

IN THE HIGH COURT OF SINDH AT KARACHI

Present: Omar Sial and Zulfiqar Ali Sangi, JJ

<><><><>

Constitution Petition No. D - 1437 of 2019

Agha Mussihuddin Khan Durrani Petitioner

Versus

Chairman NAB & Others Respondents

<><><><>

Constitution Petition No. D - 2356 of 2019

Agha Siraj Khan Durrani Petitioner

Versus

National Accountability Bureau
through its Chairman Respondent

<><><><>

Constitution Petition No. D - 4604 of 2019

Agha Siraj Khan Durrani Petitioner

Versus

National Accountability Bureau
through its Chairman & Others Respondents

<><><><>

Constitution Petition No. D - 2976 of 2019

Gulzar Ahmed Petitioner

Versus

National Accountability Bureau
through its Chairman & another Respondents

<><><><>

Constitution Petition No. D - 2235 of 2019

Aslam Pervez Langah Petitioner

Versus

The Chairman NAB
& others Respondents

<><><><>

Constitution Petition No. D - 2236 of 2019

Zulfiqar Ali Dahar Petitioner

Versus

The Chairman NAB
& Others Respondents

<><><><>

Constitution Petition No. D - 1776 of 2019

Tufail Ahmed Shah Petitioner

Versus

National Accountability Bureau (Sindh)..... Respondent

<><><><>

Constitution Petition No. D - 1851 of 2019

Mrs. Shamshad Khatoon Petitioner

VersusThe Chairman NAB
& Others Respondents

<><><><>

Constitution Petition No. D - 1850 of 2019

Mitha Khan Petitioner

VersusThe Chairman NAB
& Others Respondents

<><><><>

Constitution Petition No. D - 6623 of 2019

Shakeel Ahmed Soomro Petitioner

VersusThe Chairman NAB
& Others Respondents

Mr. Aamir Raza Naqvi, Mr. Shahab Sarki, Mr. Syed Ahmed Raza Shah and Mr. Ghulam Shah, Advocates along with petitioners except petitioner Agha Siraj Khan Durrani in C.P. No. D – 2356 of 2019, who is in custody.

Mr. Aamir Mansoob Qureshi and Mr. Muhammad Rehman Ghous, Advocates along with petitioners in C.P. Nos. D – 2235, 2236 & 1851 of 2019.

Mr. Dur Muhammad Shah and Mr. Fateh Muhammad, Advocates along with petitioner in C.P. No. D - 1776 of 2019.

Mr. Haad A. M. Paganwala and Mr. Zain Soomro, Advocates along with petitioner in C.P. No. D - 6623 of 2019.

Mr. Malik Naeem Iqbal and Mr. Altaf Jawaid, Advocates along with petitioner in C.P. No. D - 2976 of 2019.

Mr. Allah Nawaz Dull, Advocate for petitioner in C.P. No. D – 4604 of 2019.

Mr. Muhammad Anwar Tariq, Advocate along with petitioner in C.P. No. D – 1850 of 2019.

Mr. Riaz Alam Khan and Mr. Sattar Muhammad Awan, Special Prosecutors NAB along with Mr. Asif Raza, I.O.

ORDER

Omar Sial, J. The petitioners are all accused in Reference No. 13 of 2019 pending adjudication before the learned Accountability Court No.III at Karachi. The main accused

in the case is Mr. Agha Siraj Durrani, who is alleged to have accumulated assets worth Rs. 1.6 billion, which according to NAB are beyond his known sources of incomes. The other petitioners are said to be people who are Mr. Durrani's front men and by one mean or another have aided and abetted Mr. Durrani or are the benamidar owners of property actually owned by Mr. Durrani. Mr. Durrani remained Minister of Local Government in Sindh for the period 2008 to 2013 and was nominated as the Speaker of the Sindh Assembly in 2013, a position he holds to date.

2. We have heard the learned counsel for the petitioners and the learned Special Prosecutors appearing on behalf of NAB. The case on behalf of NAB was initially argued by Mr. Riaz Alam Khan who was ably arguing the case when he was suddenly replaced by Mr. Sattar Muhammad Awan, who has also ably assisted us. While Mr. Awan adopted the arguments of Mr. Khan, regrettably, we observed a number of conflicts between the arguments of the two prosecutors. For the sake of brevity and as the arguments raised by counsels are reflected in our observations below, we have not reproduced their submissions here. The record in the case is voluminous. We have based our observations on what was argued before us and the pieces of evidence shown to us from the voluminous record.

