

**JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT**

Eh. Cr. A No.12-P/2018.

**Ayaz-ul-Haq
Vs
State through NAB**

JUDGMENT

Date of hearing 04.10.2018

Appellant (by) Mr. Shahid Naseem Khan Chamkani, Advocate

State-NAB (by) Syed Azeem Dad, ADPG

MUSARRAT HILALI, J.- This criminal appeal is directed against the judgment dated 17.03.2018 delivered by Judge, Accountability Court-III, Peshawar in Reference No.05 of 2016, whereby appellant, Ayaz-ul-Haq, has been convicted and sentenced under Section 9 (a) (ix) (x) punishable under Section 10 of the National Accountability Ordinance, 1999 to undergo seven years R.I and fine of Rs.15 Millions in default whereof he shall further undergo 02 years S.I. It is also directed by the learned Judge, Accountability Court that the amount of fine is to be recovered under Section 33 (a) of NAO,

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1999. Benefit under Section 382-B Cr.P.C. was extended to him.

2. Brief facts of the case are that Reference dated 16.12.2015 (Ex.PW-14/35) forwarded by Director General NAB, Khyber Pakhtunkhwa was based on the investigation Report dated 13.12.2015 (Ex.PW-14/34) compiled by I.O and Assistant Director Muhammad Shafique. According to the investigation report, NAB authorities received complaints from victims, and accordingly an inquiry vide order dated 24.03.2015 was ordered by DG, NAB, Khyber Pakhtunkhwa against the nominated accused Ayaz-ul-Haq and others. In the inquiry, accused was found allegedly involved in collection of money under the garb of mudariba business and for the purpose lured people to handover their money on the promise that they shall be given exorbitant profit at the rate of Rs.4000/- to Rs.5500/- per month per lakh on the investment which payment of profit was stopped after few months. The detail of claims against the accused is as under:-

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S.#	Name and Parentage of Claimant	Amount of investment
1.	Fida-Ullah S/O Muhammad Tayab	Rs.58,50,000/-
2.	Muhammad Farooq S/O Qari Abdul Nasir	Rs.3,00,000/-
3.	Muhammad Nazeef S/O Syed Ahmad	Rs.10,00,000/-
4.	Riaz Muhammad S/O Aqiq Ahmad	Rs.4,00,000/-
5.	Inam-Ullah S/O Abdul Wahab	Rs.4,00,000/-
6.	Roshan Khan S/O Ziarat Gull	Rs.5,00,000/-
Total		Rs.84,50,000/-

The investigation report concludes that the accused was running the whole affair illegitimately based on fraud and dishonestly thus depriving claimants of their hard earned savings amounting to Rs.8.45 millions constituting an offence u/s 9 (a) punishable u/s-10 of the Ordinance.

3. After completion of investigation, the appellant was charge sheeted to which he did not plead guilty and claimed trial. At the trial, in order to prove its case, the prosecution examined 15 witnesses in all. The appellant, at the close of prosecution evidence, was examined under Section 342, Cr.P.C, who denied the allegations leveled against him. After hearing arguments, learned trial Court, vide judgment dated 17.03.2018,

impugned herein, convicted and sentenced the appellant as mentioned above. Feeling dissatisfied, the appellant has preferred the instant appeal.

Arguments heard and record perused.

4. The accused-appellant has been charged by the NAB on the allegation of corruption and corrupt practices as defined under Section 9 of the National Accountability Ordinance, 1999.

In order to see how this case has arisen, some necessary facts need to be stated. The accused-appellant was allegedly involved in collection of money under the garb of mudariba business after luring or enticing people to hand over their money to the accused on the promise that they would get exorbitant monthly profit and after giving the due profit for some months, the same was stopped and thereby fraudulently misappropriated/embezzled an amount of Rs. 84,50,000/- of the claimants namely, Fida Ullah, Muhammad Farooq, Muhammad Nazeeb, Riaz Muhammad, Inam Ullah and Roshan Khan.

