

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No.4657/2016

MUHAMMAD IQBAL
VERSUS
THE STATE, ETC

Petitioner by : **M/s. Makhdoom Ali Khan & Umair Majeed Malik,**
Advocates.

Respondents by : **Sardar Muzaffar A. Khan, ADPG, NAB.**
Mr. M. Saleem Ahmed Khan, DD/I.O, NAB.

Date of Hearing : **05-01-2017.**

ATHAR MINALLAH, J.- The petitioner has invoked the 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 petitioner is more than 69 years old. He is the proprietor of M/S Zam Zam Corporation (hereinafter referred to as the '***Corporation***'), which is, inter-alia, engaged in the import and distribution of drugs. The petitioner instituted suit No.943/2012 before the Sindh High Court seeking a declaration in relation to two notifications. A learned Single Judge in Chambers granted an injunction vide order dated 16-08-2012. Subsequently, on the basis of a report, dated 19-11-2012, and with the consent of the parties, the suit was decreed on 11-03-2013. The order dated 11-03-2013 shows that it was passed in the presence and with the consent of the Deputy Attorney General and an official, namely Ms. Um-e-Laila, Assistant Drugs Controller who was present in the Court. One of the members of the price fixation Committee, namely Saeed Allahwala filed J.M No.20 of 2013 under section 12(2) of the Code of Civil Procedure, 1908 (hereinafter referred to as the '***CPC***') alleging that the present petitioner in collusion with certain government officials had obtained

order dated 11-03-2013 through fraud and misrepresentation. A month later J.M No.37 of 2013 was also filed by the Drug Regulatory Agency of Pakistan (hereinafter referred to as the "**Agency**") under section 12(2) of CPC on the same grounds. Initially the decree dated 11-03-2013 was suspended by a learned Single Judge in Chambers vide order dated 22-05-2013, but later the said order was modified vide order dated 22-05-2013. The Federation of Pakistan assailed the interim order, which was passed by the Sindh High Court, before the august Supreme Court. The apex Court vide order dated 17-02-2016, passed in Civil Appeal No.488 of 2015, directed that the two JMs i.e. J.M No.20/2013 and J.M. No.37/2013 be fixed before a learned Single Judge on 08-03-2016 for hearing and proceedings of the same on day-to-day basis. Pursuant to the said order of the august Supreme Court a Single Judge in Chambers heard both the J.Ms and the same were dismissed vide order dated 07-04-2016. The learned Single Judge in Chambers had unambiguously observed that no fraud or misrepresentation appeared to have been committed by the petitioner. The relevant portion of the order dated 07-04-2016 is reproduced as follows:-

"As to the contention that the sub-committee did not enjoy the authority to deal with those medicines which were not recommended to be considered by the Committee, it has come on record that applications were entertained and after its approval forwarded to main Committee. It is a matter relating to indoor management within the DRAP and the respondent No.1 on formation of the Sub-Committee presented its representation and/or application in relation to their products, which they felt to be considered, which were recommended by the Sub-Committee, and no one including the DRAP and the applicant in J.M.20 of 2013 disputes such

facts, the conclusion of sub-committee and its remarks are very material.

As I observed I will not discuss its effect as it is not required here. In such a situation, no fraud or misrepresentation appear to have been committed on the part of the respondents"

3. We have been informed that an appeal has been preferred against the order dated 07-04-2016, passed in J.M Nos.20/2013 and 37/2013. However, admittedly no order has been passed as yet and, therefore, the order 07-04-2016 remains to be effective and in the field. The National Accountability Bureau had initiated an inquiry pursuant to a complaint on 15-05-2013 and the same was converted into investigations on 01-07-2015. An Interim Reference No.17/2016 was filed on 17-06-2016 on the basis of an investigation report, a copy whereof is attached with the petition. The investigation report as well as the Interim Reference allege that the proprietorship namely M/s Zam Zam Corporation had derived wrongful financial gains on account of the consent decree dated 11-03-2013, passed by the Sindh High Court. The role attributed to the present petitioner, as per the investigation report, is to the extent of aiding, assisting, abetting and conspiring with Dr. Muhammad Ali, the then members of the pricing Committee of the Agency and the Deputy Attorney General who had submitted the report dated 19-11-2012. The petitioner is arrayed as an accused at serial No.15 of the Interim Reference and to his extent the allegations mentioned therein are as follows:-

