

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT,
ISLAMABAD.

W.P. No. 4461 of 2019

Muhammad Aijaz Haroon

Versus

The State through National Accountability Bureau, Islamabad and another

Petitioner by : Mr. Shah Khawar and Barrister Qasim
Nawaz Abbasi, Advocates.

Respondents By : Barrister Rizwan Ahmed, Special
Prosecutor, NAB.
Mudassar Hussain, I.O, NAB.

Date of Hearing : 28.01.2020.

AAMER FAROOQ, J. - The petitioner, namely Muhammad Aijaz Haroon seeks bail after arrest in the inquiry initiated against him and others. The petitioner was served grounds of arrest and was arrested on 21.11.2019 from Karachi. After obtaining transit remand, he was presented for physical remand on 25.11.2019, which was allowed for 10 days by the Administrative Judge, Accountability Court, Islamabad. On 12.12.2019, the petitioner was sent on judicial remand.

2. Learned counsel for the petitioner, *inter alia*, contended that case against the petitioner is without justification or basis; that the allegations as levelled in the grounds of arrest are without any substance; that at the time when allotments were made of the plots in question, the petitioner was not even member of the Society; that allotment letters and list of allottees clearly show that allotments were made in the year 1983 and thereabout; that plots subsequently were transferred/sold to Omni Group which *per se* is no offence and the money received was deposited in the accounts of petitioner and his family. Learned counsel further contended that the plots had been in existence

since inception of the Society and were not created by/or on the order of petitioner. It was further submitted that investigation against the petitioner stands concluded and he is not required for the same. Learned counsel also submitted that bail is not to be withheld as a punishment in light of the dictum laid down by the Hon'ble Supreme Court of Pakistan in case reported as **Manzoor and 4 others versus The State (PLD 1972 SC 81)**. It was further contended that case of Tallat Ishaq reported as **PLD 2019 SC 112** does not oust jurisdiction of this Court, but provides guidelines for exercise of the discretion. It was further submitted that grounds of arrest which is an executive action is amenable to judicial review under Article 199 of the Constitution; that bare perusal of the grounds of arrest shows that Executive Authority namely Chairman, NAB has exercised the power of issuance of grounds of arrest without application of mind and going through the record, hence the same is irrational and unreasonable in the facts and circumstances.

3. Learned Special Prosecutor, NAB, *inter alia*, contended that the petitioner is involved in money laundering inasmuch as he had connection with Omni Group as he received sum of Rs.144 Million in the garb of sale consideration from the Omni Group which sum was deposited in his accounts and in the bank accounts maintained by his family members. It was further contended that allottees of 12 plots recorded statements under section 164 Cr.P.C that allotments were made to them much later in time in the year 2002; that the property owned by the Society has been usurped by the petitioner as fake allotment letters were issued, which subsequently were purchased from the referred allottees and subsequently were sold to the Omni Group.

4. Arguments advanced by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

5. As noted above, the petitioner is facing inquiry with respect to fake bank account scam regarding illegal allotment of plots in Overseas Cooperative

Housing Society (Kidney Hill) Limited and its payment from fake bank accounts.

The grounds of arrest issued and served upon the petitioner are dated 21.11.2019. For the sake of brevity, same are reproduced below:-

- "a) That you being Chairman and Secretary of Overseas Cooperative Housing Society's Management committee misused your authority by creating 12 X fake plot files in the name of fictitious allottees.**
- b) That you have conspired with other accused persons for laundering of illegal/unexplained money of OMNI Group in garb of 12 X fake plot files and received illegal pecuniary advantages/unlawful gains (Rs.144 M approximately) from two fake bank accounts namely M/s Lucky International and M/s A-One International.**
- c) That you received illegal pecuniary advantage to the tune of Rs. 144 M and the same was misappropriated through your own bank account as well as through the bank accounts of your associates.**
- d) That you being custodian of record have maneuvered membership and allotment details of Society and illegally created various plot files to benefit yourself and our associates.**
- e) That you have falsified Society's record and created and transferred various plot files in favour of your associates for your personal benefits through illegal and unlawful exercise of powers of Managing Committee."**