5. Under Section 9(a)(ix) of the National Accountability Ordinance, 1999, if a person commits the offence of cheating as defined in Section 415 of Pakistan Penal Code, 1860 and thereby dishonestly induces members of the public at large to deliver any property including money or valuable security to any person.

Similarly, Section 9(a) (x) says that if any person commits the offences of criminal breach of trust as defined under Section 405 of Pakistan Penal Code, 1860 with regard to any property including money or valuable security entrusted to him by members of the public at large.

6. In the instant case during the course of trial, the prosecution has examined 15 witnesses in all. The most important of them are PW-3, 4, 5, 6 and 7, the complainants. All these witnesses in their statements claimed that the accused induced them to invest in the mudariba business which according to him was free of interest, purely Islamic and in accordance with sharia. The accused also promised that they would be paid

exorbitant monthly profit, however, after paying profit for 5/6 months and in some of the cases for 7 months, the accused stopped payment of monthly profit and on demand, he started giving lame excuses for the return of principal amount. The witnesses also admitted in their cross examination that mudariba contract was signed by Inamullah accused and the complainants and that the role of accused-appellant was that of 'Wasi' and that there was no advertisement neither on T.V nor in newspaper or in any other form alluring the complainants to invest in the mudariba business of the accused.

7. The word "*Induce*" means to influence someone to do something while "*inducement*" has been defined as allurement. To make a person criminally accountable, it must be proved that an act, which is forbidden by law, has been caused by his conduct and that the conduct was accompanied by two essential elements of crime, namely *actus reus* and *mens rea*. Keeping in view the legal provision and definition formulated, let us appreciate the deposition of PW-3, 4,

5, 6 & 7 to see as to whether the ingredients of the offence allegedly committed by the accused have primarily been fulfilled satisfactorily?

Muhammad Nazeef, the complainant, was examined by the learned trial Court as PW-3. In his examination-in-chief, the witness deposed that:

"Accused, claiming to be a qualified Mufti and a teacher in a madrassa at Rawalpindi, also belonged to the district Batagram and induced the general public including himself to invest in the mudariba business of accused in the year 2012. According to the witness accused claimed his business to be free of interest, purely Islamic and in accordance with Sharia. Accused promised the witness for profit of Rs. 4000/- to Rs. 5000/- per month per lac of investment and he thus invested Rs. 10,00,000/- with the accused. He stated to have received the profit for 5-6 months which was reinvested with the accused. According to him accused stopped payment of profit subsequently and, when demanded of the principal amount, started delaying tactics for different dates. The witness stated to have filed application with the NAB authorities alongwith copy of CNIC (Ex.PW 5/1) at Pages 62 to 64 of the Reference. He highlighted payment receipt and mudariba agreement (Ex.PW 5/2) at Page 65 and 66 of the Reference containing signatures of the accused Ayazul Haq as recipient of Rs. 2,00,000/- and Rs.8,00,000/- (Rs.10,00,000/- in toto) from the witness. Copy of mudariba agreement dated 01.05.2012 at page 66 of the Reference contains name of accused Ayazul Haq duly printed on the Form as Wasi for Mudarib

(his brother Inam Ullah). An affidavit in respect of above mentioned application was also furnished by the witness to the NAB authorities and the same (Ex.PW 5/3) is at Page 67 of the Reference. He stated to have been examined by the case I.O as well.

In his cross examination, the witness disclosed himself to be a retired teacher receiving Rs. 26000/- as monthly pension and not doing any job for having invested his money in the mudariba business. He conceded that mudariba contract at page 66 of the Reference did not contain signatures of the accused. He refuted the suggestion of making a false statement and admitted that no advertisement on TV, Newspaper or in any other form was done regarding the mudariba business. He told that it was co-complainant Qari Muhammad Farooq who informed him about the mudariba business and that he invested the money on separate occasions. To a question he stated to might have received profit for 7/8 months and that the same was reinvested whenever received. With regard to the profit he never issued any receipt or acknowledgment".

