

# **IN THE HIGH COURT OF SINDH, KARACHI**

## **Constitutional Petition No.D-1555/2015**

Present:

Mr. Justice Ahmed Ali M. Shaikh.  
Mr. Justice Abdul Maalik Gaddi.

Petitioner: Abid Saeed through Mr. Pervaiz  
Iqbal Butt, advocate.

Respondent The Director General NAB  
Sindh through Mr. Noor Muhammad  
Dayo, ADPG NAB alongwith Mr.  
Obaidullah Abro, Senior Prosecutor  
NAB.

Date of hearing: 13-05-2015

Date of Judgment: 13-05-2015

## **JUDGMENT**

**ABDUL MAALIK GADDI, J:-**This Constitutional Petition has been filed by the Petitioner with the following prayers:-

- (a)** To grant bail to the petitioner named above in the Reference No.35 of 2007 pending adjudication before learned Accountability Court-V Karachi.
- (b)** To declare the process issued to be illegal, unlawful, void ab initio and of no legal effect and are liable to be struck down.
- (c)** To quash proceedings of Reference No.35 of 2007 against the Petitioner.
- (d)** Grant any other relief or relieves this Honourable Court may deem fit in the circumstances of the case.

2. Briefly stated the facts of the case are that the present petitioner alongwith co-accused Muzafar Ayaz Abid were sent by the Director General, NAB to face trial of the Reference No.35 of 2007 under Section 24(b) of National Accountability Ordinance, 1999 (hereinafter shall be referred to as the Ordinance, 1999) on the allegations of misappropriation of an amount of Rs.1,122,000/- by the accused persons towards excise duty and octroi charges, thereby committed the offences of corruption and corrupt practices as defined under Section 9(a) of the said Ordinance. For the sake of convenience, it would be appropriate to reproduce the contents of the Reference which was sent by the NAB Authority to the NAB Court which reads as under:-

#### **“REFERENCE”**

1. The case of misappropriation of excise duty and Karachi Metropolitan Corporation (KMC) Charges against employees of National Bank of Pakistan, Massan Road Branch, Karachi, was reported on 247.04.20002 through a source report to the Deputy Director, FIA, CBC-I, Karachi. On transfer of case from FIA to NAB after Notification vide item No.6-14 added by SRO(1)2003 dated 20.11.2003, the Director General NAB (Sindh) authorized the inquiry followed by investigation vide No.19(06)Invgt/HM/FCIW/NAB/(S)/2006/K-3112 dt 31.10.2006.
2. The investigation officer has completed his investigation. The investigation report reveals that accused Muzaffar Ayaz Abid (accused No.1) and Abid Saeed (accused No.2) are prima-facie involved in corruption and corrupt practices.
3. As per investigation report, Muzaffar Ayaz Abid (accused No.1) was the Deposit Incharge in National Bank of Pakistan, Massan Road Karachi, Abid Saeed (accused No.2) was a daily wages worker and as such, a private person. Whereas, Azhar Hussain Zuberi, was the then Manager in National bank of Pakistan, Massan Road Branch, Karachi, during 1999. Azhar Hussain Zuberi, remained posted as Manager of the said Branch upto 31.03.1999. He was replaced by Israr Ali, who assumed the charge as Manager on 01.04.1999.
4. On 11.03.1999, as PLS Account No.8042-8 in the name / title of “Ahmed Ali” was opened, however, Account opening Form is not available but the Account Opening register shows such date. The said account opening was not authenticated by the manager, in the Account Opening Register. Whereas all other accounts of his period were duly authenticated by him. As per entry in Account Opening Register, Abid Saeed (accused No.2), account holder No.416-2 was the introducer of the Account No.8042-8 titled “Ahmed Ali”. As per endorsements in the Cheque Book Register on 11.03.1999, Cheque Book containing 25 leaves was issued against Account No.8042-8 titled “Ahmed Ali”. An amount of Rs.100,000/- was transferred in the Account and on the same day the amount was withdrawn. The said amount of Rs.100,000/- pertained to Demand Finance wherein as per Banking Rules Payment Order was to be prepared in the name of supplier, however, in this case the cash withdrawal was allowed.
5. On 24.07.1999 Pay Order No.141536, on 31.07.1999 Pay Order No.141724 issued in favour of Excise & Taxation Officer, Port Qasim and on 11.08.1999, Pay Order No.140421, Pay Order No.140422 in favour of KMC drawn on Deutsche Bank Karachi (a foreign bank) were illegally deposited in Account No.8042-8. Subsequently, with connivance of accused No.1, the pay orders were lodged for clearance. The proceeds were fraudulently credited in the Account No.8042-8 in the name of “Ahmed Ali”. A Pay Order

