

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No. 5915 of 2020

Muhammad Ilyas

versus

The Chairman, National Accountability Bureau and 3 others

JUDGMENT

<i>Date of hearing</i>	05.12.2023
<i>Petitioner by</i>	<i>Mr. Khurshid Anwar Bhindar, learned Advocate.</i>
<i>Respondents by</i>	<i>Ch. Farid-ul-Hassan, learned Special Prosecutor NAB.</i>

SULTAN TANVIR AHMAD, J:- Through this petition, filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner has challenged order of restriction bearing No. 1(9)/HQ/535/NAB-P(IW-ii) dated 08.10.2007 passed National Accountability Ordinance, 1999 (the ‘*Ordinance*’), with respect to property measuring 41-kanals 05-marlas situated in Mouza Suhadara, Tehsil Wazirabad, (Gujranwala) commonly known as Ayesha Rice Mills (the ‘*Property*’) as well as the act of placing the *property* under caution and order dated 23.12.2019 to include the *property* in the list of confiscated

assets for the recovery of fine of Rs. 1286 Million, in terms of section 33-E of the *Ordinance*, as arrears of land revenue in connection with case No. 20/2006 titled State vs. Zaheer Abbas Ghumman & others.

2. Brief facts, required for reaching to decision of the case, are that Syed Sibt-ul-Hassan Gillani alias Double Shah was found to be involved in receiving investment from people of the area with promise to double the investments in short span of time. Reference was filed against Double Shah before the learned National Accountability Court, Lahore (the '**Accountability Court**'). During the course of inquiry against Double Shah, Zaheer Abbas Ghumman and others were investigated and after due probe a reference No. 17/2009 was also instituted against them. Zaheer Abbas Ghumman, Javed Iqbal and Syed Moazzam Hussain Gillani requested for their plea bargain for an amount of Rs. 1286 Million, which was accepted by the National Accountability Bureau (**NAB**). Zaheer Abbas Ghumman and others made confession before the learned *Accountability Court* on 13.04.2012. Consequently, the learned *Accountability Court* convicted Zaheer Abbas Ghumman and others and proceeded to pass the sentence in the following manners:-

"They committed offence of corruption and corrupt practices as defined in section 9 (a)(iii)(iv) (ix) and (xii) and punishable u/s 10 (a) of NAO 1999. All the accused are first offenders. They involved

themselves to work as agent of Double Shah due to greediness. They are sole bread earners of their families. They voluntarily confessed their guilt and put themselves on mercy of the court. They are behind the bar since 26-05-2009. These are mitigating circumstances, to deal the accused with leniency. They are convicted u/s 10 (a) of NAO 1999 and sentenced to six (6) years rigorous Imprisonment each which is sufficient to meet the ends of justice. They shall also be pay to the tune of Rs.1286 million subject to adjustment of amounts paid to, collected or recovered by NAB in the terms of cash bank accounts moveable and immoveable assets mentioned at pages 9, 10, 11, 13, 14 and 15 of the investigation report. In case of failure in payments of fine, they shall have to under go six (06) months simple imprisonment. The amount of fine shall be recoverable as arrears of land revenue as envisaged u/s 33-E of NAO 1999. All the assets, amount and bank accounts in the names of the accused and obtained by the accused in the name of their benamidars/beneficiaries shall be confiscated in favour of the state.”

3. As per the allegations of the prosecution against the petitioner as well as orders assailed, one Haq Nawaz who is brother of Zaheer Abbas Ghumman-convict paid Rs. 17.5 Million (rupees seventeen million five hundred thousand only) to the petitioner on 13.03.2007 as token money for the purchase of the *property* and the petitioner is holding the *property* as *benamidar* of Haq Nawaz. Aggrieved from the said allegations and above mentioned orders the present petition has been instituted.

4. Mr. Khurshid Anwar Bhindar, learned counsel for the petitioner, has submitted that the allegations against the petitioner are uncertain and formless; that the petitioner is real owner in possession of the *property* who purchased the same in the year 1995; that the petitioner is also holding title

