

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Jamal Khan Mandokhail
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Syed Hasan Azhar Rizvi

C.M.A.501-K/2023 in C.A.85-K/2018
(Application for Return of Surety)

Mumtaz Ali ...Appellant

Versus

The State thr. Chairman NAB and Others ...Respondents

For the Applicant: Mr. Muhammad Ashraf Kazi, Sr. ASC
Mr. Ghulam Rasool Mangi, AOR

For the Respondents: Mr. Sattar Mohammad Awan, DPG (NAB)

Date of Hearing: 29.12.2023

Order

Muhammad Ali Mazhar, J. The crux of the matter is that the appellant in the main case (Mumtaz Ali) was indicted in Accountability Court-I, Sukkur, *vide* Reference No. 09/2016 for committing the offence of misappropriation of government funds by way of corruption and corrupt practices as envisaged under Section 9 (a) (iii) (iv) & (xii) of the National Accountability Ordinance, 1999 ("**NAO, 1999**"). After a full-fledged trial, the appellant was convicted by the Accountability Court ("**NAB Court**").

2. The relevant portion of the NAB Court judgment passed in the aforesaid Reference against the appellant is as under: -

"85. On evaluation of whole evidence, as discussed in Point No-1, it has been emerged out that the prosecution has succeeded in bringing the guilt of accused Mumtaz Ali Shaikh has caused loss to the National Exchequer to the tune of Rs.61,79,238/-, by way of misappropriation, as such he is liable to be convicted for having committed the offence of corruption and corrupt practice as envisaged u/s 9 (a) (iii), (iv), (vi) & (xii) of National Accountability Ordinance, 1999. Hence I convict and sentence the accused Mumtaz Ali Shaikh u/s 265-H (2) Cr.P.C read with section 10 of National Accountability Ordinance, 1999 to suffer R.I for Ten (10) years and to pay fine of Rs.61,79,238/- The fine amount shall be recoverable from the accused as arrears of land

Revenue in terms of section 33-E of National Accountability Ordinance, 1999.

86. The accused shall also stand disqualified in terms of section 15 of National Accountability Ordinance, 1999 for a period of ten years to be reckoned from the date of release after serving out his sentence awarded to him and also from seeking or from being elected, chosen, appointed or nominated as a Member or Representative of any public body or any statutory or local authority or in service of Pakistan or any Province and also he shall not be allowed to obtain any financial facility controlled by Government for the period of ten years. Since the accused is present on bail, therefore, he is taken into custody and remanded to Central Prison, Sukkur alongwith conviction warrant to serve out the sentence awarded to him. His bail bonds stand cancelled and surety stands discharged".

3. After recording conviction in the Reference, the convict (Mumtaz Ali) preferred Criminal Acctt. Appeal No. D-4 of 2023 in the High Court of Sindh, while the National Accountability Bureau ("**NAB**") also filed a cross appeal, i.e., Criminal Acctt. Appeal No. D-10 of 2023, for the enhancement of sentence. The High Court disposed of both the appeals in the following terms:

"8. We have also gone through Para 87 of the impugned judgment and found that appellant is retired Government Servant, besides is a person of advance age, therefore is facing agony of the investigation and trial, being in custody. The continuous incarceration of the appellant for four years has served very purpose of prosecuting him which meets ends of justice as well. We, therefore, deem it appropriate to maintain conviction to the extent of appellant and reduce the quantum of sentence from 10 years to the period which he has already undergone. With these modifications this appeal stands disposed of. The appellant shall be released forthwith if he is not required in any other custody case. He is also awarded benefit of section 382-B, Cr.P.C.

9. Consequently the Cr. Accountability Appeal No.D-10/2023 filed by the Chairman NAB through PGA has become infructuous and is hereby dismissed along with pending applications."

4. The learned counsel for the applicant (alleged surety) argued through the aforementioned petition and *vide* order dated 26.12.2018, the post-arrest bail was granted to the appellant subject to the deposit of Rs.61,79,238/- (Rupees Sixty-One Lac Seventy-Nine Thousand Two Hundred Thirty-Eight Only). He further argued that the applicant, who is the son of the appellant, had deposited Saving Certificates amounting to Rs.61,79,238/- before the Officer In-charge at the Branch Registry of this Court in Karachi in compliance with the order dated 26.12.2018. It was further contended that the Accountability Court convicted the appellant; therefore, he prayed for the discharge of

the alleged surety and further contended that the amount of fine may be recovered by the NAB under the Land Revenue Act.

5. The Deputy Prosecutor General, NAB ("**DPG**") vehemently opposed the application and argued that the bail was granted subject to the deposit of fine amount and not as surety; therefore, on conviction with the same amount of fine and affirmation of conviction by the High Court in appeal, the fine amount is liable to be paid to the NAB without any further recourse under Section 33-E of the NAO, 1999.