for Rs.723,050/- favouring Excise & Taxation Officer, Port Qasim lodged in clearing, was entered in clearing register by Muzaffar Ayaz Abid (accused No.1)Manzoor Hussain Bhutto OG-II signed on the reverse of Pay Order as well as on credit vouchers. Manzoor Hussain Bhutto admitted having signed on the reverse of the Pay Order and to have posted credit in the impugned account, as asked to do so by accused No.1. Similarly Pay Order of Rs.399,435/- in favour of excise and Taxation Officer, Port Qasim and Pay Order for Rs.617,499/- in favour of KMC was credited in account title "Ahmed Ali". He further stated that said account was being operated by Abid Saeed (accused No.2).

6. As per record two cheques No.422481 and No.422484 issued from account of Ahmed Ali Account No.8042-8, wherein amount was fraudulently withdrawn, bear endorsement on face cash, name of Abid Saeed (accused No.2) as recipient of cash. The testimony of Mahmood Alam, Senior Assistant Corroborates the aforesaid position. Attaullah OG-II Cashier stated to have delivered cash from impugned Account No.8042-8 titled "Ahmed Ali" as per following details:-

Cheque No.	Date	Amount	Paid to	Accused
422481	26-07-1999	140,000/-	Abid Saeed	Accused No.2
422482	26-07-1999	383,000/-	Muzaffar Ayaz Abid	Accused No.1
422483	26-07-1999	200,000/-	Muzaffar Ayaz Abid	Accused No.1
422484	02-08-1999	399,000/-	Abid Saeed	Accused No.2
<b>TOTAL</b>		<b>1,122,000/-</b>		

7. The proceeds of last two Pay orders Rs.617,984/- was collected in the impugned account on 12-08-1999 but was not withdrawn. Israr Ali, Manager stated that after 3 months during fortnightly checking of the clearing register, it came to his knowledge that aforesaid Pay orders of Deutsche Bank were illegally deposited in Account No.8042-8 title Ahmed Ali. Photocopies of the Pay orders were obtained from Deutsche Bank and the apprehension was confirmed. The said fact was also communicated to zonal chief. Thereafter, a pay order for Rs.615,000/- was prepared in favour of KMC and custody of the Pay Order was kept in NBP Massan Road Branch, Karachi.
8. As per testimony of Mahmood Alam Deposit Incharge as well as Israr Ali, Branch Manager on 16-12-1999, a cheque for Rs.600,000/- was received at NBP, Massan Road Branch against Account No.8042-8 through clearing from NBP, Denso Hall Branch, Karachi. Mahmood Alam, bounced back against the account. Courier of the bank namely Mehboob Khan alias Farash stated that accused No.1 stole the dishonored cheque from National institute of Final Transactions (NIFT) brought the cheque to his house and asked him (the courier) to return the bounced cheque by hand to NBP Denso Hall Branch. The Cheque was without any covering memo, therefore, Mehboob Khan did not oblige Muzaffar Ayaz Abid (accused No.1). Three credit vouchers and cheques book issue register were forwarded for opinion of handwriting expert. As per opinion of handwriting expert the question writing are similar as compared to the specimen and routine writings of Muzaffar Ayaz Abid (accused No.1).
9. On the basis of evidence on record and the scrutiny of document, it is prima facie established that the accused No.1 being entrusted with the property in the way of his business as a banker has committed the offence of criminal breach of trust, accused No.2 by operating the disputed account fraudulently misappropriated government exchequer. Two accused persons have jointly misappropriated a total sum of Rs.1,122,000/-. By committing the said offence, the accused persons have committed an offence under Section 9(a) of National Accountability Ordinance, 1999 and schedule thereto, which is punishable under Section 10 of the said Ordinance.
10. That on the appraisal of the material and evidence brought before me, I am of the opinion that it is appropriate to proceed further against the accused persons there is sufficient evidence and material to justify the filing of this reference. The matter is, therefore, referred to the Hon'ble Court within the meaning of Section 16(c) of National Accountability Ordinance, 1999.
11. It is respectfully prayed that the accused persons be tried and punished in accordance with law. Investigation report, list of witnesses and documents as per list at attached herewith.

Sd/- 29.06.2007  
Major General  
Director General  
(Mukhtar Ahmed).

