

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

Writ Petition No. 1169 of 2019

Asif Ali Zardari

Versus

The State through Chairman, National Accountability Bureau, Islamabad

Petitioner By : Petitioner in person.
Mr. Farooq H. Naek, Sardar Latif Khan Khosa, Raja Rizwan Abbasi, Sardar Shahbaz Ali Khan Khosa, Malik Javed Iqbal Wains, Mian Ali Ishfaq, Raja Abdul Qadeer, Syeda Naz Gul & Mr. Habib Ullah Zia Khan, Advocates.

Respondent By : Mr. Jahanzeb Khan Bharwana, Additional Prosecutor General, Mr. Nayyar Rizvi, Additional Prosecutor General, Mr. Hassan Akhtar, Additional Prosecutor General, Sardar Muzaffar Ahmad Khan, Deputy Prosecutor General, Barrister Rizwan Ahmad, Mr. Irfan Ahmed Boola and Mr. Sittar Sahil, Special Prosecutor, NAB, Mr. Muhammad Ali Abro, AD/IO & Muhammad Younas, Case Officer, NAB.

Date of Decision : 10.06.2019.

AAMER FAROOQ, J. - On 10.06.2019, the Writ Petitions mentioned below were dismissed vide short order of even date. This judgment elucidates the reasons for dismissal of the Writ Petitions.

2. The petitioners namely Asif Ali Zardari (W.P. No. 1169/2019), Faryal Talpur (W.P. No. 1170/2019), Sher Muhammad Mugheri (W.P. No. 1176/2019) and Shahzad Ali (W.P. No. 1279/2019) seek bail before arrest in Reference No. 02/2019, pending before Accountability Court, Islamabad.

3. The facts, in brief, are that an FIR was lodged (FIR No. 04/2018) on 06.07.2018 by the Federal Investigation Agency ("**FIA**"), State Bank Circle, Karachi under sections 419, 420, 468, 471, 109 PPC read with section 5(2) PCA, 1947, read with sections 3&4 of the Anti-Money Laundering Act, 2010, wherein it was alleged that huge amounts of money is being laundered through fake and forged accounts by depositing and withdrawal of the same. The companies and persons involved in the forged accounts were named in the FIR and it was alleged that total scam is worth Rs. 4.145 Billion approximately. Pursuant to referred FIR, interim challan was filed bearing Charge Sheet No. 12, dated 21.07.2018, in the Special Court (Offences in respect of Banks) Sindh at Karachi in which some of the petitioners, named hereinabove, were held to be responsible, however, it was provided in the referred challan that the matter is still being investigated. The Hon'ble Supreme Court of Pakistan in Human Right Case No.39216-G of 2018 initiated proceedings and constituted Joint Investigation Team ("**JIT**"), which resulted in submission before the august Apex Court Final (Synthesis) Report dated 19.12.2018. Prior to the said report, vide order dated 05.09.2018, the august Apex Court made certain observations regarding preliminary findings of the FIA with respect to fake bank accounts. The matter was finally decided by the Hon'ble Supreme Court of Pakistan on 07.01.2019 which resulted in certain directions and observations. The major portion of directions is provided in paragraph-37 as well as preceding paragraphs of the referred order. The crux of Final (Synthesis) Report dated 19.12.2018 and order of the Hon'ble Supreme Court of Pakistan is that a large amount of money derived from kickbacks, corruption and corrupt practices and then deposited in accounts, the holders of which are not aware of it; hence National Accountability Bureau ("**NAB**") was directed to further investigate and probe the matter and proceed in accordance with law. NAB filed an application under section 16-A of the National Accountability Ordinance, 1999 ("**the Ordinance**") before Special Court (Offences in respect of Banks) Sindh at Karachi for transfer of the

proceedings to the Accountability Court, Islamabad. The referred application was allowed and proceedings under Charge Sheet No. 12 ibid were transferred to the Accountability Court, Islamabad and were numbered as Reference No. 02 of 2019.

