

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

Ehtesab Criminal Appeal No. 03-P/2021

Ahsan Ullah Khan vs. Chairman NAB and others.

J U D G M E N T.

Date of hearing: 01.07.2021

Petitioner (s): By Barrister Syed Mudasser Ameer.

**Respondent/State (s): By Mr. Muhammad Riaz Mohmand,
ADPG.**

SYED ARSHAD ALI, J:- This consolidated judgment in the instant Ehtisab Criminal Appeal filed by appellant Ahsan Ullah Khan under section-32 of the National Accountability Ordinance, 1999, shall also dispose of the connected Writ Petition No. 604-P/2021 filed by the petitioner for suspension of operation of the sentence awarded by the learned Judge, Accountability Court-IV, Peshawar.

2. Arguments heard and record of the case was perused.

3. It is the case of prosecution that on receipt of information regarding illegal promotions of Revenue Staff and illegal allotment of land by the appellant, while serving as Senior Member Board of Revenue, an inquiry was conducted which later converted into investigation and during inquiry/investigation, the Investigation Officer collected necessary documentary as well as oral evidence and submitted his report wherein it was held that accused Ahsan Ullah Khan during his tenure as Senior Member Board of Revenue illegally and without jurisdiction promoted revenue officials

by misusing his authority under the garb of judicial powers. That during investigation it was established that the appellant has committed the offence of corruption and corrupt practices as defined in section 9(a) (iv) punishable under Section 10 of the National Accountability Ordinance, 1999 ("*NAO, 1999*").

4. On the basis of inquiry, Reference against accused Ahsan Ullah Khan/appellant was submitted in the Accountability Court-IV, Peshawar. Accused was summoned repeatedly through SHO concerned but the summons returned un-served, on the basis whereof the statement of Zahoor Ahmad DC was recorded. The statement of the DEFC is Ex.SW1/2 while the statement and his report are Ex.SW1/1 and Ex.SW1/2. On the basis of statement of the DFC, proceedings under Section 512 Cr.P.C. was initiated against the accused-appellant. During proceedings under Section 512 Cr.P.C., statements of some of the PWs were recorded including the investigation officer. In the light of the evidence recorded by the prosecution, the accused was declared proclaimed offender and perpetual warrant of arrest was issued against him vide order dated 02.01.2017. The accused was also convicted under Section 31-A of the National Accountability Ordinance, 1999 and sentenced to undergo three years imprisonment.

5. Arguments heard and record perused.

6. The essential question before this Court as to whether the present appellant could be tried and convicted in

absentia under Section 31-A of the NAO, 1999. In order to comprehend the mandate of Section 31-A of the NAO, 1999, it would be appropriate to reproduce the said provision of law:-

“31-A Absconding to avoid service of warrants.-

- (a) Whoever absconds in order to avoid being served with any process issued by any Court or any other authority or officer under this Ordinance or in any manner prevents, avoids or evades the service on himself of such process or conceals himself to screen himself from the proceedings or punishment under this Ordinance shall be guilty of an offence under this Ordinance punishable with imprisonment which may extend to three years notwithstanding the provisions of sections 87 and 88 of Code , or any other law for the time being in force.*
- (b) Notwithstanding the provisions of section 18 it shall not be necessary to file a reference under this section in cases where a reference is pending before the Court”.*

7. The bare perusal of the provision would show that a person deliberately avoiding his appearance/participation in a criminal trial under the NAO, 1999 becomes guilty of an offence distinct from the offences for which he is tried. We have also perused Sections 16 & 17 of the NAO, 1999 envisaging procedure of the trial, which are reproduced as under:-

“16. Trial of offences:

- (a) Notwithstanding anything contained in any other law for the time being in force an accused shall be prosecuted for an offence under this Ordinance in the Court and the case shall be heard from day to day and shall be disposed of within thirty days.*
- (b) The Court shall sit at such place or places as the Federal Government may, by order, specify in this behalf.*
- (c) Where more Courts than one have been established at a place, the Chief Justice of the High Court of the Province concerned shall designate a Judge of any such Court to be an Administrative Judge and a case triable under*

this Ordinance shall be filed before the Court of the Administrative Judge who may either try the case himself or, assign it for trial by any other Court established at that place at any time prior to the framing of the charge.