6. Heard the arguments. According to the conviction recorded by the NAB Court, the prosecution proved the guilt of the accused who caused a loss to the National Exchequer in the sum of Rs.61,79,238/- through misappropriation and committed the offence of corruption and corrupt practice as envisaged under Section 9 (a) (iii), (iv), (vi) & (xii) of the NAO, 1999. As a result of being found guilty, the appellant was sentenced to ten years of rigorous imprisonment and a fine of Rs.61,79,238/-. The order further stipulated that the fine shall be recoverable as arrears of land revenue in accordance with Section 33-E of the NAO, 1999. The appellant was also disqualified in terms of Section 15 of the NAO, 1999, for a period of ten years, from being elected, chosen, appointed or nominated as a Member or Representative of any public body or any statutory or local authority or in service of Pakistan or any Province, and he shall also not be allowed to obtain any financial facility controlled by the Government for a period of ten years. The judgment of the High Court in appeal reflected that, considering the advance age of the appellant, the High Court maintained the conviction, but reduced the sentence from ten years to the period already served and with this modification, the appeal was disposed of, but for all practical purposes, the liability of the payment of the fine remained intact and unremitting.

7. Indeed, what was argued by the learned counsel for the applicant in support of the application moved for discharging the alleged surety is not commensurate or complementary to the conditions set forth by this Court while granting post-arrest bail to the appellant. For ease of convenience and a true understanding of its spirit, the bail Order is replicated as under:

“Maqbool Baqar-J Mr. Muhammad Ashraf Kazi, learned Sr. ASC for the petitioner submits that the petitioner is ready and willing to deposit with the trial Court the entire amount of his liability, as so far determined by the prosecution. Syed Amjad Ali Shah, learned DPG NAB present in Court waives notice and submits that in view of the case of Shamraiz Khan vs. The State (2000 SCMR 157) he would have no objection to the grant of bail to the petitioner subject to his depositing the entire amount of his liability, in this case, being Rs.61,79,238/- (Rupees Sixty One Lac Seventy Nine Thousand Two Hundred & Thirty Eight) with the Assistant Registrar of this Court at Branch Registry Karachi. In the circumstances, this petition is converted into an appeal and allowed, the petitioner is admitted to bail subject to his depositing to the Assistant Registrar of this Court the above amount”.

8. The record reflects that during the pendency of trial before the NAB Court, the appellant applied for bail but *vide* order dated 21.06.2017, his first bail petition was dismissed by the High Court. Thereafter, on 07.12.2017, he again filed C.P. No. D-2319 of 2017 (the second bail petition) in the Sindh High Court on the ground of hardship but his second bail petition was also dismissed on 13.09.2018. As a last resort, he filed the bail petition in this Court which was allowed subject to the deposit of the entire amount of his liability. It further reflects from the main file that sixteen original Defence Savings Certificates were tendered/deposited to cover up and secure the fine amount commensurate to the bail order. The Office Letter dated 03.01.2019, shows that the Assistant Registrar of this Court sent a letter to the Officer In-charge, National Savings Center, Saddar, Karachi along with Xerox copies, communicating that the original Defence Savings Certificates mentioned in his letter dated 03.01.2019 be pledged in favor of Registrar, Supreme Court of Pakistan and necessary entries may be made in their record under intimation to this Court. In response to this letter, the Officer In-charge, National Saving Center, Karachi *vide* his letter dated 03.01.2019 communicated to the Assistant Registrar, Supreme Court, Karachi, that the payments of Defence Savings Certificates under Registration No.49112 dated 02.01.2019 for Rs.6,179,500/- issued in favor of Mushtaq Ali have been stopped till further orders of this Court and necessary remarks have been mentioned in the Office Record.

9. It is evident from aforementioned bail order that the appellant's counsel, on instructions, conveyed that the appellant voluntarily proposed and was ready to deposit the entire amount of his liability