3. As mentioned above, the allegation against Mr. Durrani is that he has collected assets beyond his known sources of income hence he is guilty of an offence under section 9(a)(v) of the National Accountability Ordinance, 1999. Section 9(a)(v) of the NAO 1999 provides as follows:

S.9 (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-

(v) if he or any of his dependents or benamidar owns, possesses, or has acquired right or title in any assets or holds irrevocable power of attorney in respect of any assets or pecuniary resources disproportionate to his known sources of income, which he cannot reasonably] account for or maintains a standard of living beyond that which is commensurate with his sources of income;

4. The Honorable Supreme Court in the case of **Muhammad Hashim Babar vs The State and another (2010 SCMR 1697)** has held:

It is pertinent to mention here that in order to prove the case is the duty and obligation of the prosecution to prove the ingredients of the offence which are as follows:-

(i) It must establish that the accused was holder of a public office.

(ii) The nature and extent of the pecuniary resources of property which were found in his possession.

(iii) It must be proved as to what, were his known sources of income.

(iv) It must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income.

The aforesaid ingredients are proved then the offence as defined under section 9(a)(v) is complete, unless the accused is able to account for such resources or property. It is also settled proposition of law that mere possession of any pecuniary resources or property is by itself not an offence, but failure to satisfactorily account for such possession of pecuniary resources or property that makes the possession objectionable and constitutes offence meaning thereby that if an accused cannot explain, presumption under section 14(c) of the Ordinance that accused is guilty of corruption and corrupt practices is required to be drawn.

5. Earlier, a learned Division Bench of this Court in the case of **Hakim Ali Zardari vs The State (2007 MLD 910)**, has laid down the criteria required to be satisfied in cases under section 9 (a)(v):

*"In order to prove the case, the prosecution is required to prove the ingredients of the offence, which are (1) it must establish that the accused was holder of a public office (2) the nature and extent of the pecuniary resources of property which were found in his possession, (3) it must be proved as to what were his known sources of income i.e. known to the prosecution after thorough investigation and (4) it must prove, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income. Once these four ingredients are established, the offence as defined under section 9(a)(v) is complete, unless the accused is able to account for such resources or property. Thus, mere possession of any pecuniary resources or property is by itself not an offence, but it is failure to satisfactorily account for such possession of pecuniary resources or property that makes the possession objectionable and constitute offence. If he cannot explain, presumption under section 14(c) of the Ordinance that accused is guilty of corruption and corrupt practices is required to be drawn. Reference is invited to a case *Biswa Bhushan Naik v. State (AIR 1954 SC 350)* in which identical provision in Prevention of Corruption Act, 1947 were interpreted."*

6. We have referred to the case of Hakim Ali Zardari (supra) as the principles in the said case were approved and reiterated by the Honorable Supreme Court in **Khalid Aziz vs The State (2011 SCMR 136)** and **Ghani-ur-Rehman vs National Accountability Bureau and others (PLD 2011 SC 1144)**.

7. With regard to the first ingredient of the offence mentioned above, with much respect and humility, we are of the view that in light of the judgment in **Abdul Aziz Memon vs The State and others (PLD 2013 SC 594)** the same would stand extended not only to a holder of public office but to any person.

8. It would also not be out of place to refer to the judgment of the Honorable Supreme Court in the case of **Chairman National Accountability Bureau vs Mian Mohammad Nawaz Sharif and 2 others (PLD 2019 SC 445)** where the Court observed:

“In cases pertaining to the offence under section 9(a)(v) of the National Accountability Ordinance, 1999 this Court has identified different ingredients of the said offence in the cases of Syed Qasim Shah v. The State (2009 SCMR 790), Muhammad Hashim Babar v. The State and another (2010 SCMR 1697), Khalid Aziz v. The State (2011 SCMR 136) and Ghani-ur-Rehman v. National Accountability Bureau and others (PLD 2011 SC 1144) explaining which ingredients are to be proved by which party and some of the above mentioned precedent cases had been referred to by the High Court in the impugned judgments passed by it. It had not been appreciated by the High Court that in all those precedent cases the accused persons had accepted ownership or possession of the properties in issue whereas in the present cases respondent No.1 had maintained that the relevant properties did not belong to them nor were they in possession of the same.”