Reading of the above grounds shows that primarily the allegation against the petitioner is that as Chairman and Secretary, Overseas Cooperative Housing Society, he created 12 fake plots in the names of fictitious allottees and then sold the same to Omni Group for sum of Rs. 144 Million, hence obtained pecuniary advantage to the tune of said sum thereby causing loss to the Society. During the course of arguments, it was inquired from the learned Special Prosecutor, NAB as to whether the plots were created by the petitioner and the candid reply was in the negative; it was submitted that it is not the case of physical creation of the plots rather allotments of the same were made. Learned Special Prosecutor, NAB placed on record list of allottees who allegedly are fictitious. Scrutiny of the allotment letters and share certificates clearly show that allotments were made in the year 1983; though it was argued on behalf of NAB that all 12 allottees have made statements under section 164 Cr.P.C. that allotments were not made in the year 1983 but much later in time i.e. 2002. It is

trite law that in order to rebut documentary evidence, cogent proof is required. There is nothing on record yet which establishes version of allottees that allotments were not made in the year 1983 and admittedly, at the relevant time, the petitioner was not even member of the Society. The referred aspect does not make case against the petitioner one making allotments of plots to fictitious allottees as all the 12 allottees exist.

6. Apparently, the said allottees entered into an agreement with the petitioner's Company for development of the said plots for consideration, however, referred arrangement could not materialize and resultantly the referred allottees sold the plots through open file transaction to the petitioner. No illegality as such exists in the said transaction or was pointed out by NAB. The plots in question were sold to Omni Group through open transfer arrangement again for total consideration of Rs.144 Million and the amount was deposited in the bank accounts of the petitioner and his son/family. The Omni Group is under investigation for fake bank accounts and money laundering. It seems that the petitioner has been roped into this inquiry due to the fact that he sold property to the Omni Group and received consideration therefrom. Nothing exists on record yet which establishes that the petitioner is also involved in fake bank accounts and is beneficiary of the same as such. One time transaction for sale of the plots to the said Group does not make him part of the said inquiry as nothing exists to the effect on record or was brought to the attention of the Court. Investigation to the extent of petitioner is concluded as he is on judicial remand. The evidence in question is entirely documentary which the NAB has already taken into custody. Though it was submitted by Special Prosecutor, NAB that not the entire record of the Society is in custody yet no specific document was pointed out nor it was argued that why further custody of the petitioner is required. It is pertinent to observe that the Society has not lodged any complaint nor the allotment of 12 plots has been found to be in favour of fictitious employees in the audit of the Society.

7. The offences provided in the National Accountability Ordinance, 1999 are non-bailable and sections 497 and 426 Cr.P.C are excluded. However, since in the case of Khan Asfandiyar Wali reported as **PLD 2001 SC 607**, it has been held by the august Apex Court that the Hon'ble Supreme Court of Pakistan as well as the High Courts have jurisdiction under Article 199 of the Constitution to release an accused, being investigated by NAB, on bail. The principles/guidelines for grant of bail were revisited by the august Apex Court in case reported as **Tallat Ishaq versus NAB through Chairman and others (PLD 2019 SC 112)**. It is also an admitted position that system of inquiry and investigation envisaged in National Accountability Ordinance, 1999 is quite different from other criminal investigations and inquiries. The system of arrest is based on sanctioning or authorizing the arrest of accused facing investigation or inquiry by Chairman NAB. In this behalf, the relevant provisions are Sections 18(e) and 24(a) of National Accountability Ordinance, 1999. For the ease of convenience, Sections 18 and 24 are reproduced below:-

"18. Cognizance of offences:

