

Present: Umar Ata Bandial, Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ

MUHAMMAD IQBAL KHAN NOORI and another---Petitioners

Versus

NATIONAL ACCOUNTABILITY BUREAU (NAB) and others---Respondents

Civil Petitions Nos.3637 and 3638 of 2019, decided on 16th June, 2021.

(Against the order dated 26.6.2019 of the Islamabad High Court, passed in Writ Petitions Nos.2104 and 2105 of 2019)

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

---Ss. 9 & 10---Constitution of Pakistan, Arts. 4, 9, 10A, 14, 185(3) & 199---Criminal Procedure Code (V of 1898), S. 497---Person accused of an offence under the National Accountability Ordinance, 1999 (NAB Ordinance)---Grant of bail in Constitutional jurisdiction of the High Court/Supreme Court---Scope---High Courts had the power to grant bail, under Art. 199 of the Constitution, to any person accused of an offence under the NAB Ordinance, independent of any statutory source of jurisdiction and notwithstanding the prohibition contained in S.9(b) of the NAB Ordinance---High Court, under Art.199 of the Constitution, had the power to judicially review an order passed by the Executive, viz, Chairman NAB or some other authorized officer of the NAB, regarding arrest and detention of a person---High Court while exercising its jurisdiction under Art. 199 of the Constitution for the enforcement of fundamental rights could pass appropriate orders, which included an unconditional release or release on bail, to grant the relief to the aggrieved person---For the enforcement of fundamental rights under the Constitution and not under the sub-constitutional statutory grounds provided in S.497, Cr.P.C., the Supreme Court had been granting bails to the accused persons in NAB cases in exercise of constitutional jurisdiction under Art. 199 read with Art. 185(3) of the Constitution, mainly on the grounds of: (i) delay in conclusion of the trial (ii) life-threatening health condition of the accused, and (iii) non-availability of sufficient incriminating material against the accused.

Asfandiyar Wali v. Federation PLD 2001 SC 607; Manzoor Ilahi v. Federation PLD 1975 SC 66; Anwar Saifullah v. State 2001 SCMR 1040; Zulfiqar Ali v. State PLD 2002 SC 546; Arif Sharif v. Chairman, NAB 2004 SCMR 1805; Aga Jehanzeb v. National Accountability Bureau 2005 SCMR 1666; Himesh Khan v. National Accountability Bureau 2015 SCMR 1092; Zulfiqar Ali v. State PLD 2002 SC 546; Saeed Mehdi v. State 2002 SCMR 282; Nawaz Sharif v. State 2019 SCMR 734; Asif Zardari v. Federation 2005 SCMR 422 and Maqbool Ahmed v. National Accountability Bureau 2016 SCMR 154 ref.

(b) Constitution of Pakistan---

---Arts. 184(3) & 199---Judicial review of executive actions---Scope---Reasonableness and proportionality were recognized as established grounds of judicial review of executive action.

Salman Rafique v. National Accountability Bureau PLD 2020 SC 456 ref.

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

---Ss. 5(a), 9, 10, 12(a), 24(a) & 24(d)---Constitution of Pakistan, Arts. 4, 9, 10A, 14, 185(3) & 199---Person accused of an offence under the National Accountability Ordinance, 1999 (NAB Ordinance)---Bail, grant/refusal of---Requirement of "sufficient material" against the accused---Scope---Law authorised proceedings against a person accused of an offence under the NAB Ordinance, and for the freezing of his property, only when there were reasonable grounds for believing that the accused had committed an offence triable under the Ordinance---In order to ascertain whether reasonable grounds existed or not, the Court should not probe into the merit of the case, but restrict itself to the material placed before it by the prosecution (NAB) to see whether some tangible material/evidence was available against the accused which may lead to the inference of his guilt---Mere accusation of an offence would not be sufficient to disentitle an accused from being bailed out; there should be reasonable grounds as distinguished from mere allegations or suspicion---Prosecution (NAB) had to show reasonable grounds to believe that the accused had committed the crime---If the Court was not satisfied that there existed reasonable grounds to believe that the accused was guilty, the Court was to grant bail in enforcement of his fundamental rights---

Sufficiency of material/evidence connecting the accused with the crime must be viewed with utmost care and caution at the bail stage.