4. Learned counsel for the petitioners, in W.P. No. 1169/2019 and W.P. No. 1170/2019, *inter alia*, contended that neither petitioners were nominated in the FIR nor their names surfaced in the interim challan, hence they are not responsible in any way; that it is apprehended that petitioners shall be arrested, however, the same cannot be done at this stage inasmuch as under section 24 (a) of the Ordinance, the Chairman NAB has the power to effect arrest of any person facing an inquiry or investigation, however, since the referred stage is over and Reference has been filed, hence the Chairman NAB has no lawful authority to execute Warrants of Arrest. It was further submitted that since proceedings are pending before Accountability Court, Bonds under section 91 Cr.P.C have been furnished and since the same has been done, petitioners cannot be arrested. It was further argued that under section 173 Cr.P.C, there is provision for filing of the interim challan, however no such parallel provision is available in the Ordinance, hence Reference once filed is the case in totality against the accused persons; that Reference No.02/2019 has been transferred, hence is the sum total of the allegations against the petitioners.

5. Learned counsel for the petitioners, in W.P. No. 1176/2019 and W.P. No. 1279/2019, adopted the arguments of learned counsel petitioners in W.P. No. 1169/2019 and W.P. No. 1170/2019, but also submitted that they have nothing to do with the fake accounts inasmuch as they are contractors and in case of petitioner in W.P. No 1176 have paid money for the purchase of files in Behria Town. It was submitted that money deposited is legitimate and they have nothing to do with money laundering.

6. Mr. Jahanzeb Khan Bharwana, Additional Prosecutor General NAB alongwith Mr. Nayyar Rizvi, Additional Prosecutor General, argued that instant

petitions are not maintainable in light of the recent pronouncements by the Hon'ble Supreme Court of Pakistan. In this behalf, it was submitted that *per se* bail application under sections 497 and 498 Cr.P.C does not lie in the NAB proceedings, however, petition under Article 199 of the Constitution is maintainable in appropriate cases. It was further submitted that in light of the recent guidelines of the august Apex Court, jurisdiction of this Court is to be exercised sparingly. Reliance was placed on cases reported as *Chairman NAB vs. Mian Muhammad Nawaz Sharif and 2 others (PLD 2019 SC 445)* as well as *Tallat Ishaq vs. National Accountability Bureau through Chairman and others (PLD 2019 SC 112)*. It was further contended that one of the beneficiaries of the forged accounts is company namely M/s Zardari Group (Pvt) Ltd., whose directors/shareholders are Asif Ali Zardari, Faryal Talpur, etc. Mr. Jahanzeb Khan Bharwana, ASC also argued that scam is worth Rs. 4.4 Billion approximately and the effect of it is still being investigated by NAB under the direction of Hon'ble Supreme Court of Pakistan; that culprits/accused persons/petitioners have layered money by depositing, withdrawing and transferring the same repeatedly to conceal the true identity and in order to unearth the same, the custody of the petitioners is required. It was also contended that though Reference No. 02/2019 is pending which has been transferred from Special Court (Offences in Banks) Sindh at Karachi, however, there is no impediment for NAB to file fresh Reference or Supplementary Reference. In this behalf, if further material is unearthed and for the said purpose, the matter is still under investigation under the direction of the august Apex Court. Learned counsel further contended that under facts and circumstances, there is no mala fide or ulterior motive on part of the prosecution.

7. Learned counsels for the parties have been heard and the documents placed on record examined with their able assistance.

8. As noted above, the instant petitions are filed under Article 199 of the Constitution and are in nature of bail before arrest. In NAB cases, a petition

for bail before arrest is barred under the provision of the Ordinance, however, in case reported as *Khan Asfandyar Wali versus Federation of Pakistan (PLD 2001 SC 607)* the august Apex Court observed that in appropriate case, a petition under Article 199 of the Constitution is maintainable for grant of bail in NAB cases. The parameters for grant of bail have recently been reiterated and exhaustively laid down by the Hon'ble Supreme Court of Pakistan in case reported as *Chairman NAB vs. Mian Muhammad Nawaz Sharif and 2 others (PLD 2019 SC 445)* as well as *Tallat Ishaq vs. National Accountability Bureau through Chairman and others (PLD 2019 SC 112)*. The referred principles and observations though deal with the grant and refusal of post arrest bail, however, the same are also applicable to bail before arrest. Seminal judgment on the issue of bail before arrest is *Hidayat Ullah Khan versus The Crown (PLD 1949 Lahore 21)*. The Hon'ble Lahore High Court, in the referred judgment, observed as follow:-

"In a proper case, the High Court has power under section 498, Criminal Procedure Code to make an order that a person who is suspected of an offence for which he may be arrested by a Police Officer or a Court, shall be admitted to bail."

