

Present: Mushir Alam, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ

NATIONAL ACCOUNTABILITY BUREAU through Chairman---Appellants

Versus

SHABBIR AHMED MALIK and others---Respondents

Civil Appeals Nos.621 to 624 of 2019, decided on 8th January, 2020.

(On appeal from the judgment of High Court of Sindh, Sukkar Bench dated 3-6-2016, passed in Const. Ps. Nos. 424, 425, 1626 and 1627 of 2016).

(a) National Accountability Ordinance (XVIII of 1999)---

---Ss. 25(a) & 33E---Voluntary Return settlement ('VR settlement')---Default in payment under the VR settlement---Whether such default vitiated the VR settlement, resulting in initiation of further proceedings by the National Accountability Bureau ("NAB") against a holder of public office or any other person under the National Accountability Ordinance, 1999 ("Ordinance") or whether NAB could recourse to S.33E of the Ordinance to recover the amount of VR settlement as arrears of land revenue---Held, that default in deposit of the amount under a VR settlement vitiated the settlement resulting in initiation of further proceeding by the NAB against the accused under the Ordinance, and the NAB could not take recourse to S.33E of the Ordinance to recover the amount determined in VR settlement as arrears of land revenue---However, any partial payment under VR settlement would be available for adjustment even after VR stood vitiated and could be adjusted against Plea Bargain ("PB") or the liability determined by the court, as the case may be---Further more absence of time frame under a VR settlement could not be relied upon to make the VR arrangement continue indefinitely.

Voluntary Return ('VR') was an option available to a person under inquiry or even before inquiry but prior to authorization of investigation against him, to come forward to discharge his liability by making a voluntary return of the amount due against him. Voluntary Return settlement, as a concept was structured around and dependent upon the volition of the person who wished to settle. Voluntary Return, therefore, constituted (i) an offer of a holder of public office or any other person to make a voluntary return of the assets acquired or gains made by him in the course, or as a consequence, of any offence under the Ordinance; (ii) acceptance of that offer by the Chairman NAB; (iii) determination of the amount due from such person by the Chairman NAB; and (iv) deposit by such person with the NAB, of the amount so determined. Anything short of this did not constitute a valid VR settlement. Voluntary Return was, therefore, a one off voluntary return facility linked with the liability of the accused as determined by the Chairman NAB. Being a voluntary payment, any failure thereof, simple put an end to the facility of VR. Any short payment or partial payment did not constitute a valid VR settlement and thus did not discharge the person from his liability in respect of the matter or transaction in issue and the proceeding initiated under the Ordinance continued unabated.

In case the NAB granted time to a person to arrange for money so as to discharge his liability under the VR settlement, any such concession extended to the accused had no bearing on the essential constituent of VR, i.e., the deposit of the determined amount. Facility of VR became effective once the entire determined amount was paid or else the facility of VR came to an end. Even if the accused was allowed to pay the amount in installments, VR would only be effective once the determined amount was deposited in full. Voluntary return envisaged a voluntary deposit against the liability and there was no concept of any outstanding amount.

Under VR, there was either a deposit of the determined amount voluntarily or there was no VR. Therefore, the question of the recovery of the outstanding amount under VR did not arise in order to attract Section 33E of the Ordinance. However, any partial payment under VR would be available for adjustment even after VR stood vitiated and could be adjusted against Plea Bargain ("PB") or the liability determined by the court, as the case may be.

Mahesh Kumar v. Chairman NAB PLD 2008 Kar. 38 and Haji Khan Muhammad v. Government of Pakistan 2013 PCr.LJ 1571 distinguished.

Elahi Bux v. State PLD 2015 Sindh 165 and Raheel Sabir Jadoon v. Chairman, NAB PLD 2014 Pesh. 95 ref.

Absence of time frame under a VR settlement could not be relied upon to make the VR arrangement continue indefinitely.

