

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.183 of 2016
Shafique A Shahzad
Versus
The State & another

Date of Hearing: 03.03.2016
Petitioner by: Ch. Abdul Aziz, Advocate
Respondents by: Sardar Muzaffar Ali Khan, ADPG
with Samina Rehman, Assistant
Director/I.O. N.A.B.

MIANGUL HASSAN AURANGZEB, J:- Through the instant petition under Article 199 of the Constitution, the petitioner, Shafiq A Shahzad, is seeking post-arrest bail. The National Accountability Bureau ("N.A.B.") arrested the petitioner on 14.12.2015. The grounds for his arrest were stated by the Investigation Wing of N.A.B. to be as follows:-

- *"That NAB-Rawalpindi is conducting the subject investigation under National Accountability Ordinance, 1999.*
- *That during the investigation it is revealed that you in connivance with other accused as Director Estate FGEHF knowingly and willfully with criminal intent by misusing his authority extended undue and illegal favours/benefits to himself and others.*
- *He with malafide intention illegally recommended and submitted the proposals of the cases of Pakistan Railways Employees which do not fall under standard criteria (age wise seniority) as per seniority list to DG for approval.*
- *He with malafide intention signed the allotment letters to the Employees of Pakistan Railway which do not fall under standard criteria (age wise seniority) as per seniority list in connivance with other accused persons.*
- *The accused malafidely recommended the cases of illegally created plots. He illegally proceeded further without getting prior approval of CDA / Executive Committee. He also recommended the allotments of above said plots and subsequently their transfer.*
- *He with malafide intention signed the allotment letters of illegally created plots in connivance with other accused persons.*
- *You are being arrested for the purpose of investigation, confrontation with record, alleged transactions and further interrogation."*

2. Vide order dated 23.12.2015, the learned Judge Accountability Court, Islamabad, remanded the petitioner in N.A.B.'s custody for a period of five days. Vide order dated 28.12.2015, the petitioner's physical remand was extended for another three days, and vide order dated 31.12.2015, the learned Judge Accountability Court, Islamabad, spurned N.A.B.'s request for a further remand, and sent the petitioner to the judicial lock-up. In the said order dated 31.12.2015, it was observed that the petitioner had remained in N.A.B.'s custody for about sixteen days.

3. The petitioner is a civil servant from the Commerce & Trade Group. On 02.12.2011, he was sent on deputation to the Federal Government Employees Housing Foundation ("FGEHF") for a period of three years. At FGEHF, the petitioner was posted as Director (Estate). FGEHF is a company incorporated under the provisions of the Companies Ordinance, 1984, and its shares vest in the Federal Government. One of its objects is to provide housing to government employees. During the petitioner's posting at FGEHF, a decision was made to create 32 more plots in the existing layout plan of Phase-IV (G-14/1, 2 & 3, Islamabad), and allot them to government servants. One of the newly created plots was allotted to the petitioner, who sold it in the market for Rs.10 Million.

4. Learned counsel for the petitioner submitted that in pursuance of one of the objects of FEGHF to provide housing to government employees, land in Sector G-14/1, 2 & 3, Islamabad, was acquired, which constituted Phase-IV of FGEHF's housing scheme; that the layout plan for the housing scheme was approved by the Capital Development Authority ("C.D.A.") whereafter plots were allotted to government employees; that on account of the acute shortage in the available plots, and given the large number of applications for the allotment of plots, there was a dire need to accommodate the applicants by the creation of more plots; that the Hon'ble Supreme Court of Pakistan, vide Order dated 16.04.2012, passed in Criminal Original Petition No.53/2010 and

connected matters, recorded the undertaking of Director (Law), FGEHF, that if and when some plots become available in Phase-IV then the employees of Pakistan Railways, who had applied for plots in Phase-IV, shall be accommodated according to their *inter se* priority/seniority. The learned counsel for the petitioner drew our attention to documents from the Prime Minister's Secretariat and submitted that FGEHF was under pressure to create new plots and allot them to the Officers listed in the letter dated 07.03.2013 from the Principal Secretary of the Prime Minister.

