

## IN THE HIGH COURT OF SINDH AT KARACHI

### Present:

Mr. Mohammad Karim Khan Agha  
Mr. Justice Zulfiqar Ali Sangi.

**Criminal Accountability Appeal No.17 of 2019 a/w.  
C.P. No.D-2433 of 2019.**

Appellant/petitioner      Muhammad Arshad Latif S/o. Mirza Abdul Latif  
through Mr. Nabeel Kolachi, Advocate.

**Criminal Accountability Appeal No.18 of 2019 a/w.  
C.P. No.D-2432 of 2019.**

Appellant/petitioner:      Qamar Mahmood Khan S/o. Allah Ditta through Mr.  
Nabeel Kolachi, Advocate.

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

Date of hearing:              01.10.2020.  
Date of Judgment:          08.10.2020.

## J U D G M E N T

**MOHAMMAD KARIM KHAN AGHA, I.-** The appellants Muhammad Arshad Latif son of Mirza Abdul Latif and Qamar Mahmood Khan son of Allah Ditta have filed Cr. Accountability Appeals No.17 of 2019 and No.18 of 2019 separately in Reference No.08 of 2017 whereby they have impugned the judgment dated 26.02.2019 passed by Judge, Accountability Court No.II Karachi where by the appellants were convicted and sentenced under S.9 of the National Accountability Ordinance, 1999,(NAO) as under;

*"To suffer punishment of five (05) years R.I. each and fine of Rs.69.99 million each, being the amount of default and in default of payment of further to suffer six (06) months S.I. each. Both the accused persons as per Section 20(b), Sub-clause 9 of FIO, 2001 shall not be eligible to receive any loan, advance or finance from any financial institution for a period of ten years and shall not be permitted to contest any election as a member of Parliament, any Provincial Assembly or local body for a period of five years, after serving out their conviction".*

2. The brief facts of the case are that on the receipt by the National Accountability Bureau (NAB) of a reference u/s 31-D of the NAO forwarded by the Governor State Bank of Pakistan in respect of the offence of willful loan,

default against Directors / Guarantors of M/s. Hilton Trans Limited, an inquiry was authorized which was subsequently converted into Investigation on 30.08.2016 vide letter No.242130/IW/-III/CO-A/T-4/NAB(K)/2016/K-3915 by the competent authority.

3. That the investigation revealed that M/s. Hilton Trans Limited, through its Directors, accused No.1 & 2 approached M/s. KASB Bank (now Bank Islami) and requested for lease financial facility for the purchase of 25 Hino Buses on 18.02.2004. That the said request was subsequently accepted by the Bank and approval vide letter dated 20.04.2004 and the said company availed lease finance facility to the tune of Rs.102.5 million for the purchase of 25 Hino Buses under Urban Transport Service (UTS).

4. That the total lease amount disbursed was Rs.92.250 million after deducting 10% of lease key money of Rs.102.5 million. The details of the facility to the company is as under:-

<i>Name of facility</i>	<i>Date of Finance</i>	<i>Limit</i>	<i>Expiry Date</i>	<i>Date of Default</i>
<i>Lease Finance</i>	<i>July 2004</i>	<i>102.5 Million</i>	<i>June 2009 (5 years)</i>	<i>July 2004</i>

5. That the company started delay in payments of leased rentals and installments **from very 1<sup>st</sup> month** due to which its accounts became stuck up and declared classified. That on the request of the company, the bank restructured / rescheduled the lease finance facility in the year 2005 but the terms and conditions of rescheduling were not abided by the company, consequent thereto, the bank cancelled the same.

6. That thereafter the bank repossessed / recovered the leased buses from the company and auctioned them against a total sum of Rs.31.322 Million and subsequently filed a recovery suit bearing No.B-11 of 2016 u/s. 9 of Financial Institutions (Recovery of Finances) Ordinance, 2001 before the Hon'ble High Court of Sindh at Karachi since the liability of the company was not completely settled.

7. That the above suit was decreed in favor of the bank vide judgment and decree dated 21.08.2006.



8. That the bank served 30 days' notice dated 09.10.2013 u/s 5(r) of National Accountability Ordinance 1999 upon the company through its directors for the repayment of Rs.117.952 million (Rs.63.885 million being principal and Rs.54.067 million being cost of fund) as on 30.09.2013 but to no avail.