"The exercise of the power should, however, be confined to cases in which, not only is good prima facie ground made out for the grant of bail in respect of the offence alleged, but also, it should be shown that if the petitioner were to be arrested and refused bail, such as order would, in all probability, be made not from motives of furthering the ends of justice in relation to the case, but from some ulterior motives, and with the object of injuring the petitioner, or that the petitioner would in such eventuality suffer irreparable harm" 4 Cr LJ 221 ref. to. The power would require to be exercised with very greatest care and restricted to exceptional case."

The referred principle was reiterated and affirmed by the Hon'ble Supreme Court of Pakistan in case reported as *Murad Khan vs. Fazal-e-Subhan and another (PLD 1983 SC 82)*. Recently in another pronouncement, the august Apex Court in case titled *Rana Abdul Khaliq vs. The State, etc. (Criminal Petition No. 446-L 2016)* observed as follow:-

"2. Grant of pre-arrest bail is an extra ordinary remedy in criminal jurisdiction; it is diversion of usual course of law, arrest in cognizable cases; a protection to the innocent being hounded on trump up charges through abuse of process of law, therefore, a petitioner seeking judicial protection is required to reasonably demonstrate that intended arrest is calculated to humiliate him with taints of mala fide; it is not a substitute for post arrest bail in every run of the mill criminal case as it seriously hampers the course of investigation. Ever since the advent of Hidayat Ullah Khan's case (PLD 1949 Lahore 21), the principles of judicial protection are being faithfully adhered to till date, therefore, grant of pre-arrest bail essentially requires considerations of mala fide, ulterior motive or abuse of process of law, situations wherein Court must not hesitate to rescue innocent citizens; these considerations are conspicuously missing in the present case. The case referred to by the learned Judge-in-Chamber unambiguously re-affirms above judicial doctrine and thus reliance being most inapt is unfortunate to say the least."

The upshot of the above judgments of the august Apex Court as well as Lahore High Court is that bail before arrest could only be granted where the arrest and prosecution is tainted with mala fide and ulterior motive, hence jurisdiction is to be exercised sparingly and under extra ordinary circumstances.

9. In the instant cases, the JIT, constituted under the order of the Hon'ble Supreme Court of Pakistan dated 05.09.2018 in Human Right Case No.39216-G supra, submitted its report in the form of Final (Synthesis) Report pointing out money laundering and use of fake and forged accounts to inject illegitimate money derived from kickbacks, corruption, corrupt practices, fraud and other such like means into the system and utilization of the same. The Hon'ble Supreme Court of Pakistan vide order dated 07.01.2019 directed the authorities including NAB to investigate and inquire into the scam and initiate appropriate proceedings. NAB which is now seized of the matter by virtue of the order of the Hon'ble Supreme Court of Pakistan is still investigating the same and Reference No. 02/2019 is only result of transfer of proceedings from Special Court (Offences in respect of Banks) Sindh at Karachi. The investigation in the matter is by no means over. The prosecuting agency i.e. NAB categorically

submitted that money trail is linked with the petitioners and their custody is required for investigation. In such facts and circumstances, no mala fide or ulterior motives can be attributed to the respondent which is the core principle for grant or refusal of the bail before arrest.

10. Arguments on behalf of the petitioners that Chairman NAB, at this stage, does not have authority/jurisdiction in the matter is without substance inasmuch as under section 24 (a) read with section 24 (c) of the Ordinance, Chairman NAB can issue Warrants of Arrest even after the Reference is filed. Moreover, as observed, the matter is still being investigated and Reference No. 02/2019 is just an aspect of the case which stood transferred by the order of Special Court as mentioned above. NAB never really investigated and inquired into the matter and only became seized of it by the direction of the Hon'ble Supreme Court of Pakistan and is still investigating the same. White-Collar crimes are not easy to deduct and trace and cannot be equated with other general offences; in such like cases, the accused persons are to be confronted with the documents and inquire about the same repeatedly in order to build up the chain. For the said purpose, the NAB authorities require custody of the petitioners. Under the circumstances, no mala fide or ulterior motive can be attributed to the prosecution/NAB. The furnishing of Bond under section 91 Cr.P.C. is not a bar for NAB to arrest petitioners for investigation of the case inasmuch as Bond is submitted only for personal appearance before the Court.

11. For the above reasons, the instant petitions are without merit and are accordingly **dismissed**.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Approved for Reporting.

M.Shah*