- (a) The Court shall not take cognizance of any offence under this Ordinance except on a reference made by [the Chairman NAB or an officer of the NAB duly authorized by him].**
- (b) A reference under this Ordinance shall be initiated by the National Accountability Bureau on—**
 - (i) a reference received from the appropriate government; or**
 - (ii) receipt of a complaint; or**
 - (iii) [its] own accord.**
- (c) Where the Chairman NAB, or an officer of the NAB duly authorized by him, is of the opinion that it is, or may be, necessary and appropriate to initiate proceedings against any person, he shall refer the matter for inquiry or investigation.**
- (d) The responsibility for inquiry into and investigation of an offence alleged to have been committed under this Ordinance shall rest on the NAB to the exclusion of any other agency or authority, unless any such agency or authority is required to do so by the Chairman [NAB] [or by an officer of the NAB duly authorized by him].**

- (e) The Chairman NAB and such members, officers or servants of the NAB shall have and exercise, for the purposes of an inquiry or investigation the power to arrest any person, and all the powers of an officer-in-charge of a Police Station under the Code, and for that purpose may cause the attendance of any person, and when and if the assistance of any agency, police officer or any other official or agency, as the case may be, is sought by the NAB such official or agency shall render such assistance provided that no person shall be arrested without the permission of the Chairman [NAB] or any officer [of NAB] duly authorized by the Chairman NAB.
- (f) Any Inquiry [or] Investigation under this Ordinance shall be completed expeditiously as may be practical and feasible.
- (g) The Chairman NAB, [or by an officer of the NAB duly authorized him,] shall appraise the material and the evidence placed before him during the inquiry and the investigation, and if he decides that it would be proper and just to proceed further [and there is sufficient material to justify filing of a reference], he shall refer the matter to [a] Court.
- (h) If a complaint is inquired into and investigated by the NAB and it is concluded that the complaint received was prima facie frivolous or has been filed with intent to malign or defame any person, the Chairman [NAB] or Deputy Chairman NAB or [an officer of the NAB duly authorized by the Chairman NAB], may refer the matter to the Court, and if the complainant is found guilty he shall be punishable with imprisonment for a term which may extend to one year, or with fine or with both."

"24. [Arrest.-]

- (a) The Chairman NAB shall have the power, at any stage of the [inquiry or] investigation under this Ordinance, to direct that the accused, if not already arrested, shall be arrested.
- (b) If the Chairman, NAB, [or an officer of the NAB duly authorized by him,] decides to refer the case to a Court, such reference shall contain the substance of the [offence or offences as the case may be,] alleged to have been committed by the accused and a copy of such reference shall be forwarded to the Registrar of the Court to which the case has been sent to try the accused, and another copy shall be delivered to the accused.
- (c) The provisions of sub-section (a) shall also apply to cases, which have already been referred to the Court.

- (d) Notwithstanding anything contained in the Code, where the holder of a public office or any other person accused of an offence is arrested by NAB under this Ordinance, NAB shall, as soon as may be, inform him of the grounds and substance on the basis of which he has been arrested and produce him before the Court within a period of twenty four hours of arrest excluding the time necessary for the journey from the place of arrest to the Court and such person shall, having regard to the facts and circumstances of the cases, be liable to be detained in the custody of NAB for the purpose of inquiry and investigation for a period not exceeding ninety days, and the Court may remand an accused person to custody not exceeding fifteen days at a time and for every subsequent remand the Court shall record reasons in writing copy of which shall be sent to the High Court.
- (e) All persons presently in custody shall immediately upon coming into force of this sub-section, unless previously produced before a Court be produced before such Court as provided in sub-section (d) and the Order authorizing retention of custody by NAB shall be deemed to relate to the date of arrest; and
- (f) The Chairman, NAB may declare and notify any place as a Police Station or a sub-jail at his discretion."