9. That thereafter the Governor State Bank of Pakistan served 7 days Show Cause Notice upon the accused persons, for the repayment of the outstanding amount of Rs.125/171 million as on 30.06.2015.

10. That after complying with the mandatory provisions, the matter was referred to the NAB u/s 31-D of the NAO for procedure under the law in accordance with the NAO.

11. That NAB established that the accused No.1 & 2 being the Directors/Guarantors of M/s. Hilton Trans Limited willfully failed to repay the loan of Rs.139.98 million, as on 30.12.2016 (principal amount of Rs.63.885 million and cost of funds of Rs.76.104 million) and that they have committed the offence of willful loan default defined u/s 9(a) of NAO, 1999 and punishable u/s 10 of NAO, 1999, read with schedule thereto. This lead to the NAB filing a reference against the appellants under the NAO which proceeded before the Accountability Courts at Karachi.

12. After compliance of the provision of Section 265 (C) Cr.P.C. the trial court framed the charge against the accused persons under Section 9(a) NAO which is punishable u/s 10 of NAO, 1999. The accused persons pleaded not guilty to the charge and claimed to be tried.

13. In order to prove its cases, the prosecution examined 06 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. Both appellants recorded their evidence on oath but did not call any DW in support of their defence case.

14. The trial court, after hearing the parties and assessing the evidence available on record convicted and sentenced the appellants through the common impugned judgment dated 26.02.2019 as mentioned earlier in this judgment. Hence the appellants have each filed an appeal against their conviction.



15. 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.

16. Learned counsel for the appellants contended that the appellants were completely innocent; that there was no evidence against them; that this case should have been heard under the Financial Institutions (Recovery of Finances) Ordinance 2001 as amended by Financial Institutions (Recovery of Finances) Amendment Act (XXXVII) of 2016 instead of the NAO; that even otherwise the prosecution had not been able to prove that this was a case of wilful default as defined under the NAO; that appellant Qamar Mahmood Khan had no liability as he had ceased to be a director of the company at the time of default; that the mandatory notices required under the NAO and especially S.31(D) had not been served on the appellants and as such this case could not have proceeded under the NAO; that the buses which were the security held against the appellant's loan were sold at an under value and hence the balance was not recoverable as the bank had breached its agreement and as such this was not a case of wilful default under S.5(r) NAO as the bank had defaulted on its agreement by selling the buses at an undervalue and thus for any or all of the above reasons the appellants should be acquitted of the charge by extending to them the benefit of the doubt. In support of their contentions the appellants placed reliance on **Khan Asfand Yar Wali and others v. Federation of Pakistan and others** (PLD 2001 SC 607), **Islamuddin Shaikh v. Federation of Pakistan and others** (PLD 2001 Karachi 419), **Kaloodi International (Pvt.) Ltd. V Federation of Pakistan** (PLD 2001 Karachi 311), **Irfan Nawab through Attorney V Soneri Bank Limited** (2013 CLD 1922) and **Intikhab A.Syed V Chairman NAB** (2019 MLD 127).

17. On the other hand learned special prosecutor NAB has fully supported the impugned judgment and contended that the prosecution has proved its case of willful 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.

18. 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.



19. At the outset it should be mentioned that both of the appellants have been released from jail having served out their sentences.

20. 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.

21. Interestingly, it appears that the appellants have never disputed the monies which they owed 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 attained finality and now only the execution application is pending.

22. In our view this case of wilful default based on its particular facts and circumstances does fall under the NAO as opposed to Financial Institutions (Recovery of Finances) Ordinance 2001 as amended by Financial Institutions (Recovery of Finances) Amendment Act (XXXVII) of 2016 as the inquiry was authorized, upgraded into investigation, reference filed and the appellants convicted under the NAO **prior** to the coming into force of that Amendment Ordinance especially since that Ordinance did not have retrospective effect. Even otherwise this case is now at the appellant stage and as such the case of **Intikhab A.Syed** (Supra) is of no assistance to the appellants based on the particular facts and circumstances of this case except in respect to sentencing. As such we find that this reference was rightly filed before and decided by the accountability court under the NAO.