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

---Ss. 9 & 10---Constitution of Pakistan, Art. 185(3)---Corruption and corrupt practices---Bail, grant of--
 -Material on the record indicated that the accused was the Director, while the co-accused was the Accountant, in company P , the company which availed the financial facility (loan) from the Banks---
 However, they had no concern with the management of company PLE , whose Directors were alleged to be the ultimate beneficiary of the loan---Banks had filed suits for recovery of their loan in the court of competent jurisdiction, which were pending adjudication---If, after the decree, their company failed to pay the decretal amount, the decree would be satisfied by auction of the mortgaged property---Neither the banks nor the National Accountability Bureau (NAB) had alleged that the property mortgaged against the loan did not exist or its ownership was disputed or forged---Counsel for NAB and representatives of the Bank were unable to show the court from the material available as to how the accused and co-accused had committed any fraud or forgery, or the offence of corruption or corrupt practices as defined in S. 9 of the NAB Ordinance, in obtaining the loan for the company they were working for---Material on record did not point out that there existed reasonable grounds to believe that the accused and co-accused had committed the offence alleged---Furthermore a period of more than two years has lapsed since their arrest in the present case, but the completion of the trial was not yet in sight, for no fault of theirs---Petitions for leave to appeal were converted into appeals and allowed, and accused and co-accused were granted bail.

(e) Jurisdiction---

---Objection as to jurisdiction of a Court/Tribunal---Such objection was to be taken first of all before the same Court or Tribunal for its decision.

Abbas Hussain v. State 1992 SCMR 320 ref.

Barrister Umar Aslam, Advocate Supreme Court for Petitioners (in both cases).

Imran-ul-Haq, D.P.G. along with Qasim, A.D. NAB for Respondents/NAB.

Date of hearing: 16th June, 2021

JUDGMENT

SYED MANSOOR ALI SHAH, J.---The National Accountability Bureau ("NAB") has arrested and detained the petitioners in the course of investigation in NAB Case No. NABR-20190123158165/ 2019/IW/ INV, which was, and is still, being conducted for the alleged offence of corruption and corrupt practices, as defined in section 9 and punishable under section 10 of the National Accountability Ordinance, 1999 ("Ordinance"), against persons involved in the fake bank accounts scam of obtaining bank loans and their misappropriation by Messrs Parthenon (Pvt.) Ltd., Messrs Park Lane Estates (Pvt.) Ltd. and others. The petitioners filed two separate writ petitions in the Islamabad High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") praying for their release on bail till decision of the case. The High Court dismissed their petitions vide its consolidated order dated 26.06.2019 ("impugned order"). They have, therefore, filed the present petitions, under Article 185(3) of the Constitution, for leave to appeal against the said order of the High Court.

2. The allegations against the petitioner, Muhammad Iqbal Khan Noori, are that he as the shareholder and director of a dummy and front company, Messrs Parthenon (Pvt.) Ltd, fraudulently obtained loans from the National Bank of Pakistan and the Summit Bank and misappropriated the same by extending the benefit to the real beneficiaries, i.e., the directors of Messrs Park Lane Estates (Pvt.) Ltd., hence causing loss to the Banks and Government exchequer. While the other petitioner, Muhammad Hanif, is alleged to have abetted other accused persons/ beneficial owners in fraudulently obtaining the financial facility (loan) from the said Banks, in his capacity as the accountant in Messrs Park Lane Estates (Pvt.) Ltd. and the company secretary in the front/dummy company, Messrs Parthenon (Pvt.) Ltd.

3. We have heard the learned counsel for the parties and have gone through the record with their able assistance. The High Court has, in the impugned order, observed while declining the relief of bail prayed

for that "[t]he offence with which the petitioners have been charged falls within the prohibitory clause of section 497 Cr.P.C." section 9(b) of the Ordinance has specifically made section 497, along with other related sections, of the Code of Criminal Procedure, 1898 ("Cr.P.C") to be not applicable in NAB cases while prohibiting Courts to grant bail to persons accused of offences under the Ordinance. The said observation of the High Court has, therefore, prompted us to elucidate briefly that these are the grounds under the Constitution and not the statutory grounds mentioned in section 497 of the Cr.P.C, which are relevant and are to be considered by the High Courts for allowing or declining bail to any person accused of an offence under the Ordinance.