The interpretation was rendered to the referred provisions by way of comparison with Section 54 of Code Criminal Procedure, 1898 by the august Apex Court in **"Khan Asfandiyar Wali and others Vs. Federation of Pakistan through Cabinet Division, Islamabad and others" (PLD 2001 SC 607)**. The Hon'ble Supreme Court at Page 929 in paragraph-258 observed as follows:-

"The above contention is without any force. We are inclined to agree with Mr. Minto that the powers conferred by the impugned provision are part of normal powers relating to inquiries and investigation. Similar powers are conferred upon Police Officers by the Criminal Procedure Code under section 54 thereof. However, we have no doubt in our minds that while exercising powers under section 24(a) of the impugned Ordinance, the Chairman NAB shall consider the facts and circumstances of each case justly, fairly, equitably, in accordance with law and in conformity with the provisions of section 24A of the General Clauses Act, 1897 and not in a discriminatory manner. Any such order passed by him is subject to correction in appropriate cases by the Superior Courts in the exercise of their Constitutional jurisdiction. It is, therefore, difficult to hold that section 24(a) is ex facie ultra vires Article 25 of the Constitution."

Detailed interpretation of Sections in question was again made in judgment reported as **"Zahoor Ahmed Sheikh and others Vs. Chairman, National Accountability Bureau, Islamabad and others"** (PLD 2007 Karachi 243).

It was observed as follows:-

30. A bare reading of section 18(b), (c), (d) and (e) of the Ordinance reveals the scheme of the Ordinance. It provides that after the receipt of information of the commission of the offence through any source as mentioned in clause (b) if the Chairman NAB or any officer of the NAB duly authorized by him forms opinion to initiate proceedings against any person, then he is required and duty bound to refer the matter for inquiry or investigation. The sole responsibility to conduct such inquiry or investigation rests upon the NAB authority. However, the Chairman NAB or any officer of the NAB duly authorized can refer it to any other agency or authority for doing the needful. In conducting such inquiry or investigation, the Chairman NAB, member of any other agency or authority or officer or servant of NAB are required and authorized to exercise all the powers of arrest, which are exercised by an officer-in-charge of a Police Station under the Code. Under the provisions of section 54 of the Code any police officer can make arrest without order from Magistrate and without a warrant of arrest. Thus such officer of NAB or authorized officer can make arrest without the order of Accountability Court and without warrant of arrest. Nevertheless, except the Chairman NAB such powers of officers of other agency or authority or officers or servants of NAB have been curtailed as they cannot make such arrest without the permission of the Chairman NAB or any officer of the NAB duly authorized by the Chairman NAB. It follows that if any other officer, except Chairman NAB, during the course of inquiry or investigation after collecting material forms opinion that the accused is to be arrested, then such officer shall produce the material before the Chairman NAB to seek permission to arrest the accused. The Chairman NAB after perusing the material collected by the inquiry or investigating officer forms the opinion within the scope of first clause of section 54 of the Code, he shall grant such permission so as to implement the intention of the legislature. If he cannot form such opinion then he shall defer to grant such permission till sufficient material is collected. No form of such permission is provided under the Ordinance, therefore, the Chairman NAB, may grant such permission in any form but it should be in writing. After receipt of such permission the concerned officer can make arrest.

31. As regards the powers of the Chairman NAB, after receipt of information through any source as provided under section 18(b), the

Chairman NAB, finds sufficient material in such information, he can arrest the accused person without the order of Accountability Court or warrant of arrest. However, if he finds no sufficient material but merely suspects that the person is involved then he can defer the arrest of such person. Nevertheless, after collecting sufficient material he shall make arrest within the scope of section 54 of the Code.

32. The legislature might have visualized that if for any reason, the Investigating Officer did not approach the Chairman NAB to grant him permission to arrest the accused, would it mean that the accused should move freely in spite of the fact that sufficient material was collected against him justifying his arrest, the legislature has taken care of it by giving new and additional power to the Chairman NAB in the shape of section 24 to get the accused arrested. Under section 24(a) of the Ordinance, if the Chairman NAB finds that during the inquiry or investigation an accused has not been arrested then he has been given power to issue direction that the accused shall be arrested. The words 'shall be arrested' clearly demonstrates the intention of legislature that the accused must be arrested, of course on fulfillment of the conditions of arrest and if the accused is not already arrested under the general powers of arrest as provided under section 18(e) of the Ordinance. However, to issue direction of arrest, the power of the Chairman NAB appears to be discretionary. How a discretionary power can be exercised? It will be discussed in the forthcoming part of the order, for exercise of such power only condition precedent to it is that the accused is not already arrested. If such condition is fulfilled then the Chairman NAB is required to issue such direction. No form of such direction is mentioned in the Ordinance, therefore, such direction can be issued in any form but it should be in writing to the authority or person to comply with the direction. This additional power has to be exercised by the Chairman NAB only.