"One accused pharmaceutical firm namely M/s Zam Zam Corporation in connivance with other accused, dishonestly got unjustified price increase of its twelve drugs

on the basis of an illegal and unauthentic report filed in Sindh High Court Karachi without approval of the Competent Authority. Moreover, the role and involvement of other directors of the above accused companies is being probed and the same will be finalized accordingly, hence this interim Reference is being filed.

The serial No.3 and 15, filed a concocted report with malafide intentions duly signed by him along with accused at serial No.3 and Saeed Allahwala a rep of PPMA on 22-02-2013 in suit No.943 of 2012 to facilitate and extend undue/unlawful benefit to M/s Zam Zam Corporation. The Honorable Sindh High Court, Karachi passed the order/consent decree in favour of M/s Zam Zam Corporation, thereby on the basis of above said report undue financial benefits to accused firm M/s Zam Zam Corporation was extended in the shape of price increase of its twelve products (Drugs)."

4. The petitioner approached this Court seeking pre-arrest bail by filing W.P.3745 of 2016 and the same was dismissed by a learned Division Bench. The petitioner was arrested on 05-12-2016 and he remained on physical remand till 07-12-2016. While on physical remand the health of the petitioner had deteriorated and he was, therefore, admitted to CCU of the Federal Government Poly Clinic Hospital, Islamabad. He remained in the hospital till 13-12-2016. Hence the instant petition seeking post arrest bail.

5. The learned counsel for the petitioner has argued that; the Reference has been filed in Islamabad merely to harass the petitioner; the

petitioner is more than 69 years old and is suffering from multiple chronic and life threatening diseases i.e. coronary artery and cardiac, diabetes, lumber spine and multilevel spine disc degeneration and prostrate; adequate medical treatment cannot be provided to him in prison and thus it is a case of hardship; neither the Agency nor Saeed Allahwala who had filed applications under section 12(2) of CPC in the Civil Suit No.943 of 2012 are complainants in the Reference; the complaint has been filed by one Mian Aftab Ahmed, Chairman of Pakistan Kamzat Mahaz; neither the name of the petitioner appears in the complaint nor any role has been ascribed to him; the Reference has been filed against the petitioner on the allegation that the latter by fraud and misrepresentation had obtained an order/consent decree dated 11-03-2013 from the Sindh High Court in Civil Suit No.943 of 2012; the said consent order/decreed was challenged by the Agency and one Saeed Allahwala under section 12(2) of CPC and the respective application were dismissed by the Sindh High Court holding that no fraud or misrepresentation had been committed by the petitioner; the allegations are baseless and NAB cannot sit as a Court of appeal on the order passed by the Sindh High Court in Civil suit No.943/2012; there is no incriminating material against the petitioner who was neither a member of the price committee nor had any role in relation thereto; the report was filed by the Deputy Attorney General and the presence of an official is also recorded in the order dated 11-03-2013 but both have not been proceeded against nor warrants of arrest have been issued to their extent; during the physical remand no incriminating evidence could be collected by the Investigating Officer; after dismissal of J.M 20/2013 and J.M 37/2013 in Civil Suit No.93/2012, the NAB could not have proceeded against the petitioner on the basis of the allegations that he had obtained the consent order through fraud and misrepresentation; the allegations required further probe, particularly when there is no incriminating material; the Reference