4. It needs hardly any argument to state that provisions of section 9(b) of the Ordinance being sub-constitutional legislation do not affect the constitutional jurisdiction of the High Courts under Article 199 of the Constitution. Clauses (1)(a)(ii) and (1)(b)(i) of Article 199 empower the High Courts to pass orders of the kind¹ of writ of certiorari² and writ of habeas corpus³ against persons performing functions in connection with the affairs of the Federation, a Province or a local authority and Clause (1)(c) of that Article authorizes to make an order giving appropriate directions to any person or authority for the enforcement of any of the Fundamental Rights.⁴ Such orders, under Article 199, can also be passed in relation to the actions of arrest and detention of a person by an executive authority. That is why this Court held in *Asfandiyar Wali v. Federation*⁵ that the High Courts have the power to grant bail, under Article 199 of the Constitution, to any person accused of an offence under the NAB Ordinance, independent of any statutory source of jurisdiction and notwithstanding the prohibition contained in section 9(b) of the Ordinance.

5. Under our democratic constitutional scheme, firmly anchored in the rule of law, the constitutional courts are to jealously protect and safeguard the fundamental rights of a person. The High Court, under Article 199, has the power to judicially review the order passed by the Executive, viz, Chairman NAB or some other authorized officer of the NAB, regarding arrest and detention of a person. Article 4 mandates that no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law. Article 9 is a cherished fundamental right of a person, which, inter alia, guarantees right to liberty, which may be curtailed "save in accordance with law." The phrase except or save in accordance with law implies that not only should the procedural requirements of the "law" be fully met but also its substantive content i.e., there must be sufficient material/ evidence on the record that can justify the application of such a "law." Therefore, material/evidence must be sufficient enough to persuade the constitutional court to deprive an individual of his fundamental right. The requirement of sufficiency of material is also echoed in the right guaranteed under Article 10, which requires that any person who is arrested shall not be detained in custody without being informed of the grounds for such arrest. The word "grounds" used in Article 10 is not limited to mere allegations but means allegations supported by sufficient material/evidence connecting the person with the offence justifying his arrest and detention. Article 10-A creates a constitutional obligation to conduct a fair trial and ensures due process. The spectrum of fair trial and due process is extensive and over-arching; an arrest and detention of a person without any sufficient incriminating material/ evidence would offend his right to fair trial. Right to dignity under Article 14 is an absolute constitutional standard, which is not subject to law. This is because dignity inheres in a human person and is not granted by law or cannot be taken away by law.⁶ Human dignity encapsulates the notion that every person has inherent equal worth; no one's life and liberty is more important than any other person's. Arresting and detaining a person without any incriminating material offends his or her right to dignity. This brings us to the most familiar maxim in criminal justice: the presumption of innocence - the principle that a person is presumed innocent until proven guilty by a court of law. This principle is pillared on constitutional right to liberty, fair trial and human dignity. This presumption can only be dislodged if there is sufficient incriminating material against a person as underlined and reinforced by the aforesaid constitutional rights. Over the years reasonableness and proportionality have also come to be recognized as established grounds of judicial review of the executive action.⁷ Thus, while exercising jurisdiction under Article 199, the High Court has to examine the

order of arrest and detention passed by the Chairman NAB and see if it passes the constitutional muster. The High Court while exercising its jurisdiction under Article 199 of the Constitution for the enforcement of fundamental rights can pass appropriate orders, which include an unconditional release or release on bail, to grant the relief to the aggrieved person.⁸ It is for the enforcement of fundamental rights under the Constitution and not the sub-constitutional statutory grounds provided in section 497, Cr.P.C., that this Court has been granting bails to the accused persons in NAB cases in exercise of constitutional jurisdiction under Article 199 read with Article 185(3) of the Constitution, mainly on the grounds of: (i) delay in conclusion of the trial,⁹ (ii) life-threatening health condition of the accused,¹⁰ and (iii) non-availability of sufficient incriminating material against the accused.¹¹

