

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR,**  
**[Judicial Department].**

**Writ Petition No.1241-P/2017**

Date of hearing:- 22.06.2017

Petitioner(s):- Abdul Waheed Khan by Barrister S.Mudasser Ameer.

Respondent (s):- NAB by Mr. Zair Nawaz Khattak, Advocate.

**ORDER**

**SYED ARSHAD ALI, J:-** By invoking the constitutional jurisdiction of this Court under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (**the Constitution**), petitioner Abdul Waheed Khan, who is behind the bars since 25.10.2016, in consequence of a Reference No.14 of 2016, initiated by the National Accountability Bureau (**NAB**) qua offence of cheating the members of the public at large and depriving them from their hard earned money on the pretext of payment of exorbitant profit by investment in their business, seeks his release on bail.

2. Accusations against the petitioner are that he along with his brother/ co-accused Abid Nadeem (the Proprietor of Allied International Money), having a business with the name and style of M/S Allied International Money Changer, Franchise currency booth, CNG Stations, Exchange Company Pvt Ltd, situated in shop No.7 Feroze Centre, behind Usmania Restaurant Blue Area, Islamabad,

fraudulently and dishonestly lured/induced/persuaded the members of the public at large to invest money in their business on a promise that they would be paid an exorbitant profit, but neither any profit was paid to the affectees nor was their principal amount returned. On the complaints of the affectees twelve in number to NAB, an inquiry was authorized by the DG NAB and on confirmation of the allegations, was converted into investigation and on completion of investigation, reference was filed against the petitioner and his co-accused before the learned Accountability Court, Peshawar, which is pending trial.

3. Arguments of learned counsel for the parties heard and record perused with their able assistance.

4. The accusations against the petitioner fall within the mischief of section 9 (ix) and 9 (x) of the National Accountability Ordinance, 1999 (**the Ordinance**), punishment of which has been provided under section 10 of the Ordinance. However, before dialing upon the merits of the case qua determination of prima facie complicity of the petitioner in the commission of offence or otherwise, it would be advantageous to first understand the true spirit of section 9 (ix) and 9 (x) of the Ordinance and the intent of the legislature behind its enactment, hence, for the sake of convenience, we would like to reproduce the same as under:-

**“9. Corruption and Corrupt practices:**

(a) A holder of a public Office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:-

- (i).....
- (ii).....
- (iii).....
- (iv).....
- (v).....
- (vi).....
- (vii).....
- (viii).....

(ix) If he commits the offence of cheating as defined in section 415 of the Pakistan Penal Code, 1860 (Act XLV of 1960), and thereby dishonestly induces members of the public at large to deliver any property including money or valuable security to any person; or

(x) if he commits the offence of criminal breach of trust as defined in section 405 of the Pakistan Penal Code, 1860 (Act XLV of 1860) with regard to any property including money or valuable security entrusted to him by members of the public at large;”

5. The bare reading of section 9 of the Ordinance depicts that cheating per-se is a crime under the Pakistan Penal Code, but to attract the provisions of section 9 of the Ordinance and to enable the NAB to assume jurisdiction in the matter, the element of **“inducing the members of the public at large”** is sine qua none so as to constitute the offence under the Ordinance *ibid*. In this case, though the NAB has taken cognizance on the basis of complaints of various persons/affectees, but a look over the stance of the affectees would reveal they have not denied their business relation with the petitioner from a particular period of time so much so that some of them have admitted the receipt of

profit in the business at the hands of the petitioner for a considerable period. The grievance of the affectees is that later on, the petitioner stopped the profit and refused to return their principal amount too. At this juncture, I will refer to the final Investigation Report, wherein some of the affectees, namely, Sarwar Khan, Ghulam Muhammad, Mian M.Akram and M.Alam Khan, have received rupees 9 million, 3 lacs, 02 millions and 4 Million, respectively, as profit in the business.

6. We would also refer to cheating which has been defined under section 415 PPC in the following words:-

**“415.Cheating.** Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property or intentionally induce the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person (or any other person) in body, mind, reputation or property, is said to “cheat”.