Since the statements of the remaining PWs are ditto copy of each other with regard to the allegations against the accused-appellant, therefore, the same need not be reproduced here. The witnesses with the exception of one or two, have admitted at trial and has also been held by the learned trial Court in para-11.3 of the impugned judgment dated 17.03.2018 that some of the

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mudariba nama were signed by the accused-appellant as 'Wasi' a guarantor, however, while going through the record we find that there is no undertaking by the appellant that in case Inamullah, the principal accused fails to abide by the terms of the agreement, he would satisfy the claim of the complainants. It is not disputed that an agreement between accused Inamullah (not before the Court) and the PWs individually arrived and agreed upon certain terms of investment of an amount. The margin of the profit was also fixed by them. The agreed profit was paid to the PWs for some months, the receipts whereof were exhibited in the Court and are available on the file. It has been noted that the accused, as per the statements of complainants, failed to pay the monthly profit and when the PWs demanded their principal amount, there was no denial on the part of the accused Inamullah, however, the matter was delayed on one pretext or another, whereafter complaints were made to NAB for the recovery of the amount.

8. In view of the facts discussed hereinabove, we are of the considered view that the allegations in the complaint and the documents placed on record by the complainants, if taken on their face value, do not disclose dishonest intention in the mind of the accused at the inception nor the act of cheating the complainants, having signed the mudariba nama. Thus the ingredients of Section 9(a)(ix) (x) are not made out. Upon a fair and ordinary construction of the complaint the matter appears to be a civil matter rather than a criminal one.

9. In *Rafiq Haji Usman .Vs. Chairman, NAB and another (2015 SCMR 1575)* while dealing with a prosecution under Section 9 of the NAO, held that:-

"In case of entrustment, money/property received is to be retained for return to the giver at a later time as opposed to a promise or contract where invest is made or money is paid for the purpose of fulfillment of a specific agreed upon purpose/contract--- Where money/property, in such a case, has been entrusted to a person, using such amount/property for any other purpose would not attract the penal consequences of S.405 PPC."

10. In the instant case, out of six, five claimants submitted an application to NAB for taking action

against the accused-appellant for inducing public at large.

The word "**public**" includes any class of the public but that class must numerically be sufficient to designate the public at large. While defining the term '**public at large**', the august Supreme Court in case titled "**Rafiq Haji Usman .Vs. Chairman, NAB and another (2015 SCMR 1575)**", held as under:-

"We are of the view that 13 persons would hardly constitute public in its literal and ordinary sense; furthermore meaning of the word large i.e. "considerable or relatively great size, extent or capacity having wide range and scope" does not bring 22 or 13 persons as the case may be within its concept and fold. Thus from this angle as well the said section seemingly perhaps can be held not attracted to the instant case. It is trite law that the provisions of law which constitute criminal offences shall be strictly construed and applied, thus prima facie we have not been persuaded by the plea made by the learned Deputy Prosecutor General that in such a case section 9(x) ibid shall be attracted".

11. As evident from the material available on the record and in the light of illuminating judicial pronouncements of the august Supreme Court, it is concluded that mere violation of agreement/contract does not ipso facto attracts the definition of cheating and

criminal breach of trust and would not attract the penal consequences.

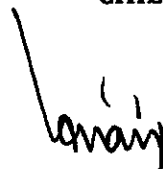
As far as the question of limitation is concerned, the august Supreme Court in case titled "*Mian Muhammad Nawaz Sharif .Vs. the State (PLD 2009 Supreme Court 814)*" held that:-

"Circumstances which prevented the petitioner from filing the petition, in the present case, against the conviction and sentences were indeed extraordinary and could be considered to be sufficient cause to extension of time."

12. Consequently, this appeal is allowed and the appellant's conviction and sentences under Section 9(a)(ix)(x) of the NAO are set aside. He is acquitted of the charge leveled against him. He shall be released from jail forthwith if not required in any other case.

13. Above are the reasons for the short order of even date.


CHIEF JUSTICE


JUDGE

(DB) Hon'ble Mr. Justice Waqar Ahmad Seth, Chief Justice
Hon'ble Justice Musarrat Hilali

Noor Shah, PS