(b) National Accountability Ordinance (XVIII of 1999)---

---Ss. 25(a), 25(b) & 33E---"Voluntary Return ('VR')---"Plea Bargain" ('PB')---Distinction---Recovery of amount of fines, etc., as arrears of land revenue---Scope---Voluntary Return ('VR') under cl.(a) to S.25 of the National Accountability Ordinance, 1999 ('the Ordinance') used the phrase "deposit with the NAB", while Plea Bargain ('PB') under cl. (b) to S.25 used the phrase "agrees to return to the NAB"---Both said concepts presented two different transactional arrangements---Former envisaged full deposit and the latter a commitment to pay---Voluntary Return was linked with the condition of full deposit whereas Plea Bargain became operative if the accused "agrees to return" to the National Accountability Bureau (NAB) the amount determined by the Chairman, NAB and the Court approved such agreement---Amount so agreed to be returned under Plea Bargain [section 25(b)] became due under the Ordinance and was thus recoverable as arrears of land revenue under S.33E of the Ordinance, whereas NAB could not take recourse to S.33E to recover the amount determined in a VR settlement as arrears of land revenue.

Imran ul Haq, Addl. P.G. NAB and Ahmed Nawaz Chaudhry, Advocate-on-Record for Appellants.

Aftab Alam Yasir, Advocate Supreme Court, Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondent No.1 (in C.As. Nos.621 and 623 of 2019).

Nemo. (in C.As.622 and 624 of 2019).

Dates of hearing: 7th and 8th January, 2020.

JUDGMENT

SYED MANSOOR ALI SHAH. J.--These appeals raise a specific legal question: whether default of payment under a Voluntary Return ("VR") settlement vitiates the settlement, resulting in initiation of further proceedings by the National Accountability Bureau ("NAB") against a holder of public office or any other person under the National Accountability Ordinance, 1999 ("Ordinance") or whether NAB can recourse to section 33E of the Ordinance to recover the amount of VR as arrears of land revenue?

2. Brief facts are that the respondents were Food Inspectors who, at the time, also held the charge of the Wheat Procurement Centre in District Jacobabad. During the inquiry initiated by the NAB against the respondents on the basis of an alleged misappropriation of wheat bags causing loss to the national exchequer, the respondents voluntarily came forward to settle the matter by offering VR under section 25(a) of the Ordinance, of the gains acquired through the said misappropriation. The applications requesting VR dated 24.4.2013, submitted by the respondents, stated that the respondents with free consent and without any coercion, duress or undue influence had voluntarily come forward and admitted that they were in possession of the gains made in consequence of an offence under the Ordinance and undertook to deposit the amount as determined by the NAB, with the prayer to be discharged of their liability in respect of the subject inquiry.

3. The said request for VR was processed by the NAB and liabilities of both the accused respondents were determined by the Chairman NAB in the sum of Rs.19,677,000/- (against Shabbir Ahmed Malik) and Rs.29,853,000/- (against Abdul Ghaffar Kalwar). Deposit of the said amount was to be made in three installments; however, no timeframe was provided for making payment of these installments. This settlement was recorded in affidavits drawn up by the respondents. The appellants paid the first installment/down payment in the sum of Rs.10,300,000/- and Rs.14,700,000/- respectively. However, they failed to pay the remaining amount in spite of notices issued to them by the NAB on 30.6.2014, 09.7.2014, 27.10.2014 and 29.10.2014. On remaining unsuccessful for a period of almost two years, the NAB cancelled the VR settlement on 04.2.2015 and proceeded with the investigation of the case on 16-3-

2015. The investigation allegedly led to discovery of further misappropriation on the part of the respondents and their liability soared to Rs.21,085,350/- and Rs.36,911,100/- resulting in the filing of References Nos. 17 and 18 of 2015 against both the respondents, respectively. Thereon, the Accountability Court Sukkar issued non-bailable warrants (NBWs) against them vide its order dated 9.1.2016, to face trial in the References.

4. The respondents approached the High Court challenging the NBWs and seeking bail before arrest, as well as, quashment of the References through separate petitions. These petitions were heard together and finally through impugned judgement dated 03.06.2016 the References against the respondents were quashed on the grounds: (i) that after a VR agreement, the outstanding amount can only be recovered under section 33E of the Ordinance as arrears of land revenue; (ii) that there was no timeframe provided in the VR agreement hence the agreement could not have been rescinded or enforced; (iii) that parallel criminal proceedings¹ for the same offences before the Anti-Corruption Court amounted to double jeopardy. Leave was granted on 19.03.2019 only to consider the question whether section 33E is applicable in case of default of payment under the VR settlement.