6. The Ordinance requires the Chairman NAB to form an "opinion" if proceedings are to be initiated against any person and the matter referred for inquiry or investigation. After appraising the material and the evidence collected during the inquiry or investigation, the Chairman NAB, if finds that there is "sufficient material" to justify filing of a reference, refer the matter to the Accountability Court for trial. While section 24(a) of the Ordinance provides that the Chairman NAB shall have the power, at any stage of the inquiry or investigation under this Ordinance, to direct that the accused, if not already arrested, shall be arrested. Section 24(d) mandates that NAB shall, as soon as may be, inform the accused of the "grounds" and "substance" on the basis of which he has been arrested. Section 5(a) defines that "accused" shall, inter alia, include a person in respect of whom there are "reasonable grounds" to believe that he is or has been involved in the commission of any offence triable under this Ordinance. Section 12(a) states that the Chairman NAB or the Court trying an accused for any offence as specified under the Ordinance, may, at any time, if there appear reasonable grounds for believing that the accused has committed such an offence, order the freezing of his property. The combined reading of all these provisions of the Ordinance leaves no room for doubt that the law authorises proceedings against a person accused of an offence under the Ordinance, and for the freezing of his property, only when there are reasonable grounds for believing that the accused has committed an offence triable under the Ordinance.

7. In order to ascertain whether "reasonable grounds" exist or not, the Court should not probe into the merit of the case, but restrict itself to the material placed before it by the prosecution (NAB) to see whether some tangible material/ evidence is available against the accused which may lead to the inference of his guilt. Mere accusation of an offence would not be sufficient to disentitle an accused from being bailed out. There should be "reasonable grounds" as distinguished from mere allegations or suspicion. It is for the prosecution (NAB) to show reasonable grounds to believe that the accused has committed the crime. If the Court is not satisfied that there exist reasonable grounds to believe that the accused is guilty, the Court is to grant bail in enforcement of the aforesaid fundamental rights. Pre-trial arrest and detention of the accused casts a heavy burden on the conscience of the court. If after trial the accused is acquitted there is no recompense or reparation for the loss of his valuable years spent behind bars including its economic, social and psychological impact on the accused, as well as, his family or near ones due to denial of bail. The sufficiency of material/ evidence connecting the accused with the crime must therefore be viewed with utmost care and caution at the bail stage.

8. Coming to the merits of the case, we have carefully gone through the material available on record, to ascertain whether reasonable grounds and sufficient incriminating material exist for believing that the petitioners have committed the offence alleged, as arrest and detention on the basis of reasonable grounds and sufficient incriminating material meet the requirement of fair trial, due process and human dignity. The material on the record indicates that the petitioner, Muhammad Iqbal Khan Noori, is the Director, while the petitioner, Muhammad Hanif, is the Accountant, in M/s. Parthenon (Pvt.) Ltd., the company which availed the financial facility (loan) from the Banks. However, they have no concern with the management of M/s. Park Lane Estates (Pvt.) Ltd., whose Directors are alleged to be the ultimate beneficiary of the loan. The petitioners have not disputed obtaining the loan from the Banks by Messrs Parthenon (Pvt.) Ltd. against the security of mortgaged property. Their stance is that the loan was obtained for the company, and not for their personal benefit, against mortgaging the property to the satisfaction of

the Banks. They assert that they have not committed any fraud in this regard with the Banks, nor have the Banks made any complaint to the NAB alleging fraud against them. The Banks have filed suits for recovery of their loan in the court of competent jurisdiction, which are pending adjudication. If, after the decree, their company fails to pay the decretal amount, the decree would be satisfied by auction of the mortgaged property. Neither the Banks nor the NAB has alleged that the property mortgaged against the loan does not exist or its ownership is disputed or forged. We, for our satisfaction as to the version of the petitioners, issued notice to the said Banks in the present petitions; whose representatives have appeared before us and verified that the Banks have filed suits for recovery of the loan amount with interest due thereon against the borrowers as well as against the mortgagers of the property, which are pending adjudication. We asked the learned counsel for the NAB and the representative of the Banks to show us from the material available on record of the case as to how the petitioners have committed any fraud or forgery, or the offence of corruption or corrupt practices as defined in section 9 of the Ordinance, in obtaining the loan for the company they were working for, but they failed to point out any such material. We are, therefore, not satisfied, in view of the material currently available on record of the case, that there exist reasonable grounds to believe that the petitioners have committed the offence alleged. The petitioners were arrested in the present case in the month of April 2019; a period of more than two years has lapsed since then, but the completion of the trial is not yet in sight, for no fault of the petitioners.