documents of the *property* in the shape of sale deed registered in his favour on 14.09.1999 with Sub-Registrar of Wazirabad (the ‘*sale deed*’); that the petitioner, having no idea as to any case against Zaheer Abbas Ghumman-*convict* and in good faith, entered into an agreement to sell the *property* dated 13.03.2007 (the ‘*agreement*’) with Haq Nawaz. It is further submitted that Haq Nawaz merely paid earnest money and then breached the *agreement*; consequently, the petitioner approached the learned Civil Court concerned and obtained decree dated 25.03.2010 to the effect of forfeiture of earnest money on account of default by Haq Nawaz. Learned counsel for the petitioner has relied upon cases titled “Eden Developers Ltd. vs. NAB and other” (**PLD 2011 Lahore 48**), “Ghani-ur-Rehman vs. National Accountability Bureau and others” (**PLD 2011 SC 1144**), “Ghulam Basit vs. The State and another” (**2013 PCR.LJ 1797**), “Saad Sumair vs. National Accountability Bureau (NAB) through Chairman and 2 others” (**PLD 2022 Islamabad 371**), “Mst. Bilqis Bano and another vs. Pakistan Defence Officers Housing Authority through Administrator and 4 others” (**2019 PCR.LJ 962**) and “Syed Azmat Hussain vs. Chairman, NAB and others” (**2011 PCR.LJ 104**) and he has contended that the petitioner is neither an accused in any of the reference emanating out of the Double Shah scam nor he is ever called as witness, thus, confiscating the *property* is in utter violation of the principles

settled in the said cases; that the petitioner or the *property* has no nexus with the alleged crime or the proceeds of the crime. The learned counsel, without prejudice to the above, has stated that even if Haq Nawaz is found to have been dealing with the proceeds of the crime, the petitioner is lawful owner in the possession of the *property* from 1995 and the *agreement* in favour of Haq Nawaz since has been cancelled on account of his failure to pay consideration and he never acquired any ownership right or interest in the *property*, thus, the same cannot be sold to satisfy any claim or payment of fine.

5. Conversely, learned Special Prosecutor of NAB has argued that huge amount is involved in the case and Rs. 682 Million has already been recovered from different *benamidars*. The remaining amount is yet to be recovered by the sale of confiscated assets including the *property*; that as a matter of fact it was Zaheer Abbas Ghumman-*convict*, who paid Rs. 17.5 Million as token to the petitioner through Haq Nawaz, his brother, as a *benamidar*. He has further submitted that the orders and the actions impugned, in this petition, are in accordance with law.

6. We have heard the arguments and perused the documents with the able assistance of the learned counsel for the parties.

7. The prosecution has not denied before us that the

petitioner is not an accused in any of references filed by NAB in the matters arising out of Double Shah scam. It is further confirmed that the petitioner was never produced or summoned by the learned *Accountability Court* as a witness. Admittedly, the petitioner is never examined by any forum, judicial or even investigation agency, in connection with the *property* or receiving proceeds of crime. The definition of *benamidar* given in the *Ordinance*, as applicable at the material time, is as follows:-

Section 5(da).

"benamidar" means any person who ostensibly holds or is in possession or custody of any property of an accused on his behalf for the benefit and enjoyment of the accused.

(Underlining is added)

A bare perusal of the definition of word *benamidar* given in the reproduced provision of the *Ordinance*, reflects that one can be said to be a *benamidar* only when he ostensibly holds or is in possession or has custody of some property which actually belongs to the accused of an offence punishable under the *Ordinance* or if it is meant for the benefit and enjoyment of the accused.

Benami transaction or *benamidar* is also mentioned in section 9(v) of the *Ordinance* which, at the relevant time, was as under:-

Section 9(v)

"If he or any of his dependents or benamidar owns, possesses, or has [acquired] right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably account for or maintains a standard of living beyond that which is commensurate with his sources of income; or ...

(Underlining is added)

8. Reading of section 9(v) of the *Ordinance* further confirms that before holding someone as *benamidar* of illegal asset it is necessary that the person is given a chance to reasonably account for the asset in question or if he maintains standard of living beyond his means or if the asset does not commensurate with his sources. It is not argued by the representatives of *NAB* before us that the petitioner was ever asked to account for the *property* or the petitioner is holding the *property* beyond his means. The Honourable Supreme Court of Pakistan in case titled "Mst. Zahida Sattar and others vs. Federation of Pakistan and others" (**PLD 2002 SC 408**) observed that in the cases under progress for accumulation of wealth by illegal or corrupt practices, if dispute arises between the one claiming to be the real owner (not being accused himself) and on the other hand the alleged ostensible owner i.e. *benamidar* then such dispute being civil in nature can be resolved by the learned Civil Court under Section 9 of the

Code of Civil Procedure, 1908. It will be beneficial to reproduce the following extract from said judgment:-