5. Learned counsel for the petitioner submitted that on account of the severe pressure exerted by the senior government employees, especially the employees of Pakistan Railways, a meeting of the officers from the Estate Wing and the Technical Wing of FGEHF was held with the Director General and it was decided that more plots should be created on the available vacant spaces in Phase-IV without altering the existing layout plan; that furthermore, it was decided in the said meeting that the layout plan for Sector G-14/1, 2 and 3 be reviewed to finalize the creation of new plots, and the consolidated and updated layout plan be submitted to the C.D.A. for approval; that vide letter dated 27.12.2015, the Director (Technical) FGEHF, sent the proposed revised layout plan to the C.D.A. for approval; that under the said revised layout plan, 32 additional plots were created in Sectors G-14/2 & 3 without altering the existing master plan and without affecting any public utility areas like schools, parks, shopping centers, mosque, graveyards, hospitals, roads and streets.

6. Learned counsel for the petitioner further submitted that the additional plots were created on the vacant space available on either side of the *Nullah* flowing through Phase-IV of the Project, and that on account of the creation of these additional plots, the width of the *Nullah* was reduced from 312 feet to about 100 feet. The services of a consultant were engaged by FGEHF and it was only after the consultant had submitted a report recommending a reduction in a width of a *Nullah*, that the revised layout plan was sent to the C.D.A. for

approval. The petitioner has managed to lay his hands on the Note File maintained by the Planning Wing of the C.D.A. and placed it on record. Perusal of this Note File reveals that the revised layout plan with additional plots along the *Nullah* was considered by the various Sections within the C.D.A. and finally, it was decided to carry out a detailed topographic survey at 2 foot contour intervals of the area around the *Nullah* and on ground demarcation to ascertain the available unutilized land. Furthermore, approval of the proposal for planning 12 plots was solicited. These proposals were submitted to the Chairman, C.D.A. The Note file does not reveal as to whether or not the Chairman approved the revised layout plan. The learned counsel for the petitioner has also drawn our attention to letter dated 14.10.2013 issued by N.A.B. to FGEHF, wherein the latter was advised that *bonafide* applicants were suffering due to the pending decision of C.D.A./FGEHF. This letter reveals that the C.D.A. was separately advised by N.A.B. to finalize the pending issue of the revision of the layout plan of Sector G-14. FGEHF was advised by N.A.B. to pursue this matter under intimation to the N.A.B. However, FGEHF was instructed by the N.A.B. not to issue any further allotments in this Sector, unless the allocated plot numbers were made available by the C.D.A. It was further submitted that the allotments of the newly created plots were made with the approval of the Director General, FGEHF; that FGEHF is divided into a Technical Wing, Law Wing, Finance Wing and Estate Wing; that survey work, creation of plots, planning and development is the responsibility of the Technical Wing, whereas the allotment of plots is not the exclusive responsibility of the Estate Wing, where the petitioner was posted.

7. As regards the allotment of a plot in favour of the petitioner, it was contended by the learned counsel for the petitioner that in the 106th meeting of the Executive Committee/Board of Directors of FGEHF, held on 11.05.2009, the eligibility criteria for the allotment of plots to officers on deputation against FGEHF's quota, was set. Under this

criteria, government employees posted on deputation in FGEHF were required to have a minimum of one and half year service in FGEHF and ten years in the government service to be eligible for an allotment of a plot, provided they had not been allotted a plot by the FGEHF or the C.D.A.; that on 14.02.2013, the petitioner applied to the Director General of FGEHF for an allotment of plot of Category-II in any developed Sector; that in the said application, it was acknowledged by the petitioner that the required one and half year period of service of the petitioner as a deputationist in FGEHF would be completed on 02.06.2013; that on 18.02.2013, the Assistant Director (Estate) FGEHF, proposed that as the petitioner's one and half year deputation period would be completed on 02.06.2013, Plot No.28-A, Street No.92, Sector G-14/3, Islamabad, be earmarked for the petitioner, and that a provisional allotment letter be issued to him on completion of the said mandatory time period; that this proposal was accepted by the Director General, whereafter a provisional allotment letter dated 05.06.2013 was issued to the petitioner; that the petitioner paid an amount of Rs.11,00,000/- for the said plot, and on 17.06.2013, a final allotment letter was issued in favour of the petitioner; that on 19.06.2013, the petitioner sold the said plot to Asif Mehmood for an amount of Rs.10 Million; that on 11.10.2013, FGEHF, in pursuance of the decision made by the Executive Committee/Board of Directors of FGEHF taken in its 128th meeting held on 11.10.2013, cancelled the allotment of the said plot in favour of the petitioner, as well as its subsequent transfer in the name of Asif Mehmood; that even though, the petitioner had instituted a civil suit against the cancellation of the said plot, presently, the ownership in the said plot vests in FGEHF; that the said plot was not given free of cost to the petitioner, but on payment of such an amount (reserved price) as FGEHF would have received from any other allottee; that no loss, whatsoever, has been caused to the national exchequer by any act of the petitioner; that the petitioner has