filed against the petitioner is nothing less than an abuse of process of law; the Reference has been filed against the petitioner in order to defeat the orders of the Sindh High Court passed in Civil Suit No.943 of 2012; no offence is made out against the petitioner in the facts and circumstances of the case; the price increase of the petitioner's drugs was granted on the basis of a judicial order which is in the field; the respondents have no jurisdiction to prosecute and try the petitioner on the allegations of price increase of drugs, which were subject matter of Civil Suit and two J.Ms filed before the Sindh High Court; no illegality in any manner whatsoever has been committed by the present petitioner; the entire purpose of the Reference is to coerce the petitioner to enter into 'voluntary return' or 'plea bargain'; no specific offence has been mentioned; there is no allegation of payment of kick-backs and commissions against the petitioner; reliance has been placed on "Muhammad Asif vs. State", **2016 SCMR 1540**, "Rahim ud Din vs. State" **1994 MLD 1378** "Mukhtar Ahmed vs. NAB" **2006 YLR 836**, "Rafiq Haji Usman vs. Chairman NAB" **2015 SCMR 1575**, "Muhammad Zafar vs. State", **2012 P.Cr.L.J 1549**, "Abdul Majeed vs. NAB", **2016 P.Cr.L.J 1874**, "Sarfraz Ahmed vs. Chairman NAB", **2016 P.Cr.L.J.79**, "Abdul Jabbar vs. State" **2015 YLR 108**, "Amin Farooqui vs NAB" **2014 P.Cr.L.J. 186**, "Muhammad Zafar vs. Shahzad Ahmed" **2011 MLD 602**, "Haji Mir Aftab vs. State" **1979 SCMR 320**, "Zakhim Khan vs. State" **1998 SCMR 1065**, "Manzoor Ahmad Watoo vs. State" **2000 SCMR 107**, "Saeed Mehdi vs. State" **2002 SCMR 282**, "Maj (R) Mushtaq Ahmed vs State" **2002 YLR 706**, "Sanaullah Babar vs. State" **PLD 2003 Peshawar 175**, "Muhammad Ali Athar vs. Director General NAB" **2013 P.Cr.L.J. 58**, "Pir Muhammad Azam vs. NAB" **2016 P.Cr.L.J. Note 84**, "Hudaibya Papers Mills Ltd vs. Federation of Pakistan" **PLD 2016 Lahore 667**, "Binyamin Khalil vs NAB" **2012 YLR 2885**, "Chairman NAB vs. Muhammad Arshad Khan" **2008 SCMR 1012**, "Muhammad Arshad

Khan vs. Chairman NAB" **2007 P.Cr.L.J. 1957** and "Ramesh M. Udeshi vs State" **2005 MLD 1745**.

6. The learned ADPG, NAB appeared along with Muhammad Saleem Ahmed Khan, the Investigation Officer of the case and argued that; the Interim Reference has been filed while the final reference will be submitted on completion of the investigations; the pre-arrest bail of the petitioner was dismissed on merits and, therefore, the instant petition is not competent on the same grounds; reliance has been placed on "Yaroo vs. The State", **2004 SCMR 864** and "Seema Fareed and others vs. The State and another", **2008 SCMR 839**; the Deputy Attorney General who had submitted the report on the basis of which the consent order dated 11-03-2013 was passed by the learned Sindh High Court has been arrayed as an accused and a call up notice has been issued to him; however, his warrants have not been issued; Ms Um-e-Laila, Assistant Drugs Controller who had appeared before the Sindh High Court on 11-03-2013 is a witness in the instant case; the petitioner is the beneficiary of the consent order obtained on the basis of report dated 19-11-2012, which had not been issued by an authorized person or forum; the petitioner has committed offences defined under sub clauses (ix) and (xii) of clause (a) of Section 9 of the National Accountability Bureau Ordinance, 1999 (hereinafter referred to as the "***Ordinance of 1999***"); the petitioner through aiding, abetting and conspiring with the members of the price Committee had obtained illegal gains by playing fraud on the Sindh High Court; the petitioner has committed the offence of cheating and had thereby dishonestly induced the members of the public at large.

7. The Investigating Officer was asked to show any incriminating material against the petitioner collected during the investigation or when he

remained on physical remand. The learned ADPG, NAB read the statement of of Saeed Allahwala recorded under section 161 of the Criminal Procedure Code, 1898 (hereinafter referred to as the "**Cr. P. C**") and referred to the minutes of the meetings of the pricing Committee in support of the contention that undue and illegal benefits were extended to the proprietorship and the petitioner. However, other than the said documents, they could not show any incriminating material connecting the petitioner to an offence defined under section 9 of the Ordinance of 1999.

