

# **IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

Present:

**Mr. Justice Mian Saqib Nisar, HCJ**

**Mr. Justice Mushir Alam**

**Mr. Justice Ijaz ul Ahsan**

## **Civil Petition No.1707 of 2018**

*Against the order dated 18.01.2018*

*passed by Lahore High Court, Lahore in*

*W.P. No.26022 of 2017*

NAB thr. It Chairman, Islamabad

**...Petitioner(s)**

## **VERSUS**

Murad Arshad & others

**...Respondent(s)**

For the Petitioner(s):

Mr. Imran ul HAq, Spl. Prosecutor, NAB a/w  
Mr. Zawar Manzoor, I.O.

For the Respondent(s):

Ms. Ayesha Hamid, ASC

Date of Hearing:

22.10.2018

## **JUDGMENT**

**Mushir Alam, J.-** Through instant petition, NAB through its Chairman has approached this Court seeking leave to appeal against the judgment dated 18.01.2018 rendered in Writ Petition No.26022 of 2017, whereby learned Division Bench of the Lahore High Court, Lahore was pleased to the enlarge the Respondent No.1 Murad Arshad to post arrest bail.

2. Globaco (Pvt.) Ltd. under arrangement with Defence Housing Authority launched a subsidized scheme, for JCOs, NCOs and army personals under the banner of DHA City, Lahore for which the company was required to procure 25,000 Kanal of land, however the company only acquired 13,092 Kanal of land. It is the case of NAB that the company lured general public through campaign to invest in the project. However, it appears that on the basis of large number of complaints received from the general public by the NAB initially against the management of DHA City alleging cheating of public at large, while enquiry against such complaints was afoot another complaint was received from Defence Housing Authority, Lahore against Globaco (Pvt.) Ltd./Orange Holding (Pvt.) Ltd.

alleging corruption and corrupt practices. Initially enquiry was authorized by the DG NAB-L on 4.5.2005. Further enquiry was re-authorized on 2.11.2015, which was later upgraded into investigation vide order of the competent authority on 7.4.2016, on the strength of which on 16.6.2016 *Interim Reference No. 32/16* was filed against Hammad Arshad and three other Co-accused persons, which did not include the name of Respondent No.1 Murad Arshad, before the Accountability Court No. IV, Lahore.

3. Respondent No.1 apprehending his arrest filed Writ Petition No.707 of 2016, which was disposed of by the Lahore High Court, Lahore on 26.01.2016 observing that *"if at any subsequent stage any need for arrest of petitioner accrues, then grounds of their arrest shall be communicated to them and in the said eventuality they would have a remedy to again approach this Court by way of a due application."*

4. It appears that on the basis of interim reference, charge was framed on 1.3.2017 and the trial against the accused person nominated therein commenced. From the record it reflects that role of the Respondent No.1 Murad Arshad came into prominence when during course of continuing investigation and trial it revealed that being director in M/s Orange properties Private Ltd, which was holding company of Globaco (Pvt.) Ltd.; he is instrumental and in active connivance with his brother and co-accused Hammad Arshad and other co-accused persons have enriched themselves by diverting colossal sums of money received from general public into the account of various companies of which they were directly and indirectly the beneficiary. Consequently grounds of arrest dated 9.05.2017 (page 87 of the file) were served, through his chowkidar. He was arrested on 10.5.2017 and was produced before the Accountability Court and remand was obtained on 11.5.2017 Respondent No.1 was formally nominated in supplementary Reference filed on 21.8.2017.

5. Respondent No.1 invoked the writ jurisdiction of the High Court on 15.5.2018 through Writ Petition No.26022 of 2017. Learned Bench after notice and hearing the parties was pleased to concede bail through impugned judgment dated 18.01.2018 mainly highlighting his role and

criminal liability (paragraphs 12 to 16 of the impugned Judgment) as shareholder and Director of offending company and of other companies he was statedly holding directorship and beneficial interest. Learned Bench relied upon the cases all invariably based on Salomon vs. Salomon and Co. Ltd. [1897] A.C. 22) and extended benefit of corporate veil to the Respondent No.1 holding that *"that the Court could not figure out any direct and active participation/involvement of the Petitioner"* and that *vital decision were not taken by him,... that the investigation to his extent is complete* and that *"the role of the petitioner is yet to be properly figured out which is possible after recording of evidence against the petitioner."* The Court while conceding bail to the respondent was influenced by the fact the other co-accused Muhammad Hammad Arshad was originally charged in the Reference, when Respondent No.1 was not the accused and despite orders dated 26.01.2016 of the Court in earlier Writ Petition No.707 of 2016 as noted above, NAB *"had not even permitted him to approach the Court in violation of the direction/observation given by the Court"*.