3. It appears from the record that at the time of receipt of Reference by the trial Court the accused Muzafar Ayaz Abid was in custody (now he is acquitted by the trial Court vide order dated 14-05-2012) whereas the present petitioner remained absent as such NBWs for his arrest were issued time and again but the same could not be executed and the trial court after adopting all the legal procedure, declared him as proclaimed offender vide order dated 06-09-2007. It also appears from the record that petitioner (Proclaimed offender) was arrested on 09.03.2015 and on 10-03-2015 produced him before the trial court whereby he remanded to judicial custody.

4. Parawise comments have been filed by the Respondent (NAB Authority), wherein they have opposed the grant of prayers as prayed by Petitioner through present petition by taking the plea that the petitioner in connivance with other co-accused have played active role in the commission of the offence of fraud, cheating and misappropriation of funds by depositing four pay orders, in fake account maintained at National Bank of Pakistan Massan Branch Karachi, the detail of which mentioned in the parawise comments.

5. Mr. Pervaiz Iqbal Butt Advocate has appeared on behalf of the Petitioner and states that the petitioner is innocent and has falsely been implicated in Reference No.35 of 2007 with malafide intention and ulterior motives by the NAB Authority; that prior to arrest the petitioner, he had no knowledge of pending Reference and came to know after his arrest on 09-03-2015 and since then he is in Judicial custody; that petitioner was alleged to be introducer of Account No.8042-8 in the name/title of Ahmed Ali but no account opening form is available that substantiates the falseness of the accusation; that there is no evidence to connect the petitioner with commission of alleged offence; that the NAB authority in violation of

Section 9(c) NAB Ordinance, 1999 dropped down Branch Manager Azhar Hussain Zubairi from the array of accused in Reference with malafide intention and without any authority that makes the matter doubtful; that Muzafar Ayaz Abid has been acquitted by Accountability Court-V Karachi vide judgment dated 14.05.2012 and the case of the petitioner is almost on same footings, therefore, he is entitled for relieves as claimed. During the course of arguments, he also reiterated the same facts and grounds pleaded in the instant petition and also prayed to allow the petition.

6. Mr. Noor Muhammad Dayo Advocate has appeared on behalf of NAB Authority and at the very outset submitted that the petitioner has come to this Court with unclean hands. He further submitted that the petitioner is nominated accused in NAB Reference and was involved by operating the disputed account No.8042-8 titled Ahmed Ali and was indulged to withdraw the amount by means of fraud causing huge financial loss to the National exchequer. He further submitted that the Reference against present petitioner and co-accused was presented in the year 2007 but the petitioner badly failed to join proceedings before the trial court as such the trial Court was pleased to issue non bailable warrants time and again against the petitioner for procuring his attendance but on his failure to appear deliberately before trial Court, he was declared as proclaimed offender after observing all legal formalities. He further submitted that the petitioner is fugitive from law and court. Such a conduct, according to him, squarely falls within the mischief of Section 31-A of the NAB Ordinance, 1999, therefore he is not entitled for relief of bail. He also invited our attention towards the deposition of PW Mehmood Alam, Officer Grade-II, PW Manzoor Hussain Bhutto, Incharge Deposit and PW Mehboob Khan, Messenger, National Bank of Pakistan, Massan Road Branch, Karachi respectively in which they

have implicated the petitioner in the commission of offence. He further submitted that the case of present petitioner is not same as of accused Muzaffar Ayaz Abid. Besides according to him the disputed, integrated question of facts have been alleged which cannot be decided through this petition, therefore, he has prayed for dismissal of the present petition.

7. We have considered the submissions made by the learned counsel for the parties and have perused the record.

8. It is an admitted position that Director General NAB had sent Reference against the present petitioner and co-accused to face their trial in the trial Court with allegations of fraud, cheating and misappropriation of funds by depositing four (04) pay orders in a fake account at National Bank of Pakistan, Massan Road Branch, Karachi, detailed of which has already been mentioned above. It is also an admitted position that the petitioner did not appear before trial Court to face trial and remained absent, consequently the trial Court declared him proclaimed offender after observing all legal formalities as prescribed under the law. However, accused Muzaffar Ayaz Abid was acquitted on 14-05-2012 by the trial Court after due trial and the case of the petitioner was kept on dormant file with observation that the case against petitioner would be re-activated as and when he is arrested. Record reveals that present petitioner was arrested on 09-03-2015 after the expiry of about three years and now he is in judicial custody. Through prayer clause (b) and (c) of this petition, the petitioner has sought quashment of proceedings of Reference No.37 of 2007 pending against him in the trial Court. In this regard, the petitioner instead of approaching the trial Court for redressal of his grievance, directly has approached to this

