

ORDER

ATHAR MINALLAH, C.J.--The petitioner, namely, Sheikh Imran UI Haque has invoked the constitutional jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (hereinafter referred to as the 'Constitution') seeking post arrest bail.

2. The facts, in brief, are that the Economic Coordination Committee of the Cabinet, in its meeting held on 15-08-2013, approved the issuance of a tender for the provision of re-gasification and allied services by a private entity. Pursuant to the said decision, Inter State Gas Systems Pvt. Ltd. (hereinafter referred to as the 'Inter State Company'), which is a subsidiary of the State owned juridical person, namely, Government Holdings (Pvt.) Ltd., was assigned the responsibility of conducting the tendering process. Pursuant to an offer made by the Government of the United States of America, the USAID appointed QED Consultancy (hereinafter referred to as the 'Consultant') to provide consultancy services relating to the tendering process. The competitive bidding process was initiated by the Inter State Company by adopting the single stage, two envelope mode of bidding process provided under the Public Procurement Rules, 2004 (hereinafter referred to as the 'Rules of 2004'). The advertisement inviting tenders was published in the daily newspapers on 08-08-2013. Initially 22 entities procured the bidding documents. After a pre-bidding meeting, bids were received by the Inter State Company on 14-10-2013 from only two bidders, namely Elengy Terminal Private Limited (hereinafter referred to as the 'Terminal Company') and a consortium led by Pakistan Gas Port Limited (hereinafter referred to as the 'Gas Port Company'). Both the said juridical persons participated in the bidding process. The Consultant, after carrying out an evaluation of the technical bids, submitted a report to the Inter State Company. The Consultant certified in its report that the process was carried out as per the Rules of 2004. The Gas Port Company did not meet the threshold prescribed for technical qualification. However, the Terminal Company was evaluated as successful. The Board of Directors of the Inter State Company approved the technical evaluation submitted by the Consultant on 07-11-2013 and, therefore, authorized the management to open the financial bid of the Terminal Company. The financial bid was opened on 07-11-2013 and was evaluated by the Consultant. On 12-11-2013, the latter submitted its evaluation report regarding the financial bid and, after its approval, a contract, dated 30-04-2014, was executed. The petitioner was an employee of the M/S Engro Corporation and at the relevant time his position was that of Senior Vice President. In addition he also held the position of Chief Executive Officer of various companies owned and controlled by the said Corporation. His role was to the extent of facilitating his employer company during the tendering process. It appears from the record that one Sheikh Rasheed Ahmed filed a petition before the august Supreme Court. The apex Court vide order, dated 12.02.2018, observed that the matters agitated in the petition required detailed and elaborate inquiry and investigation and thus the petitioner was advised to approach the appropriate forum. The said petitioner, therefore, filed a written complaint, dated 21.02.2018, before the Chairman of the Bureau wherein the commission of illegalities, nepotism and illegal benefits having been extended to M/s Engro Corporation in the award of the LNG Terminal and branch pipelines at Port Qasim, Karachi were alleged. It was alleged that there were serious violations of the Rules of 2004. The competent authority entertained the complaint and on 06-06-2018 authorized an inquiry. The final inquiry report was considered by the Executive Board of the National Accountability Bureau (hereinafter referred to as the 'Bureau') and the latter authorized two separate investigations. The investigation in the instant matter was authorized vide letter dated 25-06-2019. The warrant of arrest was issued on 16-07-2019. The petitioner was arrested on 07-08-2019 after his petition seeking pre-arrest bail was dismissed by this Court. The petitioner remained in the physical custody of the Investigating Officer for 49 days and thereafter the learned Accountability Court, vide order, dated 26-09-2019, ordered his judicial remand. The final investigation report has been completed and the Bureau is in the process of filing a Reference against the petitioner. Through this petition, the petitioner is seeking his post arrest bail.

3. The learned counsel for the petitioner has been heard at length. He has mainly argued that; the latter was not vested with any authority and, therefore, the question of misuse thereof does not arise; the petitioner was an employee and, therefore, was only facilitating the submission of documents on behalf of his employer company; the execution of the contract was pursuant to a transparent bidding process wherein the petitioner had no role; despite extensive proceedings which consisted of conducting an inquiry and investigation for more

than three years, besides keeping the petitioner incarcerated for 49 days on physical remand, the Bureau till date has not been able to collect any incriminating material regarding the involvement of the petitioner in corruption or corrupt practices.

4. The learned Special Prosecutor of the Bureau has appeared along with the Investigating Officer. They were heard at great length. They could not show any incriminating material which could justify the incarceration of the petitioner. They could not refer to any record indicating criminality or mens rea that could be attributed to the petitioner. The figures quoted by the Investigating Officer relating to the alleged loss suffered by the exchequer were not supported by any material placed on record. The learned Special Prosecutor, as well as the Investigating Officer, have candidly conceded that the alleged role of the petitioner was to the extent of aiding and abetting the main accused.

5. The learned counsel for the petitioner and the learned Special Prosecutor of the Bureau have been heard and the record perused with their able assistance.