23. It is correct that notices have to be served by both the complainant bank and the SBP to the appellants before a decision can be made under S.31 (D) by the Governor of the SBP whether to refer the case to the NAB for further inquiry under the NAO. The record reveals that notices were duly served on the address of the defaulting company **as per the records of the bank** provided by the defaulting company and the prosecution has exhibited TCS receipts to show that the bank notices were received at the address of the company given by the appellants at the time of taking out the loan. If the appellants changed address then it was the duty of the appellants to inform the change of address to the bank but they failed to do so. It is not the job of the bank to trace out the whereabouts of loan defaulters before serving notices on them. The bank is only obliged to serve notice to the defaulters on the address last provided by them to the bank.



Even otherwise it appears that the appellants were deliberately avoiding service of the notices in this case so that they could use this as an excuse/defence in NAB's wilful default's case against them since the appellants knew well that they were defaulters through the Recovery Suit which had been filed against them by the bank so that had every opportunity to write to the bank and explain why there's was not a case of wilful default and likewise they could have furnished an explanation to the SBP and if the SBP found the explanation credible then it would probably not have referred the case of the defaulters to the NAB. We have gone through the citations of the appellants in respect to the service of notices and find that the aforesaid cases are of no assistance to the appellants as they are distinguishable from the instant case which is based on its own particular facts and circumstances and find that all the requirements of notice under S.31 (D) NAO have been fulfilled and rather that the appellants did their best to deliberately and intentionally avoid receiving any such notice in order to benefit themselves.

24. With regard to appellant Qamar Mahmood Khan we note that he resigned as a Director **after** the company had already defaulted and he remained a director in 2004 as per record and that he was purportedly let off his liability as the KASB bank officials were mixed up in the whole scam of granting the loan to the company against inadequate security. For example, in cross examination PW 5 Muhammed Wasim Khan who was joint Director of SBP states as under at P.543 of the paperbook;

*"When the loan was initiated for acquiring 25 buses then the valuation of these buses were 111.650 million and just after few months the bank auctioned the buses for just Rs.31.804 million in the month of December, 2005 whereas loan was disbursed on 12.03.2004. I have asked the bank regarding this issue but the failed to satisfy us regarding valuation of the buses. We came to the conclusion that the borrower in connivance with the bank officials had defrauded the bank."* (bold added)

25. In any event appellant Qamar Mahmood Khan's continuing guarantee for the company's liabilities remained intact.

26. Wilful default is defined by S.5(r) of the NAO which reads as under;

*"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".(bold added)

27. 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 wilful default.* (bold added)

28. The appellants have contended that their case was not a case of wilful default under S.5(r) NAO as it fell within one of the proviso's of S.5(r). Namely, that the appellants had not committed wilful default as it was a wilful breach of the agreement between the appellants and KASB bank by the Bank selling the company's security i.e. the buses at an under value in order to recover their loan. We do not find selling the security (buses) by the bank as a wilful breach of their agreement with the appellants. This is because the appellants defaulted on their loan (and in fact did not make a single repayment) which entitled the bank after notice to sell the available security of the company (in this case the buses) in order to recover its loans. The buses were sold after advertisement through a public auction and such monies were used to partly pay off the loan. We do not see how this can amount to the breach of the appellant's agreement with the bank.

29. We find that all required steps were taken under S.31 (D) NAO and that the case was correctly referred to the NAB as one of wilful default. In our view from the IO's evidence and other evidence on record including both other oral and documentary evidence this matter has been thoroughly and independently investigated by the NAB and also 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.

30. 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. **The appellants did not even make one loan installment repayment and in our view deliberately avoided all notices from the bank and the SBP with regard to why the loan should not be treated as one of wilful default. We have seen no genuine reason on record to show that the defaulted amount was not wilful.**

31. 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.

32. Thus for the reasons mentioned above the convictions and sentences of both the appellants as set out in the impugned judgment are maintained.

33. The appeals, any constitution petitions and listed applications stand dismissed.

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