also been exonerated in the departmental inquiry against him.

8. It was further submitted that the ultimate authority, who sanctions the allotment of a plot in FGEHF, is the Director General, therefore the petitioner cannot be held liable for the allotment of the newly created plots to government servants; that the petitioner did not misuse his authority under the law for any illegal gain. He further submitted that there is no chance of the petitioner tampering with the evidence or repeating any offence. He also submitted that the petitioner is ready, willing and able to join the investigation and attend the N.A.B. as and when summoned by the Investigation Officer.

9. On the other hand, Sardar Muzaffar Ali Khan, Additional Prosecutor General N.A.B., with the assistance of Ms. Samina Rehman, Assistant Director/Investigation Officer, N.A.B., submitted that at the stage of hearing a petition for bail, deeper appreciation of the facts was not warranted; that the offence alleged to have been committed by the petitioner falls within the prohibitory clause of Section 497 Cr.P.C, hence, the accepted norm is that the refusal of bail is a rule, and the grant of bail is an exception in such matters. On merits, the learned Prosecutor General submitted that the petitioner had committed a grave offence by managing an allotment of a plot in his favour, which he sold for Rs.10 Million. This, he submitted, was a loss to the national exchequer. He admitted that although the said plot had been allotted to the petitioner after he completed a period of one and half year of service as a deputationist at FGEHF, but the said plot was earmarked for him before the completion of the said period. It was added that the petitioner played a major role in the creation of additional plots in Phase-IV; that the petitioner was instrumental in the allotment of the additional plots to undeserving government employees; that the revised layout plan with the additional plots had not been approved by the C.D.A.; that without such an approval and without carrying out a detailed survey, the additional plots could not be created or allotted; that action against the Director General

FGEHF, who was to be the principal accused, could not be taken because he died during the inquiry. The learned Additional Prosecutor General further submitted that the investigation in the matter had been authorized and that the Reference is ready and would be filed in the near future.

10. We have heard the arguments of the learned counsel for the parties and have perused the record with their able assistance.

11. After the petitioner was arrested on 14.12.2015, he was in N.A.B.'s custody for a period of sixteen days. Given the nature of the offence alleged to have been committed by the petitioner, this was a period long enough for the N.A.B. to interrogate him and confront him with documentary record. N.A.B.'s request for an additional period for the petitioner's physical remand was turned down by the learned Judge Accountability Court, vide order dated 31.12.2015. The petitioner has been in the judicial lock-up ever since then and there was nothing preventing the N.A.B. to confront him with the documentary record in the jail premises. The learned Judge Accountability Court, in his Order dated 31.12.2015, had also observed that the petitioner could be confronted with the documentary record in the jail premises. The learned counsel for the petitioner has already submitted that the petitioner shall join the investigation and attend the N.A.B. offices whenever called by the Investigation Officer. The learned Additional Prosecutor General had submitted that the Reference in the case is ready and shall be filed in the Court in the near future. This implies that the investigation is complete and petitioner shall face the trial after the Reference is filed.

12. We are not inclined to make any observation on the merits of the case lest it may go against either party or influence the impending trial before the Accountability Court. However, for the purposes of this petition, we have taken note of the fact that the allotments of the additional plots made by FGEHF have been cancelled and the amount deposited by the allottees has been secured. It is nobody's

case that these additional plots were allotted at lower or concessional rates. These plots were allotted at the reserved price fixed by FGEHF. If the N.A.B. feels that these plots ought to have been sold at the market price rather than the reserved price then the same principle would be applicable across the board to all the plots that are sold/allotted by FGEHF wherever they may be. This would be a larger issue warranting a policy decision by the competent authority.