“12. The question arises whether a Civil Court is vested with the jurisdiction to entertain a suit to try an issue which is subject-matter of a criminal charge for which an accused is being tried in a Criminal Court under special law i.e. NAB Ordinance. The answer to this question revolves around the decision on the question whether the Civil Court can try a criminal charge which is exclusively triable by a criminal Court under the special law. The answer cannot be but in the negative. If it had been a dispute between the real owner and the ostensible owners who were alleged to be the benamidars arising from denial of latter's right for former, certainly it would have been a dispute of civil nature and only the Civil Court could take cognizance of the same under section 9, C.P.C. which provides that a Civil Court shall (subject to the provisions herein contained) have jurisdiction to try all suits of civil nature except the suits of which their cognizance is either expressly or impliedly barred.”

(Emphases supplied)

9. In the aforesaid case the Supreme Court of Pakistan also recommended the Federal Government to consider making suitable amendments in the *Ordinance*, ensuring that the alleged ostensible owners are summoned by the learned Accountability Courts to provide them opportunity, during the trial, to prove that the assets in question were acquired by them through their own resources and if it is decided that the allegations are correct, they should be provided with remedy of appeal to advance the needs of justice.

10. The Supreme Court of Pakistan in case titled "Iqbal Ahmed Turabi and others vs. The State" (**PLD 2004 SC 830**) examined the question involving benami transaction in a NAB matter and observed that in the situation when the dispute arises between third party on the one side and the real owner and the *benamidar* on the other, conduct of the parties and surrounding circumstances are to be taken into consideration to determine as to whether the questioned transaction was a *benami* or not. The relevant part of the judgment reads as follows:-

*"The premises was taken from petitioner Iqbal Ahmad Turabi but the tenancy agreement was executed in which petitioner Hassan Raza was shown as landlord. In the beginning the rent was being collected by petitioner Iqbal Ahmad Turbai but after few months petitioner Hassan Raza started collecting the rent. From the above evidence, it is clear that the letting out of the premises to Khalid Hussain has not been denied by any of the petitioners. It is pertinent to point out that in benami transaction, from whom the consideration money came and from whom the document of sale are produced in Court plays a dominant roll when the dispute is between the real owner and the *benamidar*. If the dispute is between the third party on the one hand and the real owner and the *benamidar* on the other hand then the above-mentioned consideration loses its importance. In such situation the conduct of the parties and the surrounding circumstances are to be taken into consideration to determine, whether the transaction was a benami transaction or not. It is no doubt true that the source of consideration money and the possession of the titled documents are essential elements to determine the nature of the transaction where the dispute arises in between *benami* and the real owner."*

(Underlining is added)

11. Section 12(a) of the *Ordinance*, which permits NAB authorities or the learned National Accountability Court to pass an order of freezing of any property or part thereof in possession of the accused or in possession of any relative or associated person, itself is dependent upon availability of *reasonable grounds*. A learned Division Bench of Islamabad High Court in case titled “Shah Rukh Jamal Versus National Accountability Bureau, Islamabad and Others” (**PLD 2022 Islamabad 1**), while examining section 12, 13 and 23 of the *Ordinance*, reached to the conclusion that *reasonable grounds* as contemplated in the section 12 of the *Ordinance*, requires existence of certain essential facts. The test settled is that the facts and circumstances should be so that it lead a reasonable prudent person to form belief that a property, directly or indirectly, is owned and controlled by an accused under the *Ordinance*. The requisite standard, to pass an order under section 12 of the *Ordinance*, is fixed as more than mere suspicion but less than on the balance of probabilities. It has also been concluded that the power to freeze one’s property is subject to judicial scrutiny. It will be well advantageous to reproduce paragraphs No. 13 to 15 of the said judgment:-

“13. The august Supreme Court in the case titled “Chaudhry Shujat Husain v. The State” [1995 SCMR

1249] has observed and held as follows:-

"The term "reason to believe" can be classified at a higher pedestal than mere suspicion and allegation but not equivalent to proved evidence. Even the strongest suspicion cannot transform in "reason to believe." In Nisar Ahmad's case the criteria laid down seems to be that where some tangible evidence is available against the accused which, if left unrebutted, may lead to the inference of guilt."