33. Under clause (b), if the Chairman NAB decides to send the case to the Court for trial then a copy of the Reference containing substance of the offence or offences is required to be forwarded to the Court through its Registrar and another copy of the Reference is required to be handed to the accused. The word 'deliver' appearing in the clause has been defined in the American Heritage dictionary as "To put into another's possession or power; surrender; hand over; to take to the intended recipient." Thus, for receiving the copy of the reference from the Chairman NAB or an officer of the NAB duly authorized by him, the presence of accused is necessary, if he is present, Reference is to be filed and if there is sufficient material against the accused justifying his arrest, then at this stage also he shall be arrested. This provision further supports that the accused is

required to be in custody at the time of filing Reference, hence he is required to be forwarded in custody to the Court.

34. Under clause (c) the Chairman NAB can exercise the power of issuing direction that the accused shall be arrested, if he is not already arrested even after filing the Reference in appropriate cases.

35. The Hon'ble Supreme Court of Pakistan in the case of Asfandiyar Wali (supra) has observed in para. 257 at page 929 that the power of arrest conferred under the provisions are part of normal powers conferred upon a police officer under the Code under section 54 thereof.

36. It will be noticed that in section 24(a) the phrase "shall have the power" has been used which appears to have given power to the Chairman NAB of discretionary nature. The said phrase has been interpreted in the book "Principles of statutory Interpretation" by Justice G.P. Singh. The author after relying upon the decisions by the Supreme Court of India in the cases of Madasslal Fakir Chund v. S. Changdeo Sugar Mills AIR 1962 SC 1543, Chinnamar Kathiam v. Ayyayoo AIR 1982 SC 137 and Commissioner of Police v. Godhandas Bhauji AIR 1952 SC 16 interpreted the words 'May'; 'It shall be lawful'; 'shall have power' and observed as under:--

"Ordinarily, the words 'May' and 'It shall be lawful' are not words of compulsion. They are enabling words and they only confer capacity, power or authority and imply a discretion. They are both used in a statute to indicate that something may be done which prior to it could not be done. The use of words 'shall have power' also connotes the same idea."

37. It is pointed out that under the powers of arrest the Chairman NAB can deprive the liberty of citizens, therefore, it is to be safeguarded jealously and citizen should not be arrested without fulfilling the conditions mentioned in any clause of section 54 of the Code. Further, the conditions prescribed for the exercise of such powers, including procedural requirements must be strictly followed. At the same time the discretion does not mean that the Chairman NAB should conduct himself in a discriminatory manner but he should exercise such powers in a uniform manner keeping in view the facts, circumstances, evidence collected or material placed before him. Thus he should conduct himself justly, fairly, equitably, for the advancement of the purposes of the Ordinance in accordance with law and in conformity of the provisions of section 24-A of General Clauses Act, 1897. It will be further noticed that the power of arrest, no doubt, apparently, is a discretionary power with the Chairman NAB but at the same time a duty is cast upon him to act in

the manner, it is intended to achieve the objective of the Ordinance, intention of the legislature and to advance the cause of justice.