6. It was argued by Mr.Imran ul Haq, learned Special Prosecutor NAB, that the respondent No.1 and his brother co-accused are the Directors of M/s Orange Holdings (Pvt.) Ltd. which is holding company of Globaco (Pvt.) Ltd.; which by launching subsidized housing scheme under the banner of DHA City Lahore, essentially for the families of JCOs, NCOs and Army Personals, lured and induced members of public at large to invest Rs.15.476/- billion out of which major amount of Rs.13.2/- billion were directly transferred in the bank accounts of their various companies of which both the brothers were holding controlling and beneficial shares. It is argued that large number of commercial plots and amenity plots were fraudulently got transferred through the help of other co-accused persons by deceiving Bank of Punjab and DHA authorities and transferred land in favour of Bank of Punjab to offset liability of their company as detailed in the supplementary reference filed through CMA No.6523 of 2018. It was argued that NAO, 1999 is a special law, all offences are non bailable, even the provisions of Criminal Procedure Code regulating bail and or even suspension of sentence are specifically excluded in application by virtue of

section 9(b) of the NAO, 1999. According to him, grant of bail in respect of offences committed under the NAO, 1999 is an exception. According to him Respondent cannot be allowed to take shield behind the corporate veil, which aspect of the matter was not considered by the High Court.

7. Learned ASC for the Respondent No.1 supports the impugned judgment. It was urged that the Respondent No.1 was roped in the subject Reference much later through supplementary Reference dated 21.8.2017. He has no dominating control over the affairs of the company. It was urged that impropriety if at all was that of a limited liability company and other nominated and apprehended co-accused are already facing the trial. According to learned ASC, Respondent No.1 was merely meager share holder in the company cannot be saddled with personal and or criminal liability if any of the company, which has separate juristic entity. It was urged that the arrest was violative of the order dated 26.1.2016 passed by the Lahore High Court in earlier Writ Petition No.707 of 2016, as all along the Respondent No.1 was appearing before the Investigation Officer, there was no occasion to cause his arrest.

8. We have heard the arguments and perused the record. The Respondent No.1 invoked the constitutional jurisdiction of the High Court under Article, 199 of the Constitution of Pakistan, 1973 challenging his arrest made on 10.5.2017, warrants of arrest dated 9.5.2017 and remand Order dated 11.5.2017 being against the provisions of the Constitution, illegal, without jurisdiction and against the order of the High Court and also sought protective bail to enable him to approach High Court in terms of Order dated 26.1.2016 passed in W.P. No.707 of 2016.

9. It is a matter of record that the Murad Arshad, Respondent No.1 herein, is one of the Director and shareholder in various companies as detailed in paragraph No.24 of the supplementary Reference No.32/2016 dated 21.8.2017 and holds beneficial interest therein alongwith his brother Hammad Arshad, who is already facing trial along with other co-accused persons. Respondent No.1 is nominated in subject Reference unveiling land scam and syphoning money through various companies under the cover of

DHA City project, Lahore. The project was to be executed by Globaco (Pvt.) Ltd., a subsidiary of Orange Holding (Pvt.) Ltd., in both the companies Respondent No.1 was holding directorship and shareholding with his brother co-accused in the matter. He apprehending his arrest filed Writ Petition No.707 of 2016, seeking protection against arrest which was disposed of on 26.01.2016 observing,

*"The learned officer, on the basis of information furnished by the I.O., has contended that till now no document towards arrest of the Petitioners is available with the NAB and that arrest of the petitioners would only be required, when any such document is issued by the competent authority" ..... "It is made clear that if at any subsequent stage any need for arrest of petitioners accrues, then grounds of their arrest shall be communicated to them and in the said eventuality they would have a remedy to again approach this Court by way of a due application."*

10. However as noted in the narrative, the grounds of arrest, which according to NAB could not be served on the Respondent No.1, who avoided to associate with investigation and circumvented to receive such grounds of arrest, same were delivered to his gatekeeper/chowkidar. We have noted that such facts are narrated by the Respondent No.1 in paragraph 17 of his Writ Petition No.26022 of 2017.

