

Judgment Sheet
IN THE PESHAWAR HIGH COURT,
PESHAWAR,
JUDICIAL DEPARTMENT.

JUDGMENT

W.P. No.832-P/2017.
Date of hearing 30.03.2017.

Sahibzada Alamgir
Vs
NAB & others.

Petitioner(s) by: **Mr. Shumail Ahmad Butt,**
 Advocate.
Respondent(s) by: **Mr. Riaz Mohmand Special**
 Prosecutor alongwith Junaid
 Nasir, I.O.

IKRAMULLAH KHAN, J. This single judgment shall dispose of instant petition (WP No.832-P/2017) filed by petitioner Sahibzada Alamgir and connected Writ Petition No.843-P/2017 filed by petitioner Olas Khan because in both petitions, petitioners have prayed for their release on bail in one and the same NAB case.

2. Learned counsel for petitioners contended that the case against the petitioners is that of further inquiry into their guilt as prima facie, no any such act

has committed by the petitioners, which attract any provision contained in Section 9(a) of NAB Ordinance 1999(hereinafter Ordinance) for which the petitioner could be held responsible in order to charge them under the Ordinance; that the NAB authorities had not only twisted facts but also have implicated the petitioner in the case with malafide, which had curtailed the liberty of the petitioners in utmost disregard of the mandate of the Constitution, 1973. Learned counsel for petitioner namely Sahibzada Alamgir, while taking us alongwith the available record contended that petitioner Sahibzada had been posted as Deputy Director Northern Region, somewhere in the year 2009, while all the site and contract were already selected and awarded respectively prior to his posting, any nexus with the charges leveled against him, which otherwise are general in nature and without specification in order to attract any offence mentioned under Section 9 of the Ordinance. Both the learned counsel for petitioners at the conclusion of their argument, vehemently stressed the hardship facing by petitioners and others similar accused, who were booked under the NAB Ordinance

in fixation of their Writ Petitions, which consumed considerable time and made their submissions that there is no any impediment provided under the NAB Ordinance, to approach the High Court for release of accused in term of Section 497 Cr.PC by filing bail petitions but the office is not entertaining bail petition in view of Section 9-b of NAB Ordinance and the procedure adopted since the year 2001, while the bar placed in Section 9-B of NAB Ordinance, already had been removed thereafter pronouncement of the direction of the apex Court rendered therein **“Asfandiyar Wali Khan’s Case (PLD 2001 SC 607)”** and Section 9-B of the Ordinance was amended through Ordinance XXXV of 2001, but still bail petition in term of Section 497 Cr.PC is not entertained by the office, which is against law.

3. On the other hand, learned DPGs in both the petitions turn by turn, argued that petitioner namely Olas Khan was posted as Project Director of the Project known as “Water Conservation and Productivity Enhancement through High Efficiency Irrigation Systems (NWFP component)” and he by misusing his official authorities, dishonestly and

fraudulently misappropriated the funds provided for the project and thereby caused loss of Rs.113,995,339/- to the exchequer, when they were confronted by this Court that what was the role of accused Sahibzada, they made submissions that he had facilitated the offence in connivance with co-accused. On the point of legal preposition put forward by learned counsel for petitioners that NAB authorities do not provide complete case record to the Court and comments which occasioned hardship for counsel of accused as well as the Court, learned DPG argued that Section 9(B) of the NAB Ordinance, bar the jurisdiction of any Court in matter of granting bail therefore, bail in term of Section 497 Cr.PC could not be sought in view of express bar as provided under Section 9(B) of the NAB Ordinance.

4. We have heard learned counsel for petitioners as well as learned DPGs, in light of available record and law on the subject.

5. In order to eradicate the menace of corruption, corrupt practices, misuse and abuse of power, misappropriation of property and all such like matters connected and ancillary or incidental thereto,

the National Accountability Bureau Ordinance, 1999 was promulgated with retrospective effect from 1.1.1985.