38. From the plain reading of section 24(a) of the Ordinance and 54 of the Code an impression would be gathered that the police officer or the Chairman NAB is under an obligation and duty bound to arrest a person if he is involved in a non-bailable offence subject to the condition that the requirements of section 54 are fulfilled. Nevertheless, if the Chairman NAB merely suspects of involvement of an accused he can keep it as secret and if there is no risk of absconding the accused, the Chairman NAB may defer making the arrest until the investigation is sufficiently completed but if any interference with the liberty of the accused person is necessary to prevent him from absconding and the facts justify arrest, the Chairman NAB shall arrest him. The police officer has also such powers to defer the arrest of a person merely on suspicion but can arrest him if there is apprehension of his abscondence. Such powers are available to a police officer under Rule 26.2 Chapter XVI, Volume III of Police Rules, 1934. It will be noticed that arrest can be deferred in the case where the competent authority merely suspects without any tangible evidence against the accused. But once some evidence is collected and suspicion turns into reasonable ground then the concerned officer is required and duty bound to arrest the accused as the law puts obligation upon him to do so by making the offence non-bailable.

The decision regarding arrest of accused by all means is an executive action which the Chairman, NAB is to take on the basis of material or evidence placed before him by the investigation team. It is trite law that this Court under Article 199 of the Constitution has jurisdiction to judicial review all the executive actions. The settled principles for scrutinizing the executive actions under Article 199 *ibid* are reasonableness of executive decision; irrationality and/or impropriety/illegality. Where decision taken violates referred principles of Judicial Review, the Court under Article 199 of the Constitution could intervene. In the instant case as well the Chairman NAB sanctioned the arrest by issuance of grounds of arrest. It seems that executive action has been taken without going through the record and scrutinizing the same. In the facts and circumstances, decision cannot be regarded as rational or reasonable. The cases investigated and inquired by NAB are generally referred as white-collar crimes; investigation

and procedure for handling such cases is way different from run of the mill offences. Most of the evidence against any person facing inquiry or investigation is documentary and generally it is the document or such evidence which is to be confronted to him. No doubt, physical remand is sanctioned in cases where documents are to be recovered or confronted, however, other than that the arrest or detention of the person facing inquiry or investigation is uncalled for inasmuch as unless there is cogent and strong evidence; there is no rationale for arresting any person. It is to be kept in mind that under the Constitution, liberty of any individual is protected. It is settled principle that even under the Code of Criminal Procedure, 1898, the law governing criminal justice system in our country is that not in every case filed against any person, arrest is to be effected, though in case of serious offences which are termed as cognizable offence, the police has the power to arrest without even warrants (Section 54 Cr.P.C.) but no such power is to be exercised even under Section 54 *ibid* if there is no sufficient evidence. No such powers are provided to NAB and in every arrest, same is sanctioned by NAB which power/discretion is to be exercised keeping in view the facts and circumstances inasmuch as liberty of person facing inquiry/investigation. Likewise, where a person is in incarceration facing trial and conclusion of the matter seems to be a far cry, bail is not to be withheld only for the reason that the ultimate punishment involves 14 years maximum imprisonment. Keeping such perils of arrest and trial and denial of bail in view, the Hon'ble Supreme Court of Pakistan in case reported as **Manzoor and 4 others versus The State (PLD 1972 SC 81)** observed as follow:-

"It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run."

In view of above, since investigation/inquiry to the extent of petitioner is concluded and he is on judicial remand and also for the reasons on merit mentioned hereinabove, the petitioner is entitled to concession of bail.

8. For the above reasons, the instant petition is **allowed** and the petitioner is enlarged on bail after arrest in the above inquiry/investigation pending against him subject to furnishing bail bonds in the sum of Rs. 1 Million with one surety in the like amount to the satisfaction of Deputy Registrar (Judicial) of this Court. As was argued by the learned Special Prosecutor, NAB that the petitioner may be required for confronting certain documents; if such is the case, they may call/summon him whenever required and in case he fails to do so, they may make an appropriate application before this Court for cancellation of bail. The petitioner shall also surrender his passport with Deputy Registrar (Judicial) of this Court.

(GHULAM AZAM QAMBRANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in open Court this 13th day of February, 2020.

JUDGE

JUDGE

M.Shah/.