6. It is not the case of the Bureau that the petitioner was holding a public office before or at the time when the contract, dated 30-04-2014, was executed. The petitioner was an employee of a juridical person which had participated in the bidding process. We are afraid that the Investigating Officer could not point out any significant violation of the Rules of 2004 committed during the bidding process which had ultimately led to execution of the contract dated 30-04-2014. The Bureau has submitted a written report and, after careful perusal thereof, we have not been able to persuade ourselves that the incarceration of the petitioner is justified. The figures relating to the alleged loss to the exchequer, as quoted in the written report, appears to be based on conjectures. No material violation of the Rules of 2004 has been mentioned. By no stretch of the imagination can the alleged role attributed to the petitioner be treated as an offence relating to corruption and corrupt practices. There is no explanation as to what authority was exercised by the petitioner which amounted to a criminal act. It is alarming that correspondence and the finalization of matters relating to establishing the LNG Terminal by an employee of a private juridical person has been treated as fraudulent and dishonest actions. As noted above, the petitioner was merely an employee and there is nothing on record to even remotely suggest that he had made any financial gain. Again, as a conjecture, his appointment as Managing Director of Pakistan State Oil is alleged to have been a gain. The standard business practices and arrangements which are industry norms internationally are being treated as corruption and corrupt practices. There is nothing on record to indicate that an effort has been made during the course of inquiry or investigation to professionally analyze the data. The Investigating Officer could not point out the role of the petitioner in the award of the contract, dated 30-04-2014, nor any material violation of the Rules of 2004. The Consultant which had conducted the proceedings and had evaluated the bids was appointed by USAID and its neutrality and independence has not been questioned. There is no allegation against the Consultant nor the entity that had conducted the bidding proceedings. The learned Special Prosecutor and the Investigating Officer of the Bureau were not able to satisfy us that there was an element of mens rea or criminality on the part of the petitioner to justify his incarceration.

7. The learned Special Prosecutor of the Bureau has argued that the National Accountability Ordinance, 1999 (hereinafter referred to as the 'Ordinance of 1999') has explicitly excluded the bail provisions and, therefore, the petition ought to be dismissed. It is noted that the petitioner has invoked the constitutional jurisdiction of this Court under Article 199 of the Constitution and, therefore, violation of the fundamental rights guaranteed under the Constitution and the excess or abuse of jurisdiction and powers vested in the Bureau in depriving a citizen of the valuable right of liberty in an arbitrary manner cannot be ignored. The powers to arrest provided under the Ordinance of 1999 are not unfettered nor can they be exercised mechanically and in an arbitrary manner. The ouster of the bail provisions in the Ordinance of 1999 does not deprive the petitioner or any other accused of the constitutionally guaranteed fundamental rights such as inviolability of dignity and freedom of movement provided under Articles 14 and 15 of the Constitution, respectively. Moreover, it is noted that Sub-article (2) of Article 14 explicitly provides that no person shall be subjected to torture for the purposes of extracting evidence. It is implicit in the said provision that an arbitrary arrest, depending on the facts and circumstances of the case, could amount to torturing an accused for extraneous reasons. We have noticed in several cases that the investigations are not carried out by expert fraud examiners or investigators or data mining experts. We have also not come across any case like the one in hand where chartered accountants or trained professionals in

matters relating to white collar crime may have been associated during the inquiry or investigations. The capacity and professional competence of investigators is inevitable to deal with matters relating to white collar crime. The object for which the Ordinance of 1999 was enacted can only be achieved if the alleged crime is investigated by professionals who are trained as experts in white collar crime. The case in hand appears to be a classic example of the violation of the guaranteed fundamental rights of a citizen. The investigation reports placed on the record and the written comments filed in this case speak volumes for the competence and capacity of the Bureau to investigate white collar crimes. It is noted that arbitrary interference with the right to freedom of movement and liberty, besides amounting to abuse of statutory powers is, prima facie, a tort. In the first place, very strong reasons are required for depriving an accused of the right to liberty in matters relating to white collar crimes, particularly when he or she is cooperating and there is no apprehension of abscondance. In this case the facts and circumstances give rise to extraordinary circumstances and, thus allowing the petitioner to suffer the rigors of incarceration would amount to violation of his fundamental rights, besides being punished without there being sufficient incriminating material against him

8. It may further be noted that the case against the present petitioner is entirely dependent upon documentary evidence which is, admittedly, in the possession of the prosecution and obviously there is no possibility for the petitioner to tamper with the same. The voluminous documentary evidence will consume time during the course of the trial. In such circumstances, keeping the petitioner incarcerated would tantamount to punishing him despite the fact that a person is presumed to be innocent until proven guilty. The Courts have invariably leaned in favour of granting of bail when the case is dependent upon documentary evidence and the same is in possession of the prosecution agency. Reliance in this regard is placed on "Saeed Ahmed v. The State" [1996 SCMR 1132] and "Muhammad Nawaz v. The State through Chairman, NAB, Islamabad and another" [PLD 2008 SC 438].

9. It has been aptly observed by the august Supreme Court in the case of 'Manzoor and 4 others v. The State' [PLD 1972 SC 81] as follows.--

"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 the light of the facts and circumstances of the present case, refusal of bail will tantamount to punishing the petitioner.

10. We are of the opinion that the petitioner is entitled to the concession of bail and consequently we allow this petition and admit the petitioner to bail subject to furnishing bail bonds in the sum of Rs.1,000,000/- (Rupees One Million Only) with one or more sureties in the like amount to the satisfaction of the learned trial Court. The petitioner will be at liberty to submit cash surety as per policy of the learned trial Court.

Needless to mention that this is a tentative assessment, which shall not affect the trial of this case in any manner.