8. The learned counsels have been heard and the record perused with their able assistance.

9. The petitioner was neither a member of the price fixation Committee nor had attended its meetings. Two employees of the Corporation had submitted a representation for consideration of increase in prices by the price fixation Committee. The petitioner had instituted Civil Suit No. 943/2012 before the Sindh High Court and the same was decided through a consent order dated 11-3-2013 on the basis of a report dated 19-11-2012. One of the members of the price fixation Committee and later the Agency filed respective applications under section 12(2) of CPC alleging that the present petitioner in collusion with certain government officials had obtained the decree dated 11-03-2013 through fraud and misrepresentation. Pursuant to the directions of the august Supreme Court both the applications filed under section 12(2) of CPC were dismissed vide order dated 07-04-2016. The Sindh High Court while dismissing the applications had unambiguously observed that it appeared that no fraud or misrepresentation had been committed by the present petitioner. The said order dated 07-04-2016 continues to be effective and in the field despite an appeal having been preferred against it. These are admitted facts.

10. The allegations against the petitioner mentioned in Reference No.17 of 2016 have been reproduced above. Perusal of the copy of investigation report, attached with the petition at pages 29 to 49, shows that the same allegations relating to abetting, assisting and conspiring with the Chairman and members of the pricing Committee and thus gaining illegal gains are mentioned therein. No other role has been attributed to the petitioner. The Investigating Officer, who was present in the Court, was repeatedly asked to show to us any incriminating material in order to connect the petitioner with an offence defined under section 9 of the Ordinance of 1999. In response, he could only rely on the statement of one of the members of the price fixation Committee, namely Saeed Allahwala, which was recorded under section 161 of the Criminal Procedure Code (hereinafter referred to as 'Cr.Pc'), and copies of the minutes of the meetings held by the Committee. Though deeper appreciation of evidence is not permissible at bail stage, yet we allowed the learned ADPG, NAB to read the statement of Saeed Allahwala recorded under section 161 CrPC. We also examined the minutes of the meetings of the price fixation Committee. We are afraid that by no stretch of the imaginations could these documents be treated as incriminating material in order to connect the present petitioner to any offence defined under section 9 of the Ordinance of 1999. We asked the Investigation Officer to show to us the material on the basis whereof the competent authority had exercised the discretionary powers vested under section 24 of the Ordinance of 1999 in order to justify the arrest warrants. No material other than the one referred to above could be placed before us. The edifice of the arguments advanced by the learned ADPG NAB is based on presumptions. There is not a speck of document in relation to the allegation that either the report date 19-11-2012 had been concocted by the petitioner or that he had any role in preparation thereof and then filing in the Court. The record indicates that

a representation had been filed on behalf of the Corporation for consideration of the price fixation Committee. The entire case of NAB, at this stage, is solely based on the allegation that the report, dated 19-11-2012, submitted before the Sind High Court by the Deputy Attorney General had not been approved by the competent authority and had, therefore, been procured through fraud and misrepresentation. This too, at this stage, is based on presumptions. Perusal of the orders passed by the Sind High Court shows that the facts and allegations pleaded before us had also been placed before the Court in the proceedings relating to J.M 20/2013 and J.M 37/2013 and the said applications were dismissed through a detailed order dated 07-04-2016. The Sindh High Court, to the extent of the present petitioner, had dismissed the applications by observing that no fraud or misrepresentation had been committed by him. In the light of the material shown to us, either proper investigations have not been conducted or the powers vested under the Ordinance of 1999 have been exercised in haste for some extraneous reason and thus giving rise to allegations relating to pressurising the accused to enter into a plea bargain. We would avoid making an observation regarding the propriety of the proceedings conducted by the NAB authorities, particularly when a judicial order dated 07-04-2016, passed by the Sindh High Court was and continues to be in the field.