11. National Accountability Ordinance, 1999 is a special law, it has been enacted with an objective to combat white collar crime of high magnitude, it provides for taking effective measures for the detection, investigation, prosecution and expeditious trial of offences as enumerated under section 9 of the NAO, 1999 made punishable under section 10 read with schedule thereof. All offences under the NAO, 1999 are made non-bailable notwithstanding general provisions of Code of Criminal Procedure, 1898 viz. Sections 426, 491, 497, 489 and 561-A thereof, which regulate power of Courts to suspend sentence, pass order in the nature of *habeas corpus*, *pre-arrest*, *post-arrest* bail, inherent power of the High Court in furtherance of power under the Code to, prevent abuse of process of Court or otherwise to secure ends of justice by virtue of non-obstinate provisions of Section 9(b) of the NAO, 1999. Jurisdiction and authority of

Courts of general criminal jurisdiction, High Court and this Court to concede bail under the NAO, 1999 either pre-arrest or post arrest etc. has remained under judicial scrutiny since its very promulgation. There are chain of authorities dilating on such aspect of the case right from the full Bench of the Lahore High Court in the case of Anwar Saifullah vs. The State and 4 others (PLD 2000 Lahore 564) wherein it was held that "the High Court had jurisdiction under Article, 199 of the Constitution to grant bail to a person accused of an offence under NAB Ordinance in appropriate cases." This Court affirmed such position in the case of Anwar Saifullah Khan vs. The State and 3 others (2001 SCMR 1040) and by a larger Bench (four members) in the case of Khan Asfandiyar Wali and others vs. Federation of Pakistan through Cabinet Division and others (PLD 2001 Supreme Court 607) and such view has since been followed consistently, in the case of Ghulam Ali vs. The State through AG, NWFP, Peshawar and another (2003 SCMR 597) keeping in sight the amended provision section 9(b) of NAO, 1999 at page 604 it was held ".....the legal position regarding maintainability of bail application under section 497 Cr.P.C before the High Court in case under NAB Ordinance, would remain as such and an accused of such an offence cannot maintain a bail application before the High Court under Section 497 Cr.P.C." One may find detailed discussion on such aspect of the matter in a very recent pronouncement of this Court reported as Olas Khan vs. Chairman, NAB (PLD 2018 Supreme Court 40).

12. We have noted that the learned Bench of the Lahore High Court in the impugned judgment has laid much emphasis on the doctrine of 'corporate veil' and based on such doctrine in a lengthy discussion extended benefit of bail to the Respondent No.1. Pakistan by and large is under influence of common law doctrine and the principle that body corporate has a separate and distinct entity, and shareholders cannot be held liable for the act of corporate entity as propounded in the leading English case reported as Salomon vs. Salomon & Co. Ltd. [1897] A.C. 22], though well entrenched in common law jurisdiction, which is based on public policy and grounded on public good. It was for quite some time sacredly followed in common law jurisdiction, indeed veil of incorporation

cannot be pierced as a matter of course in each and every case and there has to be some justifiable reasons, which may warrant in doing so. *“That is, because of the corporate veil, shareholders are not responsible for paying the debts of the corporation (beyond the level of their own investment) and generally are not legally liable for any crimes the corporation might commit. While the corporate veil protects shareholders, it may be disregarded under certain circumstances, notably if a shareholder assisted the corporation in the commission of a crime”.* (see corporate veil as defined at <https://financial-dictionary.thefreedictionary.com>)

