

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE ANWAR ZAHEER JAMALI
MR. JUSTICE DOST MUHAMMAD KHAN
MR. JUSTICE UMAR ATA BANDIAL

Civil Petition No.1340/2014

(On appeal from the judgment dated
26.06.2015 passed by the Lahore High
Court in W.P.No.13040 of 2012)

Himesh Khan

...Petitioner

VERSUS

The National Accountability Bureau (NAB), Lahore & others

..Respondents

For the petitioner:

Mr. Azam Nazeer Tarar, ASC
Syed Rifaqat Hussain Shah, AOR

For respondent No.1-3:

Mr. Mehmood Raza, Addl. P.G. NAB

Respondent No.6:

Mr. Anwar Mansoor Khan, Sr. ASC

Date of hearing:

14.4.2015

JUDGMENT

Dost Muhammad Khan, J.— Himesh Khan, the petitioner herein, along with several co-accused, is facing criminal charges in NAB Reference No.62 of 2008 before the Accountability Court.

2. When the petitioner was the chairman of Bank of Punjab during the year 2004, the proprietor of Haris Steel Industries obtained loan facility of Rs.250 millions from the bank. This credit facility was enhanced subsequently by the committee comprising co-accused Haroon Aziz (G.M), Hameed –ur- Rehman (G.M) and Shoaib Qureshi

(G.M). Co-accused, Sheikh Muhammad Afzal, proprietor of Haris Steel Industries managed to open 23 fake accounts in collaboration and collusion with the co-accused, who were by then bank officials to defraud the bank.

3. When the financial scam was detected, the NAB intervened by initiating inquiry followed by investigation, as a result whereof the above Reference was filed. The said Reference is pending before the Accountability Court-V, at Lahore, where co-accused of the petitioner have been granted bail, while he is in custody since 16.07.2009. The petitioner unsuccessfully sought post arrest bail from the learned Division Bench of the High Court and the last in the series is the one under challenge in this petition dated 26.06.2014 again declining the relief of grant of bail to him.

4. Keeping in view the above facts and circumstances, the petitioner is behind the bars for the last about five years. The calendar of witnesses would show that in all about 150 witnesses are to be examined. Initially 72 witnesses were examined when by then co-accused Sheikh Muhammad Afzal was at large on bail due to plea bargain with the NAB however, when the said accused tracked back and did not fulfill his obligation under the plea bargain, he was re-arrested therefore, all the witnesses examined were to be re-called for cross-examination and a second round of trial in this manner commenced. We asked the learned Additional Prosecutor General, NAB and Mr. Anwar Mansoor Khan, learned Sr. ASC, representing the Bank of Punjab that, whether the trial is likely to be concluded in the next couple of months, they replied in the negative with the plea that the petitioner and his co-accused have prolonged the trial, getting

unnecessary adjournments and if they indulge in the same and similar practice then it is difficult to conclude the trial in the said period.

5. Mr. Anwar Mansoor Khan, learned Sr. ASC for the Bank of Punjab has filed CMA NO.1421/2015 to show that about 60 adjournments were sought by and allowed to the petitioner and his co-accused and cross-examination of one of the witnesses for the prosecution was dragged on beyond reasonable time and whatever delay in the conclusion of the trial has occurred that is due to the contribution of the petitioner and his co-accused.

6. We have gone through the order-sheets of Accountability Court-V, Lahore, however, in majority of the order-sheets the petitioner is shown present along with his counsel and except on few occasions, adjournments have been sought by his co-accused for one reason or the other and at some occasions due to absence of presiding officer or due to non-production of the accused from jail further progress in the case could not take place therefore, in our view, the delay in the conclusion of the trial could not be legitimately attributed to the petitioner but mainly due to the prosecution and the co-accused, for which the petitioner cannot be blamed.

7. Mr. Anwar Mansoor Khan, learned Sr. ASC then vehemently argued that the petitioner's case falls under special law, which does not recognize the grant of bail and because the provision of section 497 Cr.P.C is not applicable therefore, the petitioner cannot be granted bail on the basis of statutory delay by pressing into service the proviso attached to section 497 Cr.P.C.

8. True that the statutory law on the subject under the National Accountability Ordinance, 1999 does not recognize the grant of bail to accused persons facing charges under the said law, however, in the case of Khan Asfandyar Wali v. Federation of Pakistan thr. Cabinet Division (PLD 2001 SC 607) the Supreme Court has devised a strategy for granting bail to such accused persons through constitutional jurisdiction of the High Court, provided their cases are arguable for the purpose of grant of bail.