- (cc) In respect of a case assigned to a Court under sub-section (c), all orders made or proceedings taken before the assignment shall be deemed to have been made or taken by the Court to which the case has been assigned.*
- (d) Notwithstanding any thing contained in this section, if in respect of any case relating to an offence triable under this Ordinance, the Chairman NAB, having regard to the facts and circumstances of the case may file a reference before any Court established anywhere in Pakistan, and such Court shall have the jurisdiction to try the same.*

17. Provisions of the Code to apply:

- (a) Notwithstanding anything contained in any other law for the time being in force, unless there is anything inconsistent with the provisions to this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1989), shall mutatis mutandis, apply to the proceedings under this Ordinance.*
- (b) Subject to sub section (a), the provisions of Chapter XXIIA of the Code shall apply to trials under this Ordinance.*
- (c) Notwithstanding anything contained in sub-section (a) or sub-section (b) or in any law for the time being in force, the Court may, for reasons to be recorded, dispense with any provision of the Code and follow such procedure as it may deem fit in the circumstances of the case.*
- (d) Notwithstanding anything in section 234 of the Code, a person accused of more offences than one of the same kind committed during ht space of any number of years, from the first of the last of such offences, may be charged with and tried at one trial for any number of such offences”.*

8. Nowhere the aforesaid provisions manifest the intention of the legislature for trial of an accused under Section 31-A of the NAO, 1999 in absentia. Even otherwise, after the judgment passed by the Apex Court in the case of **Muharam Ali vs. Federation of Pakistan** (PLD 1998 SC 1445) and in the case of **Manzar Qayyum vs. The State and others** (PLD 2006 SC 343), trial of an accused in absentia

unless elaborately provided in a Statute is itself void. In this regard, we can refer to a judgment of the Hon'ble Karachi High Court rendered in the case of **Noor Muhammad Khatti vs. The State** (2005 PCr.LJ 1889) authored by his Lordship Mr. Justice Rahmat Hussain Jafferri, para-06 of the said judgment is reproduced as under:-

“We have given due consideration to the arguments, gone through the material available on the record and find that the accused were convicted in absentia. In some of the earlier enactments, the Legislature have allowed the Courts to try the accused in absentia after fulfilling certain conditions. The said provisions are available in Suppression of Terrorist Activities Act, 1975 and Anti-Terrorism Act, 1997. IN both the enactments, a detailed procedure has been provided for the trial of accused who absconds because he evaded and avoided the service of warrants or concealed himself to screen himself from the proceedings and punishment. The procedure starts from the issuance of warrants, publication of proclamation in the newspapers, engaging an Advocate on State expenses or by the accused, framing charge, recording evidence allowing the Advocate to conduct cross-examination to the witnesses, hearing arguments, pronouncing judgment in the absence of the accused, setting aside judgment if accused appears before the Court after fulfilling certain conditions.

9. We have also gone through the celebrated judgment of the Apex Court in the case of **Dr. Mobashir Hassan and others vs. Federation of Pakistan and others** (PLD 2010 Supreme Court 265). In the said judgment, the vires of National Reconciliation Ordinance, 2007 was challenged. Through the said Ordinance, an amendment was made in the National Accountability Ordinance, 1999 through Section 31-aa whereby trial in absentia was declared illegal. Although in **Dr. Mobashir Hassan's case** the said provision

was declared ultra vires but on the principle of trichotomy. Therefore, the trial and conviction of an accused for an offence under Section 31-A of NAO, 1999 would though be illegal, however, the convicted person has to formally challenge the same before the Appeal Court under Section 32 of the NAO, 1999. In this regard, we would like to reproduce para-71 & 72 of **Dr. Mobashir Hassan's case (PLD 2010 Supreme Court 265)**, which reads as under:-

“71. On having gone through the above judgment, it is crystal clear that offence falling within the mischief of Section 31A of the NAO, 1999 is distinct offence, from the allegations made in the reference, which was filed against an accused and if the convict has been acquitted in the reference or the reference has been withdrawn, even then the conviction under Section 31A of the NAO, 1999 remain operative and the convict has to avail remedy, for getting it set aside, by approaching the next higher judicial forum, as envisaged under Section 32 of the NAO, 1999.

72. As discussed above, conviction in absentia is a final order, therefore no other forum can declare such conviction as void, except a judicial forum, that too, by filing an appeal. But in instant case, as it has been pointed out hereinabove, by amending a law, such conviction has been declared void, therefore, the amendment in Section 31A of the NAO, 1999 by inserting clause (aa), by means of Section 6 of the NRO, 2007, is declared void being against the provisions of Section 31A read with Section 32 of the NAO, 1999, which provides remedy to the convict to file appeal”.

10. In view of the above, we set aside the impugned judgment dated 02.01.2017 of learned Accountability Court-IV, Peshawar convicting the appellant under Section 31-A of NAO, 1999 to suffer three years imprisonment is set aside and the case is remanded to the learned trial Court to proceed against the appellant in accordance with law. During the proceedings, the present appellant shall remain on bail against

the existing sureties/bond till the conclusion of the trial unless he misuses the concession of bail and in that eventuality the prosecution would be at liberty to approach this Court for recalling of the bail.

11. This appeal as well as the connected Writ Petition No. 604-P/2021 are disposed of accordingly.

ANNOUNCED.
Dated: 01.07.2021

JUDGE

JUDGE

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