and not as surety. On this offer, the DPG extended his no objection, following the dictum laid down in the case of Shamraiz Khan vs. The State (2000 SCMR 157). The post-arrest bail was granted subject to depositing the entire liability with the Assistant Registrar of this Court at the Branch Registry, Karachi. The learned counsel for the applicant argued that if the NAB wants to recover the fine money, it should invoke Section 33-E of the NAO, 1999, which provides that any fine or other sum due under this Ordinance, or as determined to be due by a Court, shall be recoverable as arrears of land revenue. In fact, it is a well-settled exposition of law that each case has to be decided on its own peculiar facts and circumstances. The appellant tendered the amount in lieu of availing the discretionary relief of bail and the same liability/fine was fixed against him in the NAB Court affirmed by the High Court. Had the appellant been acquitted by the High Court in appeal, he could have asked for the refund or release of the full amount deposited by him. However, the High Court maintained the conviction to the extent of the already undergone sentence without upsetting or affecting the quantum of the fine imposed upon the appellant by the NAB Court. In the case of Shamraiz Khan (*supra*), the accused was a contractor of the Food Department who, in conspiracy with other co-accused, had short-delivered some wheat bags. The survey of Shamraiz Khan (*supra*) depicts that during course of arguments, the learned Advocate General had informed the Court that a major portion of the amount had already been deposited by the petitioner and according to his instructions, about Rs. 5,25,00,000/- (Rupees Five Crore Twenty-Five Lacs) were yet to be recovered, on which the learned counsel for the petitioner informed the Court that securities of the petitioner in the sum of about Rupees Five Crores are lying with the Prudential Commercial Bank Limited, Quetta, and these securities can be encashed, and the amount was taken by the Department.

10. The learned counsel for the applicant referred to the case State and others vs. Muhammad Kaleem Bhatti and others (PLJ 2020 SC (Cr.C.) 225), in which the point in issue before this Court was whether by virtue of the provisions of Section 70, Pakistan Penal Code, 1860 ("PPC") the amount of fine imposed upon a convict can be recovered after a period of six years after passage of the sentence or fine or not. This Court held that in Section 33-E of the National Accountability

Ordinance, 1999 it has categorically been provided that a fine imposed upon a convict is to be recovered by way of arrears of land revenue and the said provision is not controlled by or subject to the provisions of Section 70, PPC. It was further held that the High Court had misdirected itself upon the law and had relied upon the provisions of Section 70, PPC without appreciating that the provisions of the National Accountability Ordinance, 1999 were to prevail in the matter as that was the special law catering for the situation at hand. Finally, this Court set aside the judgments passed by the High Court and clarified that by undergoing a sentence of imprisonment in default of payment of fine a convict is not absolved of his liability to pay fine and the amount of fine can still be recovered from him despite undergoing the sentence of imprisonment in default of payment of fine because a sentence of imprisonment in default of payment of fine is only a punishment for non-payment of fine and is not a substitute for the sentence of fine.

11. In the instant case, the appellant on his own wish and volition, agreed to deposit the misappropriated amount calculated by the NAB against him, which is still intact. The conviction has attained finality, as nothing suggests that the judgment of the High Court was ever challenged in this Court. Nothing in the bail order of this Court reflects that the appellant was called upon to furnish the surety, but he showed willingness to deposit the entire amount of liability. Therefore, the application for the withdrawal of surety was misconceived and injudicious. There is also no logical justification to call upon the NAB to start from scratch and initiate proceedings under Section 33-E of the NAO, 1999, after returning the amount to the appellant. If it happens, it will amount to defraud and deceive the Court to first secure the bail order through misrepresentation and, after finalization and affirmation of the judgment of the conviction by the Trial Court and Appellate Court, implore the release of the amount which is nothing but an ineffectual endeavor to deprive the National Exchequer of making the loss good, which was suffered due to corruption and corrupt practices. The appellant wants to drag the condition of payment of fine without any lawful justification. Even the applicant, who wants the release of the Defence Savings Certificates, was fully aware of the condition of the bail order and came forward to furnish certificates equal to the fine amount to rescue his own father. The ratio

of the judgment rendered by this Court in the case of Muhammad Kaleem Bhatti (*supra*) deduced that Section 33-E of the NAO, 1999 is not controlled or regulated by Section 70 of the PPC; rather, the provisions contained under NAO, 1999 will prevail as the same is a special law. The sentence of imprisonment in default of payment of fine does not absolve the liability to pay fine and such amount of fine can be recovered despite undergoing the sentence in default of fine for the reason that imprisonment in default of payment of fine is only a punishment for non-payment of fine and is not a substitute for the sentence of fine. In the instant case, there is no need to initiate or invoke proceedings under Section 33-E of the NAO, 1999 afresh when the amount is already deposited as admitted liability and not as surety. The office is directed to hand over the Defence Savings Certificates to the NAB after fulfilling all requisite formalities for the encashment of liability determined by the NAB Court and affirmed by the High Court to attain finality in the matter. However, it is clarified that on encashment of the Defence Savings Certificates by the NAB, if any excess amount is found over and above the quantum of liability on account of any accumulated profit/increase, the same shall be refunded back to the applicant after adjusting the liability/fine.

12. The aforementioned Civil Miscellaneous Application was fixed for hearing on 29.12.2023 when, for reasons to be recorded later, it was dismissed. Above are the reasons assigned in support of our short order.

Judge

Judge

Judge

KARACHI
29th December, 2023
Mudassar
Approved for reporting