9. The court cannot lightly ignore shocking delay in the conclusion of the trial of an accused person, provided he or they is/are not exclusively responsible for the same.

10. In the instant case, as explained above, several adjournments were allowed but due to the request of the co-accused or for some other reasons, not attributable to the petitioner and only few adjournments of negligible numbers were sought by the petitioner and that too for the reason that his counsel was busy in the superior court in some other cases.

11. The contention of the learned Sr. ASC for the Bank of Punjab that the petitioner even after such a long delay in the conclusion of the trial cannot be let free on bail because application of section 497 Cr.P.C with its 3rd proviso relating to grant of bail on ground of statutory delay is inapplicable and not attracted at all to his case, in our view, is not of paramount consideration.

12. Pakistan is a welfare State where liberty of individual has been guaranteed by the Constitution beside the fact that speedy trial is inalienable right of every accused person, therefore, even if the

provision of section 497 Cr.P.C in ordinary course is not applicable, the broader principle of the same can be pressed into service in hardship cases to provide relief to a deserving accused person incarcerated in jail for a shockingly long period. This principle may be vigorously pressed into service in cases of this nature if the objects and purposes of mandatory provision of section 16 of the National Accountability Ordinance, 1999 is kept in view, which is reproduced below: -

“S.16 Trial of offences

[(a) Notwithstanding anything contained in any other law for the time being in force an accused shall be prosecuted for an offence under this Ordinance in the Court and the case shall be heard from day to day and shall be disposed of within thirty days]”

13. An accused person cannot be left at the mercy of the prosecution to rot in jail for an indefinite period. The inordinate delay in the conclusion of trial of detained prisoners cannot be lightly ignored provided it was not caused due to any act or omission of accused. In the case of The State v. Syed Qaim Ali Shah (1992 SCMR 2192) the accused was facing charges under the Suppression of Terrorist Activities (Special Courts) Act (XV of 1975) where under section 7 thereof grant of bail even in bailable offences was taken out of the discretion of the Court, however, it was held that despite of exclusion clause beneficial provision of section 497 Cr.P.C can be pressed into service in some genuine and rare cases to provide relief of grant of bail to a highly deserving accused, incarcerated in prison for a longer duration.

14. The grant of bail on account of inordinate delay in prosecution was discussed and guiding principle was laid down by this

Court in the case of Riasat Ali v. Ghulam Muhammad and the State (PLD 1968 SC 353), which is to the following effect: -

“Criminal Procedure Code, S.497— Grant of bail in non-bailable offences: -

Delay in prosecution of accused amounts to abuse of process of law and is a valid ground for bailing out accused however, delay in prosecution of each case as a ground for bail is to be weighed and judged, in each case on its merits.”

There is also a long chain of authorities and dicta of this Court where bail has been granted on account of shocking delay in the conclusion of trial in cases falling under the NAB laws. Reference in this regard may be made to the case of Anwar Saifullah Khan v. The State (2001 SCMR 1040) where it was held that bail cannot be withheld as a punishment on the ground that the offences, the accused is charged for, are not bailable or grant of bail therein was falling within the prohibition.

15. Keeping in view the above principles of law and justice and the factual aspects of the case we are of the considered view that it is a fit case where bail is to be granted, more so, when co-accused including the real beneficiaries are enjoying the same concession, much earlier and only the petitioner has been kept behind the bars. The anxiety of the prosecution that the petitioner was brought from USA after hectic efforts and there is likelihood that he may abscond again if he is granted bail, can be addressed in an effective manner directing him to deposit his passport and all his travel documents with the Accountability Court till the conclusion of the trial. Accordingly, this petition is converted into appeal and allowed.

These are the detailed reasons for our short order of even date,
which is reproduced herein below: -

"After hearing the arguments of the learned ASCs for the petitioner and the bank as well as the learned Additional Prosecutor General, NAB, this petition is converted into appeal and allowed in the terms that petitioner Himesh Khan is admitted to bail on furnishing his surety in the sum of Rs.10,000,000/- (ten millions) and P.R. bonds in the like amount to the satisfaction of the Trial Court, in addition to deposit of his passport and other travelling documents, etc., if any, in his possession. Till further orders his name shall also be placed/retained on Exit Control List (ECL). Reasons to follow separately."

Judge

Judge

Judge

Islamabad, the
14th April, 2015
Nisar/-'

Approved For Reporting