6. In the original Ordinance, the jurisdiction of High Court was expressly ousted in matter of bail and appeal against acquittal or conviction, as well as the power exercisable under Section 426, 491, 497, 498, 561-A Cr.PC. Not only the jurisdiction of High Court in term of Section 497 Cr.PC but also in view of Section 498 Cr.PC was made expressly barred. The original Section 9(B) of NAB Ordinance, if reproduced would be read as:-

9-(b)---- All offences under this Order shall be non-bailable and notwithstanding anything contained in Ss.426,491, 497,498 and 561-A or any other provision of the Code, or any other law for the time being in force no Court (including High Court), shall have jurisdiction to grant bail to any person accused of any offence under this Order.”

7. The bare reading of the afore-stated provisions of law (then it was) had expressly ousted the jurisdiction of High Court not only in grant of bail to an accused in view of and under provisions of Section 497 Cr.PC, but also under Section 426, 491,

498 & 561-A Cr.PC. Persons arrested and confined under any provisions of the Ordinance, in order to seek their release, approach the High Court, by invoking its jurisdiction under Article 199 of the Constitution, 1973. The matter came before the apex Court in “Afsandiyar Wali Khan’s case supra. Thereafter the apex Court thoroughly deliberated on various provisions of the NAB Ordinance, rendered its findings as such.

8. After pronouncement of the judgment of apex Court supra, the legislator brought the relevant amendment in various provisions of NAB Ordinance including Section 9(B) which after the amendment, introduced through Ordinance XXXV of 2001 amended the above referred provisions of law with effect from 10.8.2001, which reads as:-

9-(b)---- All offences under this Order shall be non-bailable and notwithstanding anything contained in Ss.426,491, 497,498 and 561-A or any other provision of the Code, or any other law for the time being in force no Court, shall have jurisdiction to grant bail to any person accused of any offence under this Order.”

9. After the amendment the jurisdiction of the Accountability Court for grant of bail remained to be ousted as the word ‘Court’ used in Section 9-B be construed is Accountability Court only as defined in Section 5(g) of NAB Ordinance, however, after the omission of words “including the High Court” through Ordinance XXXV of 2001, the High Court can grant bail, on the grounds and on the principle of law, enumerated by superior Courts, in term of Section 497 Cr.PC. The embargo and ouster clause of jurisdiction of High Court had done away with soon after the promulgation of Ordinance XXXV of 2001 effective from 1.8.2001.

10. The same view has also been expressed by the apex Court in case of **“Muhammad Saeed Mehdi Vs The State etc” (2002 SCMR 282)**, which has binding effect on all Courts in term of Article 199 & 185(3) of the Constitution, 1973, which reads as:-

*(d) National Accountability Bureau Ordinance (XVII of 1999) -----
S.9(b) [as amended] --- Constitution of Pakistan (1973), Art.199 --
Constitutional petition --- Post-arrest bail, grant of --- Ouster of jurisdiction of High Court to grant bail in scheduled offences had been*

done away with by amendment in S.9(b) of National Accountability Bureau Ordinance, 1999, omitting the words "High Court"--- Even under unamended provisions of S. 9(b) of the Ordinance, High Court had jurisdiction under Art. 199 of the Constitution to grant bail in an offence under the Ordinance in appropriate case as the bar of jurisdiction thereunder being in the nature of legislative enactment could not take away its jurisdiction under Art. 199 of the Constitution.

11. By virtue of the provisions contained in Section 17 of the NAB Ordinance, the provision of the Code of the Criminal Procedure, 1898 is applied mutatis mutandis, to the proceeding under the NAB Ordinance, which reads as:-

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 of this Ordinance, the provisions of the Code of Criminal Procedure, 1898 (Act V of 1898), shall mutatis mutandis, apply to proceedings under this Ordinance.

b) Subject to sub-section (a), the provisions of Chapter XXIIA of the Code shall apply to trials under this Order.

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 the space of any number of years, from the first to the last of such offences, may be charged with and tried at one trial for any number of such offences.”

12. For the reasons mentioned hereinabove, we are with full agreement with the submission of learned counsel for petitioners that there is no bar on the jurisdiction of High Court to entertain, dispose of and decide bail petition filed by any accused in terms of Section 497 Cr.PC in cases, registered against them under the NAB Ordinance, however, no ordinary Court including the Accountability Court, can exercise such powers, envisaged under Section 497 Cr.PC, as NAB Ordinance is a special law.