9. In view of these circumstances, we find that the further detention of the petitioners in the case would be without lawful authority. We are of the considered view that it was a fit case for exercise of constitutional jurisdiction by the High Court, under Article 199 of the Constitution. We, therefore, convert these petitions into appeals and allow the same. We set aside the impugned order, accept their constitutional petitions and make order that the petitioners shall be released on bail subject to their furnishing bail bonds in the sum of rupees one million each with one surety each in the like amount to the satisfaction of learned Accountability Court. Needless to say that the observations made in this order are tentative and shall not influence the trial court while concluding the case after recording evidence.

10. Before parting with the judgment, we think it our obligation to mention that the learned counsel for the petitioners, during arguments, also emphasized the points that the NAB and Accountability Court have no jurisdiction to proceed in the present matter without a reference from Governor, State Bank of Pakistan as provided in section 31D of the Ordinance, and that only the relevant Court under the Financial Institutions (Recovery of Finances) Ordinance 2001 has jurisdiction to proceed in the matter. The High Court has not given any finding on these two points in the impugned order. We also do not consider it proper to decide these points in the present bail matter, and leave them open to be agitated by the petitioners, if so advised, before the trial court, i.e., the Accountability Court, as the objection pertaining to the jurisdiction of a Court or Tribunal is to be taken first of all before the same Court or Tribunal for its decision.¹²

11. Foregoing are the reasons for our short order dated 16.6.2021, whereby these petitions were converted into appeals and allowed. For the sake of convenience and for completion of record, the same is reproduced hereunder:-

For the reasons to be recorded later, petitioners are granted bail subject to their furnishing bail bonds in the sum of rupees one million each with one surety each in the like amount to the satisfaction of learned Accountability Court. Both these petitions are converted into appeal and allowed.

MWA/M-59/SC Bail granted.

¹ The use of the terminology of traditional "writs" was done away with in the 1962-Constitution and this discontinuance was carried on in the 1973-Constitution by the Legislature, making the exercise

of constitutional jurisdiction untrammelled by the substantive limitations and procedural formalities of the old prerogative writs. See *Manzoor Ilahi v. Federation* PLD 1975 SC 66 per Salahuddin, J. and Paper on "Judicial Review of Administrative Action" by Fazal Karim.

2 *Talat Ishaq v. NAB* PLD 2019 SC 112.

3 *Government of Sindh v. Raeesa Farooq* 1994 SCMR 1283.

4 *Manzoor Ilahi v. Federation* PLD 1975 SC 66 per Anwar ul Haq, J.

5 PLD 2001 SC 607.

6 Erin Daly, James R. May - Dignity Law - Global recognition, cases and perspectives. (see preface)

7 See *Salman Rafique v. National Accountability Bureau* PLD 2020 SC 456.

8 *Manzoor Ilahi v. Federation* PLD 1975 SC 66.

9 *Anwar Saifullah v. State* 2001 SCMR 1040; *Zulfiqar Ali v. State* PLD 2002 SC 546; *Arif Sharif v. Chairman, NAB* 2004 SCMR 1805; *Aga Jehanzeb v. NAB* 2005 SCMR 1666 and *Himesh Khan v. NAB* 2015 SCMR 1092.

10 *Zulfiqar Ali v. State* PLD 2002 SC 546; *Saeed Mehdi v. State* 2002 SCMR 282 and *Nawaz Sharif v. State* 2019 SCMR 734.

11 *Asif Zardari v. Federation* 2005 SCMR 422 and *Maqbool Ahmed v. NAB* 2016 SCMR 154.

12 *Abbas Hussain v. State* 1992 SCMR 320