13. The Courts in various jurisdictions adopted progressive approach under compelling circumstances to scrutinize such legal attire piercing the veil of incorporation to identify the real schemers and players indulged in such acts of omission and commission and seeking refuge behind such cloak and got away unchecked and unaccountable for the wrong done. However, such doctrine is no more treated sacred or revered rule of thumb, Lord Denning in *Lazarus Estates Ltd v. Beasley* [1956] 1 QB 702, at page 712 held that *“No Court in this land will allow a person to keep an advantage which he had obtained by fraud. No judgment of a Court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The Court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved, it vitiates judgments, contracts and all transactions whatsoever...”* In the case of *Littlewoods Mail Order Stores Ltd. vs. Inland Revenue Commissioners* [(1969) 1 W.L.R 1241], Lord Denning, spearheaded to dilute such legal fiction and opined that *“the doctrine laid down in Soloman's case has to be watched very carefully. It has often been supposed to cast a veil over the personality of a limited company through which the Courts cannot see. But that is not true. The Courts can, and often do, pull off the mask.”* One may gainfully see *Woolfson vs. Strathclyde Regional Council* [1978] SC(HL) 90, *Adams & others vs. Cape Industrial PLC and another* [(1990) CH 433], *Trustor AB vs. Smallbone* [(No 2) (2011) 1 WLR 1177], *Standard Charter Bank vs. Pakistan National Shipping Corp and others* [(2003) 1 AC 952]. In the case of *Life Insurance Corp of India vs. Escorts Ltd. and others* [(1986) 1 Supreme Court

**Cases 264]** at the conclusion of para-90 at page-336 Indian Supreme Court identified four key instances when corporate veil can be pierced "*i) where a statute itself contemplates lifting the veil, or ii) fraud or improper conduct is intended to be prevented, or iii) a taxing statutory beneficent statute is sought to be evaded or iv) where associated companies are inextricably connected as to be in reality, part of one concern.* List of instances where veil of incorporation could be lifted as noted in cited case, is merely illustrative and not exhaustive. Case of Union Council, Ali Wahan, Sukkur vs. Associated Cement (Pvt.) Limited (1993 SCMR 468) is quite illustrative of circumstances in which veil could be lifted. In the case reported as Standard Chartered Bank vs. Pakistan National Shipping Corporation of Pakistan reported as [2003] 1 AC 952= [2003] 1 All ER 173 defence of the director of PNSC signing the Bill of Lading sought to avoid personal liability saying it was act of the Company was not accepted.

14. Veil of incorporation and circumstances under which it could be lifted depends on facts and circumstances of each case and statutory regime applicable to such facts. Then the Courts do keep in sight the purpose and object a statutory regime intends to achieve and remedy the mischief under which acts of omission and or commission seemingly of a body corporate could be pressed into service as against personal criminal liability and or civil obligation of a Partner, Director, Shareholder, promoter or employee of a company, corporation and or firm whatever attire it may choose to wear or a Court may look behind such attire to identify real person who is exercising and managing the control and the affairs of such body corporate or firm or any combination thereof etc. that is under scrutiny viz-a-viz public interest and affectees of act of omission and commission of such legal entities etc. under relevant statutory regime. In many a jurisdiction including Pakistan many a times corporate attire is being abused for covert purposes to fleece innocent public, commit fraud, launder crime money, convert ill-gotten gain and conveniently getting away with it and escape criminal liability etc; Organization for Economic Cooperation and Development (OECD) in its Report titled as "Corporate Vehicle for Illicit Purpose (2001) in Executive Summary, at page-7 noted



*"....While corporate vehicles play an essential role in the global economic system, these entities may, under certain conditions, be misused for illicit purposes, including money laundering, bribery/corruption, hiding and shielding assets from creditors, illicit tax practices, self-dealing/defrauding assets/diversion of assets, market fraud and circumvention of disclosure requirements, and other forms of illicit behavior"* ([www.oecd.org/daf/ca/43703185.pdf](http://www.oecd.org/daf/ca/43703185.pdf)). Pakistan, fully cognizant of such happening, made headway in framing law that permits piercing the corporate veil and foisting criminal liability and civil obligation on real actors, perpetrators and natural persons behind such legal attire for instance section 38 of Drug Act, 1940 now section 34 of the Drug Act, 1976 whereunder *"every director, partner and officer of the company. Corporation, firm with whose knowledge and consent the offence was committed"*, is held liable for the offence under the Drug Act, 1976 [*Superintendent of Police, Federal Investigation Agency, Lahore and another vs. Akhtar Hussain Bhutta (PLD 1978 Supreme Court 193)*]. Under section 5 of the NAO, 1999 definition of accused includes (d) "Associates", and in Clause (o) definition of "person" thereof, is defined to means:

**"(d) Associates" means:--**

- (i) *any [person] who is or has been managing the affairs [of] or keeping accounts [for] the accused or who enjoys or has enjoyed any benefit from the assets.*
- (ii) *any association of persons, body of individuals, partnership firm or private limited company within the meaning of Companies Ordinance, 1984, of which [the accused] is or has been a member, partner or director or which has been promoted, floated, established or run by the accused, whether singly or jointly, with other persons".*
- (iii) *a trustee of any trust declared by the accused, or of which the accused is also a trustee or a beneficiary; and"*
- (iv) *a benemidar".*
- (o) **"Person"**, *[unless the contest otherwise so requires] includes in the case of a [company*

*or a body corporate], the sponsors, Chairman, Chief Executive, Managing Director, elected Directors by whatever name called, and guarantors of the company [for body corporate] or any one exercising direction or control of the affairs of such [company or a body corporate], [.....] and in the case of any firm, partnership or sole proprietorship, the partners, proprietor or any person having any interest in the said firm, partnership or proprietorship concern or direction or control thereof.*

Above provisions sufficiently demonstrate that all those persons who are found to be handling the affairs of a corporate and or legal entity in whatever legal attire or façade used to carry out any commercial and or other activity and commit any wrong and or act of omission and or commission which come within the mischief of any clause of section 9 and punishable under section 10 read with schedule thereto gives sufficient power to NAB authorities to lift the veil of incorporation and trace out the real actors and mastermind behind such façade.

15. It appears that on the basis of interim reference, charge was framed on 1.3.2017 and the trial against the accused person nominated therein commenced.

16. In a case reported as Hema Mishra vs. State of Uttar Pradesh and others (2014) 4 Supreme Court Cases 453 = AIR 2014 Supreme Court 1066 in somewhat similar circumstances in paragraph-13 the Indian Supreme Court noted that *provisions similar to Section 438 Code of Criminal Procedure (for Pre-arrest bail) was expressly done away with in the State of Uttar Pradesh, the High Court is burdened with large number of writ petitions filed under Article 226 of the Constitution of India seeking pre-arrest bail. (the legality of was upheld in Kartar Singh vs. State of Punjab [(1994) 3 Supreme Court Cases 569]). In Paragraphs-17 and 37 it was held as follows:*

*(17) Though it cannot be said that the High Court has no jurisdiction to entertain an application for bail under Article 226 of the Constitution and pass orders either way, relating to the cases under the Act 1987, that power should be exercised sparingly, that too only in rare and appropriate cases in extreme circumstances. But the*

*judicial discipline and comity of courts require that the High Courts should refrain from exercising the extraordinary jurisdiction in such matters;*

....

....

*37. Thus, such a power has to be exercised very cautiously keeping in view, at the same time, that the provisions of Article 226 are a devise to advance justice and not to frustrate it. The powers are, therefore, to be exercised to prevent miscarriage of justice and to prevent abuse of process of law by authorities indiscriminately making pre-arrest of the accused persons. In entertaining such a petition under Article 226, the High Court is supposed to balance the two interests. On the one hand, the Court is to ensure that such a power under Article 226 is not to be exercised liberally so as to convert it into Section 438, Code of Criminal Procedure proceedings, keeping in mind that when this provision is specifically omitted in the State of Uttar Pradesh, it cannot be resorted to as to back door entry via Article 226. On the other hand, wherever the High Court finds that in a given case if the protection against pre-arrest is not given, it would amount to gross miscarriage of justice and no case, at all, is made for arrest pending trial, the High Court would be free to grant the relief in the nature of anticipatory bail in exercise of its power under Article 226 of the Constitution. It is again clarified that this power has to be exercised sparingly in those cases where it is absolutely warranted and justified".*