5. Learned Additional Prosecutor General NAB submits that the sole ground for quashment of the References by the High Court was its reliance on section 33E of the Ordinance. He submits that after the respondents failed to honour the voluntary return arrangement, the facility under section 25(a) of the Ordinance came to an end and NAB proceeded against the respondents in accordance with the Ordinance. He places reliance on *Elahi Bux v. State* (PLD 2015 Sindh 165), *Minhon Khan Chandio v. National Accountability Bureau* (2011 PCr.LJ 79), and *Raheel Sabir Jadoon v. Chairman, NAB* (PLD 2014 Peshawar 95) to submit that the failure of the respondents to honour the voluntary return does not attract section 33E of the Ordinance.

6. Learned counsel for the respondents on the other hand submits that in case of failure of an accused to honour the voluntary return, NAB can only proceed under section 33E of the Ordinance for recovery of the amount as arrears of land revenue and places reliance on *Mahesh Kumar v. Chairman, NAB* (PLD 2008 Karachi 38), *Khan Muhammad v. Government of Pakistan, NAB* (2013 PCr.LJ 1571), *Ali Muhammad v. State* (PLD 2009 Lahore 312). He adds that *Shabbir Ahmed Malik*, one of the accused was also booked in FIR No.3/2014 under section 409 P.P.C. read with section 5(2) of the Prevention of Corruption Act, 1947 and after regular trial was acquitted by the Special Judge, Anti-Corruption Court, Larkana vide judgment dated 25.04.2017, and as a consequence, he cannot undergo trial for the same offence afresh.

7. We have heard the learned counsel for the parties at some length, examined the record of the case and the provisions of the Ordinance. The answer to the legal question that has arisen in these appeals hinges upon the interpretation of sections 25(a) and 33E of the Ordinance, which are reproduced hereunder for ready reference:-

Section 25:(a)

"25.(a) Notwithstanding anything contained in section 15 or in any other law for the time being in force, where a holder of public office or any other person, prior to the authorization of investigation against him, voluntarily comes forward and offers to return the assets or gains acquired or made by him in the course, or as the consequence, of any offence under this Ordinance, the Chariman NAB may accept such offer and after determination of the amount due from such person and its deposit with the NAB discharge such person from all his liability in respect of the matter or transaction in issue:

Provided that the matter is not sub judice in any court of law."

Section 33E:

"33E. 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"

Without going into the constitutionality of section 25(a), which we have been informed is the subject matter of another case,² we restrict ourselves to the meaning and scope of VR under section 25(a). VR is

an option available to person under inquiry or even before inquiry but prior to authorization of investigation against him, to come forward to discharge his liability by making a voluntary return of the amount due against him. A VR settlement, as a concept is structured around and dependent upon the volition of the person who wishes to settle. VR, therefore, constitutes (i) an offer of a holder of public office or any other person to make a voluntary return of the assets acquired or gains made by him in the course, or as a consequence, of any offence under the Ordinance; (ii) acceptance of that offer by the Chairman NAB; (iii) determination of the amount due from such person by the Chairman NAB; and (iv) deposit by such person with the NAB, of the amount so determined. Anything short of this does not constitute a valid VR settlement. VR is, therefore, a one off voluntary return facility linked with the liability of the accused as determined by the Chairman NAB. Being a voluntary payment, any failure thereof, simple puts an end to the facility of VR. Any short payment or partial payment does not constitute a valid VR settlement and thus does not discharge the person from his liability in respect of the matter or transaction in issue and the proceeding initiated under the Ordinance continues unabated. VR under the law is a one-time facility of depositing the determined amount and not a long-term repayment arrangement. In case the NAB grants time to a person to arrange for money so as to discharge his liability under the VR settlement, any such concession extended to the accused has no bearing on the essential constituent of VR, i.e., the deposit of the determined amount. Facility of VR becomes effective once the entire determined amount is paid or else the facility of VR comes to an end. Even if the accused is allowed to pay the amount in installments, VR will only be effective once the determined amount is deposited in full. Voluntary return envisages a voluntary deposit against the liability and there is no concept of any outstanding amount. "Outstanding amount" or "any sum due" imply that a person is otherwise bound to pay and hasn't paid. Under VR, there is either a deposit of the determined amount voluntarily or there is no VR. Therefore, the question of the recovery of the outstanding amount under VR does not arise in order to attract section 33E of the Ordinance. However, any partial payment under VR will be available for adjustment even after VR stands vitiated and can be adjusted against Plea Bargain ("PB") or the liability determined by the court, as the case may be.