14. It is obvious from the above discussed precedent law that having 'reasonable grounds to believe' has reference to the required evidentiary threshold. It is a legal standard and it has to be met as a precondition before exercising the intrusive power under section 12 of the Ordinance of 1999. There must be 'reasonable grounds' which manifests existence of certain essential facts. It essentially refers to the existence of such facts and circumstances which would lead a reasonable prudent person to form a belief. In the context of section 12 such belief would be relatable to the property being, directly or indirectly, owned and controlled by an accused and the latter having committed one of the offences described under section 9 of the Ordinance of 1999. The requisite standard is higher than a reasonable suspicion but less than 'on balance of probabilities'. It is distinct from conjecture, speculation or suspicion. The required standard is far less than proving something beyond a reasonable doubt. It is a threshold required for a reasonable person to conclude and be satisfied on the basis of sufficient material to conclude deprivation of or interference with the right to own, hold or control a property. The conclusion may be subjective but it must be based on some reliable material or evidence. The formation cannot be based on mere suspicion even if it may be reasonable. In a nutshell, forming an opinion On the basis of reasonable grounds to believe is distinct and a higher legal standard than 'reasonable suspicion'.

15. There is another distinctive factor of the scheme regarding the intrusive power provided under section 12. The power is subject to judicial scrutiny explicitly described under section 13. While the claim or objection is exclusively justifiable by the Accountability Court, a statutory right of appeal lies to a High Court. Moreover, even if no order has been passed under section 12, there is a statutory

prohibition under section 23 to deal with a property connected with one of the offences described under section 9 of the Ordinance of 1999. The special scheme provided under sections 12, 13 and 23 of the Ordinance of 1999 to deal with a property owned or controlled by an accused and connected with the offence allegedly committed by the latter is distinct from the powers under Cr.P.C.”

(Emphases supplied)

12. Reverting to the facts of the case. It is the claim of the petitioner that he is in possession of the *property* since 1995 and he had been running his business on the *property* in name of ‘Ayesha Rice Mill’. The original ownership of the petitioner from 1990s and the title document i.e. the *sale deed* is not denied. Haq Nawaz, the brother of the Zaheer Abbas Ghumanman-convict, entered into the *agreement* and paid earnest money. This *agreement* is in conformity with article 17 of the Qanun-e-Shahadat Order, 1984. The learned special prosecutor of NAB has not argued that Haq Nawaz ever paid the balance consideration. The learned prosecutor, when confronted as to the aspect of balance consideration, has candidly conceded that there is nothing on record showing such payment. The decree dated 25.03.2010 was granted in favour of the petitioner by the learned Civil Court for forfeiture of the earnest money upon admitted failure to fulfill the obligation or to pay the remaining consideration, which has attained finality. No one until today has approached the learned Civil Court claiming any interest in the *property*. No application for fraud or misrepresentation under section 12(2) of the Code of Civil Procedure, 1908 is

ever instituted by anyone. The Order dated 13.04.2012 reads that during the inquiry against Zaheer Abbas Ghumman-*convict*, the petitioner is found to be beneficiary of illegal gains. We have very carefully gone through the final investigation report dated 11.02.2010. In this final investigation report the only part that relates to the *property* simply states that Zaheer Abbas Ghumman-*convict* has purchased the *property* in the name of his father out of the crime proceeds for which Rs. 17.5 Million was paid as token money to the petitioner. However, today it is argued that the *property* is purchased in the name of Haq Nawaz brother of the said convict. There is no discussion in the entire record for reaching to the conclusion. The entire documents relied by the NAB-authorities lack reasonable grounds and it is purely based on mere suspicions and do not qualify the *reasonable prudent person* test settled in *Shah Rukh Jamal* case (*supra*).

13. Starting from the year 2007 until today, NAB-authorities have not brought the case of the petitioner before the learned *Accountability Court* for judicial scrutiny. The petitioner was not even summoned as a witness in any of references filed in Double Shah scam. No effort has been made to examine if the amount of earnest money paid by Haq Nawaz is actually proceeds of the crime. It is not argued before us that even Haq Nawaz has been tried for being *benamidar* or for using or having possession of crime proceeds. This is the

position despite the fact that more than one decade has passed. Learned Special Prosecutor has submitted before us that the *property* is required to be sold for recovery of fine imposed against Zaheer Abbas Ghumman-*convict* under section 33-E of the *Ordinance*, however, he has failed to satisfy if this can be done without first establishing that the *property* is held as *benami* for any convict.

14. For what has been discussed above, the present petition is **allowed** and the orders assailed are *set-aside*. No order as to costs.

(**Ali Baqar Najafi**)
Judge

(**Sultan Tanvir Ahmad**)
Judge

Approved for reporting

Judge

Judge

Announced in open Court on _____.

Judge

Judge

Nadeem