17. Since the promulgation of Ehtisab Act, 1997 as succeeded by NAO, 1999 jurisdiction of Trial Court i.e. Accountability Court has been expressly ousted to concede bail, which in turn has burdened all the High Courts with load of bail application under Article, 199 of the Constitution, 1973. As held in the case of Hema Misra (Supra) jurisdiction under Article, 199 of the Constitution has to be exercised with circumspection and caution as extraordinary jurisdiction is invoked and exercised to advance the cause of justice and not to frustrate it or to defeat the intent of law. The jurisdiction under Article, 199 of the Constitution, 1973 are therefore to be exercised to prevent miscarriage of justice and abuse of NAO, 1999. Such jurisdiction is not to be exercised as a substitute of power under sections 426,491, 497,489 and 561-A of Code of Criminal Procedure 1898 liberally and indiscriminately converting High Court into wholly Court of ordinary criminal jurisdiction.

18. Reverting to merits of the case, role of Respondent No.1 is detailed in investigation report and in paragraph-17 onwards of the Supplementary Reference No. 32/2016 dated 21.8.17, his name appears in Form-29 and Form-A of the offending companies. His signature appears on documents and on cheques of substantial amount deposited in the account of companies of which he is one of the shareholders and there is serious allegation that he in connivance with other co-accused not only transferred plots to the Bank of Punjab to offset liability of another company of which he is alleged to be one of the beneficiary, in the wake of serious allegations of siphoning off and misappropriation of colossal amount of 10421 members of the public as detailed in the supplementary reference and his role as an active participant and decision makers in running the affairs of Globaco Pvt. Ltd., he is alleged to have committed offence as defined under clause (iii), (iv), (vi), (ix) and (xii) of section 9 of NAO, 1999. Respondent No.1 along with his brother co-accused Hammad Arshad already facing trial cannot under facts and circumstances, be given benefit of corporate veil when per definition clause 5 (d) and (o) of Section 5 of NAO, 1999 gives NAB authorities power to pierce the veil of incorporation and nail down the real persons under whose dictate and command affairs of errant corporate entity were conducted and to find out who is the actual and real actor and beneficiary of crime committed under the NAO, 1999. In this view of the matter sufficient material is available to connect the Respondent No.1 as exercising effective control of the errant companies cannot be exonerated from explaining his position and role as an "Associate" as defined in clause (d) and a "Person" within the contemplation of clause (o) of section 5 of the NAO, 1999. In the case of The State vs. Haji Kabeer Khan (PLJ 2005 Supreme Court 950= PLD 2005 Supreme Court 364) after reviewing large number of cases, this Court recalled the bail granted by the High Court and relying on Khan Asfanyar Wali case (Supra) observing that "*It is to be noted that under the NAB Ordinance there is no provision for grant of bail before arrest, therefore, this Court while examining vires of section 9(b) of the NAB Ordinance in the case of Khan Asfanyar Wali case (ibid) took view that High Court shall exercise this power sparingly in rare and exceptional*

circumstances for valid reason to be recorded in writing In this behalf reference can be made to the case of Meeran Bux versus The State (PLJ 1986 Supreme Court 83) and Murad Khan versus Fazal-e-Subhan and another (PLD 1983 Supreme Court 82). As such we are of the opinion that the powers for the grant of bail Court has to be exercised strictly keeping in view the observation made therein but it seems that the learned High Court had not recorded reasons indicating the exceptional circumstances for exercising extra ordinary constitutional jurisdiction in favour of respondent particularly in case in which accused had not been arrested and no ground of mala fide for bail before arrest has been attributed to the prosecution in the memo of petition.” such view has been consistently followed see case of Nisar Ahmed vs. The State and others (PLD 2016 Supreme Court 11) and as recently as in Olas Khan (Supra).

19. In view of the forgoing reasons, the Petition was accepted vide short order dated 22.10.2018 which reads as follows:

*“For the reasons to be recorded later, by accepting this petition and setting aside the impugned order, it is held that the bail granted to respondent No.1 (an accused in Reference No.2 of 2016) is absolutely against the principles for grant of bail which (bail) is hereby cancelled, therefore, he be arrested immediately in the aforementioned reference.”*

Chief Justice

Judge

Judge

Islamabad, the  
22<sup>nd</sup> of October, 2018

Approved for Reporting