8. The case law referred to by learned counsel for the respondents and relied upon by the High Court is misconceived and has no relevance to the matter in hand. *Mahesh Kumar v. Chairman NAB* (PLD 2008 Karachi 38) and *Haji Khan Muhammad v. Government of Pakistan* (2013 PCr.LJ 1571) relate to the cases of PB under clause (b) of section 25, and not of VR under clause (a) of that section of the Ordinance. There is a clear difference between the two clauses; under clause (a) the phrase "deposit with the NAB" and under clause (b) "agrees to return to the NAB" present two different 'transactional arrangements. One envisaging full deposit and other a commitment to pay. VR is linked with the condition of full deposit whereas PB becomes operative if the accused "agrees to return" to the NAB the amount determined by the Chairman, NAB and the Court approves such agreement. The amount so agreed to be returned under clause (b) becomes due under the Ordinance and is thus recoverable as arrears of land revenue under section 33E of the Ordinance. *Mahesh Kumar* actually involved the question whether non-deposit of amount of PB was an offence within the provisions of section 5(r) of the Ordinance, when the remedy of recovery of such amount was available under section 33E of the Ordinance; while the controversy in *Haji Khan Muhammad* pertained to imposition of interest on actual amount of PB. None of these cases relate to VR and therefore do not advance the case of the respondents. *Elahi Bux v. State* (PLD 2015 Sindh 165) and *Raheel Sabir Jadoon v. Chairman, NAB* (PLD 2014 Peshawar 95) however, espouse the view expressed by this Court.

9. The legal question involved in these appeals is therefore answered in the terms that default in deposit of the amount under a VR settlement vitiates the settlement resulting in initiation of further proceeding by the NAB against the accused under the Ordinance, and the NAB cannot recourse to section 33E of the Ordinance to recover the amount determined in VR settlement as arrears of land revenue. The absence of time frame under the present VR arrangement cannot be relied upon to make the VR arrangement

continue indefinitely. In the present case sufficient time (2 years) was given to the respondents to pay up and inspite of several notices sent to the respondents there was no response, hence the cancellation of the VR settlement. In view of this legal position, the impugned judgment³ is set aside; as a consequence, References Nos.17 and 18 of 2015 against the respondents shall be deemed to be pending before the Accountability Court concerned, to be decided strictly in accordance with law.

10. It is stated that respondent Shabbir Ahmed Malik has been acquitted by the Anti-Corruption Court on 25.04.2017 after the impugned judgment dated 03.06.2016. Bare perusal of the order of the Anti-Corruption Court shows that the sole ground for the acquittal of the respondent was the quashment of the Reference made through the impugned judgment. Be that as it may, the effect of acquittal of the respondent Shabbir Ahmed Malik by the Anti-Corruption Court, under Article 13 of the Constitution read with section 403 Cr.P.C. may be considered and decided by the Accountability Court in view of the provisions of sections 3, 16, 16A and 18 of the Ordinance in accordance with the law, if the same is agitated by the respondents before it.

11. Learned counsel for the respondent Shabbir Ahmed Malik prays for his bail before arrest. He submits that in compliance of Order dated 03.06.2016 of the High Court, the said respondent has deposited the remaining amount determined under the VR, which forms a major portion of the amount assessed against him in the Reference. This fact is borne out from the Certificate dated 16.10.2017 issued by the Sindh High Court and is confirmed by the Additional Prosecutor General, NAB. We, therefore, admit respondent Shabbir Ahmed Malik to bail subject to his furnishing a bond in the amount of Rs.200,000/- with one surety of the like amount to the satisfaction of the Accountability Court concerned.

12. These appeals are allowed in the above terms.

Sd/- Mushir Alam,
Judge
Mazhar Alam Khan Miankhel,
Judge
Syed Mansoor Ali Shah,
Judge

CORRIGENDUM*

Certain typographical errors were observed in paragraphs 3, 4, 7 and 9 of the judgment. The same have been corrected today and the judgment has been updated.

Sd/- Mushir Alam,
Judge
Mazhar Alam Khan Miankhel,
Judge
Syed Mansoor Ali Shah,
Judge

MWA/N-2/S

Appeals allowe