11. The Ordinance of 1999 is a penal statute and it is settled law that the provisions thereof have to be strictly construed since they constitute criminal offences. We fail to understand how the offences defined under sub clauses (ix) and (xii) of clause (a) of section 9 of the Ordinance of 1999 are attracted to the extent of the petitioner on the basis of the record placed before us. The august Supreme in the case titled "Rafiq Haji Usman vs. Chairman, NAB and another", **2015 SCMR 1575** has observed and held that where element of fraud, deceit etc or a specific provision of any law which constituted a criminal offence was

not attracted and made out and there also was no material available on record in such context, the exercise of discretion for granting bail by court in appropriate case should not be withheld as a punishment. Besides the order of the Sindh High Court, dated 07-04-2016, being admittedly in the field, no material has been collected during the investigations nor has been shown to us in the context of a fraud or deceit committed by the petitioner let alone abetting, assisting or conspiring with others. In a recent judgment titled "The State vs. Anwar Saif Ullah Khan" **PLD 2016 SC 276**, the august Supreme Court, in the context of section 9(a)(vi) of the Ordinance of 1999, has observed and held that in order to constitute an offence there must be existence of mens rea, an element of conscious knowledge or conscious participation must be evident from the acts or omissions of an accused with the object of obtaining illegal gains and undue benefits. The same principle would also apply to all other clauses of section 9 of the Ordinance of 1999 because they constitute criminal offences. The offences would be attracted if there is an element of mens rea and not a mere irregularity or some violation of law no matter how serious. The element of mens rea is not in existence in the instant case on the basis of the material shown to us by the Investigating Officer. Moreover, there is no allegation against the petitioner of giving commissions or illegal gratifications nor that he in any manner was in a position or authority to influence the members of the price fixation Committee.

12. We are afraid that the Investigating Officer has not been able to satisfy us that proper investigations have been conducted or that there was sufficient material placed before the competent authority for the purposes of exercising the discretionary powers

conferred under section 24 of the Ordinance of 1999. There is no cavil to the proposition that the Chairman NAB is vested with the powers under Section 24 of the Ordinance of 1999 to direct that any of the accused, if not already arrested, shall be arrested. This discretionary power has to be exercised in accordance with the settled principles of law, in a just, fair and equitable manner, inter-alia, having regard to the principles and law laid down by the august Supreme Court in the case titled "Muhammad Bashir vs. Station House Officer, Okara Cantt and others", **PLD 2007 SC 539** wherein it has been held that an arrest of a person in the absence of requisite material justifying the same tantamounts to abuse of power. The power to order the arrest of an accused are neither unfettered nor unbridled. These powers obviously cannot be used for extraneous reasons such as coercing or pressurizing an accused to enter into plea bargain. It is a statutory obligation of the competent authority to justify in each case that the discretion vested under section 24 of the Ordinance of 1999 has been exercised in accordance with the settled principles and that requisite material justifying the same was not only before him or her but was also considered. On the basis of the record shown to us, this does not appear to the case to the extent of the orders passed in relation to the present petitioner.

13. In the light of the above discussion, the role and involvement of the petitioner in relation to an offence defined under sub clauses (ix) and (xii) of clause (a) of section 9 or any other offence, definitely needs further probe. The petitioner is more than 69 years old and, at this stage, there is no incriminating material available on record to connect him with an offence defined under section 9 of the Ordinance of 1999. The petitioner has no criminal record and nothing has been placed on record to indicate that there exists an apprehension that he might abscond or tamper with the evidence if released on bail . It is an

obvious case of hardship and, therefore, we are satisfied that he is entitled to the concession of bail.

14. 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 favourably in the 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 vs. The State" **1996 SCMR 1132** and "Muhammad Nawaz vs. The State through Chairman, NAB, Islamabad and another" **PLD 2008 SC 438**.

15. It has been aptly observed by the august Supreme Court in the case of '*Manzoor and 4 others versus 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.

16. For what has been discussed above we are inclined to extend the concession of bail to the petitioner in the instant case and, therefore, the petition is allowed. The petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs. 20000000/- (rupees twenty million only) with one surety in the like amount to the satisfaction of the Addl. Registrar (Judl.) of this Court.

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

(MOHSIN AKHTAR KAYANI)
JUDGE

(ATHAR MINALLAH)
JUDGE

Approved for reporting

Asif Mughal/