13. There is no denying the fact that there were ever increasing number of applicants / government servants for the allotment of plots. For the present purposes, suffice it to say that the decision made by the management of FGEHF to create more plots in Phase IV was prompted by the immense pressure not just from the eligible government servants, but also from various departments including the Prime Minister's Secretariat. FGEHF engaged the services of a consultant for the creation of additional plots along the *Nullah*. After the revised layout plan was made, it was submitted to the C.D.A. for approval. However, the additional plots were allotted prior to the approval of the revised layout plan by the C.D.A. Now that the allotment of these additional plots have been cancelled by FGEHF, they can be allotted to the eligible and deserving government servants, which may include the existing allottees as well. Whether each and every government servant to whom the additional plots were allotted did not satisfy the eligibility criteria, if any, and whether the petitioner was instrumental in allotting the additional plots to undeserving applicants, are matters that the N.A.B. has yet to determine and would establish during the trial. And whether or not the petitioner and his colleagues at FGEHF derived an unlawful gain for themselves in the allotment of the additional plots to the allottees remains a matter for further inquiry.

14. As regards the allotment of a plot in favour of the petitioner, N.A.B. does not dispute the fact that the provisional and final allotments letters were issued to him after he had completed one and half year of service as a

deputationist with FGEHF. It is also not denied that he had been in the service of Pakistan for more than ten years. N.A.B. is of the view that the petitioner's application prior to the completion of one and half years of service in FGEHF and the earmarking of a plot for the petitioner is a grave illegality. We do not see as to how the petitioner can be held criminally liable for making a premature application on 14.02.2013 in which he had explicitly disclosed that the required one and half year period of service of the petitioner as a deputationist in FGEHF would be completed on 02.06.2013. Whether or not the petitioner was instrumental in having a plot earmarked for himself prior to 02.06.2013 is also not borne out from the record and is a matter of further inquiry.

15. It is not the N.A.B.'s case that the petitioner is withholding any official record. The case against the petitioner is entirely dependent upon documentary evidence, which is already in possession of the N.A.B. and there is no possibility of tampering with the same.

16. In the case of Tariq Javed Afridi Vs. State reported as PLD 2002 Lahore 233, it has been held *inter alia* that lack of jurisdiction on the part of a public functionary will not amount to an offence under Section 9(a)(vi) of the National Accountability Ordinance, 1999. If however, a public functionary deliberately uses or exercises his own authority or for that matter usurps the powers of another public functionary with the objective of gaining any benefit or advantage for himself or for any other person, he will be guilty of an offence under Section 9(a)(vi) of the N.A.B. Ordinance, 1999. It is not N.A.B.'s case that the petitioner usurped the powers of another public functionary so as to derive a gain or a benefit for himself. The ultimate authority in granting the allotment of plot to the petitioner was the Director General, and the allotment was made in favour of the petitioner after he satisfied the prescribed criteria, i.e. ten years of service in government employment and one and half year of service as a deputationist in FGEHF.

17. The petitioner and or the 3rd party purchaser are not in possession of the plot, which was allegedly unlawfully allotted to the petitioner. The allotment of this plot in the petitioner's favour and its further transfer in favour of Asif Mehmood has already been cancelled by FGEHF. The possession of the said plot is with FGEHF, and the reserved price paid by the petitioner is also secure with the FGEHF. The petitioner has remained incarcerated for two and half months. In such circumstances withholding of bail is not warranted.

18. In view of the aforementioned, the writ petition is allowed and in consequence thereof, the petitioner is admitted to bail subject to furnishing bail bonds in the sum of Rs.01 Million with two sureties in the like amount subject to the satisfaction of the Additional Registrar (Judicial) of this Court.

19. Before parting with the judgment, we may observe that nothing said herein should in any manner influence legal proceedings before any civil or criminal court regarding this matter.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

APPROVED FOR REPORTING

Qamar Khan*

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