13. No doubt, the NAB Ordinance is a special law but special law by itself does not exclude the jurisdiction of High Court in matter of bail in terms of Section 497 Cr.PC, if specifically the same jurisdiction is not ousted.

14. Provision of Cr.PC, which is self contained Code for holding of criminal trial and matter relating

thereto has been applicable to proceedings under NAB Ordinance, 1999 as provided by Section 17-A of the said Ordinance, including the provisions contained in Sections 491, 496, 497, 498 and 561-A Cr.PC, however, the jurisdiction of High Court was barred in term of Section 9(b) of NAB Ordinance in this respect. However, after the amendment made by Act XXXV of 2001, in the NAB Ordinance, the bar of jurisdiction, was removed. There are many other special laws, where even the provision of Cr.PC is not expressly applied, to trials under the respective special laws but even then, Courts are granting bail under Section 497 Cr.PC, to accused charged under the provisions of same special laws on account of the fact that the application of the Code is not specifically ousted. For example, the Arms Ordinance, 1965, KPK Arms Act 2013, Explosive Substances Act 1908, Drugs Act, Explosive Act 1884, Electricity Act 1910, the provisions of Gambling Act 1977, the Emigration Ordinance 1979 etc.

15. Where, a Court has the jurisdiction in regard to trial of an offence, or having power of appeals, and if specifically, the application of the

Code is not excluded, then both the Court had jurisdiction to exercise its power envisaged under Section 497 Cr.PC, however, if such jurisdiction is expressly, ousted by special enactment, the same could not be exercised. As mentioned hereinabove, only the Accountability Court has been barred by Section 9(2) of the NAB Ordinance, to exercise power under Section 491, 496, 497, 498, 561-A Cr.PC but the power of High Court, could not be ousted by the mere use of word 'Court' which is itself defined under Section 5(g) of the NAB Ordinance, to be meant the Accountability Court only.

16. Insofar as the submission of learned counsel in regard to the allegations against the petitioners are concerned, petitioner namely Olas Khan being Project Director (now retired) prima facie, there are sufficient material, so far collected by NAB against him.

17. The record reveals that the accused/petitioner had advanced 20% mobilization amount even to those companies, persons, whose works were dropped and even the schemes were not found feasible.

18. It is also depicted and palpable on available record that many schemes for which more than 80% amount had released were not existed on grounds but those were commissioned and funds were released with active connivance of the Project Director.

19. As it is settled principle of law, that deep appreciation of facts, while disposing of bail petition or constitutional petition, in matter of detention, is not requirement of law, but prima facie from the inquiry against the petitioner Olas Khan, sufficient and reasonable documentary proof is available which makes out a case, in term of Section 9 of the NAB Ordinance, 1999 against him so he does not deserve any concession of bail at this stage. So his petition for release on bail in the instant matter is declined and the WP No.843-P/2017 filed by him, is dismissed accordingly.

20. Insofar as the case of petitioner Sahibzada Alamgir is concerned, admittedly he had posted in the year 2010, as Deputy Director, when the Project was already near to completion. Moreover, no any iota piece of evidence in any documentary form was

available on record that he had paid any amount to any person. His role was subservient to the principle accused Project Director, but no any direct allegation of corruption or misuse or abuse of power is alleged against him by the NAB, however, whether the petitioner/accused had acted in violation of any law or rules, benefitting him or any other person, could be dealt with by the learned trial Court. As the inquiry is already completed against this accused, where, he had charged only for connivance and no any direct allegation, had brought by the NAB therefore, keeping in view his position and kind of duties, assigned to him as Deputy Director, for the northern region, he deserves to be released on bail. So for these reasons, the Writ Petition No.832-P/2017 filed by petitioner Sahibzada Alamgir is allowed and he is admitted to bail provided he furnishes bail bond in the sum of Rs.10,00,000/- (Rupees Ten Lac) with two sureties each in the like amount to the satisfaction of learned Administrative Judge, Accountability Courts, Peshawar, who shall ensure that the sureties must be local, reliable and men of means.

21. Before we conclude this judgment, it would be appreciated that this judgment be placed before his Lordship, the Chief Justice of this Court, for further orders, in regard to bail petitions pertaining to NAB cases.

Announced
30.03.2017.

J U D G E

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“A.Qayum”.