to it or collected by it whether it is a case of simple default not falling within the ambit of the NAO or is indeed a case of wilful default which falls within the ambit of the NAO.

35. In our view from the IO's evidence and other evidence on record including other oral and documentary evidence this matter has been thoroughly and independently investigated by the NAB and found to be a case of wilful default which justifiably lead to NAB filing a reference under the NAO before the concerned accountability court. At trial all the PW's gave consistent, non contradictory evidence which we find to be reliable, trustworthy and confidence inspiring and none of their evidence was dented during cross examination. Their evidence is corroborated by the documents exhibited at trial.

36. It is also notable that the appellants have not put forward any plausible reason as to why they failed to repay the loan and did not even join NAB's investigation to justify their position despite being sent call up notices and also did not give evidence on oath at trial in order to justify their position. The loan is of about 4 crore rupees but the appellants have only produced 2 FIR's showing that cheques which they were owed in 2011 not 2014 of RS 6 and 11 lacs respectively bounced which in the context of the case where 4 crore was owed are inconsequential amounts and would in no way put the appellants in a position to pay off their liabilities to the bank especially as these cheques relate to 2011 and not 2014 which is 3 years earlier. Even the appellants' initial dealings and

conduct with the bank when the demand for repayment of the loan was made show that they had no genuine desire to repay the loan and gave no explanation as to their non payment as the appellants did not even bother to reply to the banks 30 day notice. We have seen no genuine reason on record to show that the defaulted amount was not wilful. The lame excuse that the appellants were not provided statements of accounts and bank statements is not sustainable in the face of the recovery suit against them which contained all these documents which would also have been considered by the SBP and the NAB. The decretial amount has already been decreed by the concerned Banking court and execution proceedings have only been stayed on account of this appeal.

37. We have gone through the impugned judgment and find it to be well reasoned and in accordance with law and the learned counsel for the appellants despite his best efforts has not been able to point out any error in the same either as a matter of law or fact. We also find from the evidence on record that all the ingredients required to make out a case of wilful default as set out in the case of **Mian Munir Ahmed** (Supra) as set out above have been proven through cogent reliable and trustworthy oral and documentary evidence and as such the prosecution has proved the charge against the appellants beyond a reasonable doubt.

38. Thus for the reasons mentioned above the convictions of both the appellants are maintained.

39. With regard to sentencing we note that the appellants have been sentenced to 10 years RI each. Since however the amount of wilful default is approx 4 corers which would amount to 2 crores each and keeping in mind that NAB's primary objective is to recover billions of rupees, the fact that the appellants are first time offenders and have the prospect of reformation and even paying back most of the amount due in the recovery proceedings before the concerned banking court and the maximum sentence under the NAO being 14 years imprisonment based on the particular facts and circumstances of this case whilst placing reliance on **Muhammed Juman V State** (2018 SCMR 318) we consider the sentences of imprisonment of 10 years RI handed down to the appellants to be too harsh. We therefore reduce the sentences of imprisonment handed down

to the appellants to 5 years RI each but maintain all the other punishments, fines and disqualifications as set out in the impugned judgment.

40. The appellants are on bail and their bail stands recalled and they shall immediately be returned to the custody of central prison Karachi to serve out the remainder of their sentences. A copy of this Judgment shall be sent to DG NAB Karachi for compliance.

41. Before parting with this judgment we would like to observe that the Financial Institutions (Recovery of Finances) Ordinance 2001 as amended by Financial Institutions (Recovery of Finances) Amendment Act (XXXVII) of 2016 regarding wilful default will have no impact on this case as the aforesaid amendment is not retrospective in effect and only prospective as held by this court in the case of **Intikhab A.Syed V Chairman NAB** (2019 MLD 127).

42. The appeals, any constitution petitions and listed applications stand dismissed **except** as modified above.

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