Court by filing this petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

9. In order to bring into play constitutional Jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, seeking relief by way of writ petition there must be an “aggrieved party” calling in question the action or omission of an authority, functioning in connection with affairs of the Federation, Province or a Local Authority where no other adequate remedy is available to the aggrieved person/party. Thus, availability of remedy in procedural statute will normally oust the jurisdiction of this Court as held in case of Shoukat Khan V/S Assistant Political Agent, Landhi Kotal, Khyber Agency and others reported in PLD 2002 Supreme Court 526. In this case law it has been held as under:-

*“---Proceedings, challenge to---Remedy---For setting aside an order or to challenge the proceedings, remedy should be availed first of all within the hierarchy of the law under which the forum whose proceedings have been objected to is functioning instead of approaching different forums for the redressal of grievance.”*

The Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 has been examined by the Honourable Supreme Court in a case of Chief Administrator of Aukaf v. Muhammad Ramzan reported in (PLD 1991 SC 102) and at page 104 it has been observed as under:-

*“.....Article 199 of the Constitution provides that the same cannot be invoked if alternate remedy is available to the aggrieved party under the relevant law.”*

In case of Messrs A.H. Pesticides (Pvt.) Ltd and another v. Federation of Pakistan and others reported in PLD 2004 Karachi 620 in this authority it has been held as under:-

*“Art. 199---Constitutional jurisdiction of High Court---Scope---Where an alternate efficacious remedy available had not been availed by the petitioner, High Court in exercise of Constitutional jurisdiction would not permit him to seek such relief through Constitutional proceedings.”*

10. When confronted to the learned counsel for the petitioner why he did not approach the trial Court in the first instance for redressal of his grievance though adequate remedy was available in shape of Section 265-K Cr.P.C., he had no plausible explanation. He has also not pointed out any extra ordinary circumstances to invoke the jurisdiction of this court in the given circumstances as such without touching the merits of the case and evidence already adduced by prosecution, it may be mentioned here that the case in hand involved alleged fraud of lac of rupees of public money, therefore, prosecution should have been given full opportunity to prove its case before any conclusion could have been recorded, therefore, under the above mentioned facts and circumstances and at this stage this petition is not maintainable to this extent.

11. As far as the question of grant of bail to the petitioner is concerned, it is contended by learned counsel for the petitioner that trial Court has no power to grant of bail to the petitioner and the petitioner is in jail, therefore, petitioner may be granted bail. In support of his contention, he has not cited any case law.

12. Record shows that petitioner remained absent to face trial in trial Court and he was declared as proclaimed offender.

13. It is now well settled that a fugitive from law and courts loses all the normal rights to which a normal person was entitled under procedural or substantive law. The petitioner/accused in this case has opted to remain fugitive for considerable period of time without any plausible explanation. Such act on his part disentitles him



for concession of bail notwithstanding the merits of the case on the principle that petitioner by his conduct thwarted the process of trial, thus he cannot be rewarded for his conduct of being fugitive from law and court and his conduct being relevant under Section 31-A of National Accountability Ordinance, 1999. In this regard, we are supported with the case of Awal Gul V. Zawar Khan and others reported in PLD 1985 Supreme Court 402, Manzar Qayyum V. the State and others reported in PLD 2006 Supreme Court 343, Muhammad Sabir Roshan v. The State reported in 2000 P Cr.LJ 1195 and Gulam Haider Jamro and another V. Chairman, NAB reported in 2007 YLR 541. Besides this, petitioner has been assigned the pivotal role in commission of crime and has been recently arrested in the said reference which is pending against him in the trial Court, prima facie prosecution has shown involvement of the petitioner in the commission of the crime causing huge financial loss to the national exchequer. Under these circumstances, at this stage of the case, petitioner has failed to make out his case for bail.

14. Since the petitioner is in judicial custody, therefore, the trial Court is directed to decide the Reference in respect of petitioner in accordance with law preferably within the period of two months after receipt of this order. Needless to say, the observation recorded in para 13 are tentative in nature and would not affect the merits of the case of either party. This order should not to be read to have passed any impediment in the way of petitioner to apply bail in future on any ground if he will satisfy the Court about the same. However, the same would be decided on its own merits.

15. In view of the above facts and circumstances of the case, we could not find any merit in this petition which

was dismissed by our short order passed on 13-05-2015  
and these are the detailed reasons for the same.

**JUDGE**

**JUDGE**