7. Bare reading of section 415 PPC depicts that unless it is established that the accused at the time of inducing the person to invest with him had the intention not to return the amount, the offence of cheating cannot be said to have been committed, rather such eventualities may lead to a civil obligation. If at any time, during trial or subsequent period the accused refuses to pay the amount or showed his inability to make the payment would not attract the provision of section 415 PPC. Similarly, inability to

pay the outstanding liabilities may lead to certain consequence under the Civil Law, as inability to pay, and receiving investment with the intention not to re-pay, is two different concepts, having different consequences. In case titled, **“Muhammad Alauddin Vs the State” (PLD 1959 Dacca 88)**, the Hon’ble Dacca High Court while dealing with similar situation has held as under:-

“In order to constitute cheating it must be established that someone is made to part with some property on the promise of another to return something in lieu thereof which the latter had no intention to give. The initial intention to deceive, therefore, must be established in order to justify conviction for cheating. The mere fact that the accused deny transaction at the trial and refuse to return the money does not necessarily show that they had a criminal intent from the beginning. Their denial may merely amount to the usual mistaken attempt to protect themselves from the result of the prosecution.”

8. Similarly, to constitute the offence of criminal breach of trust, the element of entrustment of property or money which is dishonestly misappropriated or disposed in violation of any direction prescribed by law or the mode in which such trust was to be discharged or in the context of any contract etc, however, in an arrangement when one person receives money or investment from another person for carrying on business, this transaction per se will not attract the entrustment of property as provided under section 405 PPC, even if the said money received for a particular business is invested or utilized for some other purposes. In case titled, **“Shahid Imran Vs the State and**

**another” (2011 SCMR 1614)**, it has been held by the Hon’ble Supreme Court that:-

“The law clearly recognizes a distinction between payment/investment of money and entrustment of money or property as in the former case the amount of money paid or invested is to be utilized for some purpose whereas in the later case that sum of money or property is to be retained and preserved for its return to the giver and the same is never meant to be utilized for any other purpose..a mere breach of a promise, agreement or contract does not ipso facto attract the definition of criminal breach of trust contained in section 405 PPC and such a breach is nor synonymous with criminal breach of trust without there being a clear case of entrustment”.

9. The material collected so far by the Investigating Agency transpires that the twelve claimants/affectees have either invested their amount in the business or have paid money to the petitioner for a particular purpose. The business of the petitioner in the shape of running CNG Stations in various cities of the country, real Estate and Money exchange, has not been denied either by the prosecution or the affectees. On the face of record, it was due to liquidity crush that petitioner remained unable to repay the amount invested with him. In view of the above circumstances, the dishonest intention of the petitioner to induce the affectees fraudulently and dishonest so as to deceive them, which are sine qua non for constituting the offence, is yet to be determined during trial after recording evidence, however, at the moment this aspect of the case makes the case of the petitioner arguable for the purpose of

bail. Even otherwise in order to attract the provision of section 9 of the Ordinance, and the NAB to assume jurisdiction in the matter, it must be establish that infact the public at large was dishonestly and fraudulently induced to make investment with the intention not to repay the same amount. Besides, the number of the affectees/claimants in this case is twelve which does not fall within the meaning of public at large in light of ratio of judgment of the Hon'ble Apex Court in case titled, **“Rafiq Haji Usman Vs Chairman NAB and another” (2015 SCMR 1575)**. The relevant part of the judgment in this report is reproduced below:-

“We are of the view that 13 persons would hardly constitute Public in its literal and ordinary sense; further more 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 person as the case may be within its concept and fold. Thus from this angle as well as 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 constructed 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.”

10. For what has been discussed above. This petition is allowed.

11. These are the reasons for our short order of even date which read as under:-

“For the reasons to be recorded later, this writ petition for bail is allowed. Accused-

petitioner Abdul Waheed Khan son of Mosam khan is admitted to bail provided he furnishes bail bonds in the sum of rupees ten millions (10.00 million) with two sureties each in the like amount to the satisfaction of learned Trial Court, who shall ensure that the sureties are local, reliable and men of means.”

**Announced:**  
**22.06.2017.,**

*Siraj Afridi P.S.*

**JUDGE**

**JUDGE**