9. We felt it necessary to refer to this case as in the present case, the learned counsels for the petitioner Siraj Durrani have categorically stated that he owns up to the assets owned by him in his name and those in the name of his immediate family members. In addition, his counsel has also pleaded that his daughters also have land in their names from which they generate income. There is no such admission for the other properties which NAB claims are in the name of his front men. In our view the dicta laid down in the cases mentioned in the aforesaid passage, which have been summed up in the Ghani-ur-Rehman case (supra), would be applicable to the case in hand. The learned Special Prosecutor has argued that the principles enunciated in the judgments referred to above are not applicable as the same were given in appeal. We disagree with the argument of the learned Special Prosecutor. Once the Honorable Supreme Court has enunciated and interpreted the law, it is mandatory on all courts below it to follow those principles, unless and until the Honorable Supreme Court itself clarifies that the principles will not apply at the bail stage.

10. We are cognizant that the petitioners are seeking an extra-ordinary concession of bail by invoking the writ jurisdiction of this Court and that the Honorable Supreme Court has directed that any concession given must be granted with great care and caution. We are also cognizant that at this stage we can only base a decision on a tentative assessment of the evidence shown to us. We have therefore restrained ourselves from making detailed observations lest it prejudices the case of either side at trial.

11. We will now avert to the circumstances of the present case in light of the wisdom of the Honorable Supreme Court in the judgments referred above.

To establish an offence under section 9(a)(v) three ingredients have to be satisfied:

- (1) the nature and extent of the pecuniary resources of property which were found in his possession,
- (2) it must be proved as to what were his known sources of income, and
- (3) it must be proved, quite objectively, that such resources or property found in possession of the accused were disproportionate to his known sources of income.

In the **Hakim Ali Zardari case** (supra) it was held that *the expression "known sources of income" must be taken to the sources known to the prosecution on a thorough investigation of the case.*"

12. As regards the first ingredient i.e. "*nature and extent of the pecuniary resources*", we have observed that there are allegations in the Reference which upon a tentative assessment are vague and will require further enquiry. For example, it is alleged (in paragraph 8) that Mr. Durrani owns vehicles aggregating Rs. 49,624,000. The Reference itself states that the registration of the vehicles were in the names of "*unknown persons*". No credentials or details of these "*unknown persons*" have been shown to us by the learned Special Prosecutor. The learned Special Prosecutor, NAB conceded that little investigation was carried out in order to trace the owners of the said vehicles. It appears that a relatively basic and simple task was ignored by the investigators, which ought to have been carried out at the first instance.

13. It is also alleged that valuables worth Rs. 125,000,000 were found in a locker owned by Mr. Durrani and his wife. The basis of valuation of these assets is vague to say the least. It appears that it is based on the current values of gold, silver etc. There is no explanation as to whether the valuables included the dowry of Mrs. Durrani. The learned Special Prosecutor NAB has argued that the entire jewellery was purchased between the period 2011 to 2018 and in this regard has relied on the statement of Muhammad Nadeem, who is said to be a sales manager at a shop named Prince Jewellers. We have seen the letter written by Nadeem. While Nadeem has admitted that he has no invoices of the sales made, he claims that the record was available with him in a register. Admittedly, the said register was neither provided by Nadeem nor was the same seized by the investigating officer. The admission on behalf of the learned Special Prosecutor that the Sales Manager was not fluent in the English language and that the draft of the letter was provided to him by the NAB investigating officer in itself is an admission which requires a closer scrutiny of the statement of Nadeem which can only be done at trial. It is not clear from the record as to the rates of which year have been applied to determine the value of the gold and silver. The learned Special Prosecutor was specifically asked to show us the basis of valuation of the wrist watches found in the locker, however, he no such expert valuation was shown to us.

14. NAB has also alleged that the daughters of Mr. Durrani have no landholding in their name. The learned counsels appearing for Mr. Durrani have however shown us extracts of Form VII which prima facie show that there is landholding in the name of the daughters. When the learned Special Prosecutor was asked about the said extracts, he justified the apparent conflict on the ground that NAB had relied on the report of a mukhtiarkar who had stated that there was no land in the daughters name. The investigating officer has, by his own admission, not examined the relevant record in its entirety. The said extracts are also attached to the memo of petition. The fact that the investigating officer has overlooked these extracts and not given a fair opportunity to the accused could suggest malafide. This aspect can also only be clarified at trial and tends to suggest that this is a case of further inquiry.

15. The second ingredient of the offence under section 9(a)(v) requires proof of *"what were his known sources of income i.e. known to the prosecution after thorough investigation"*. On a tentative assessment we have observed that the investigation may not have been "thorough". We are surprised at the admission made by the learned Special Prosecutor, which was confirmed by the investigating officer, that not once did the investigating officer visit the localities where the assets of the Durrani family were located and what income they generated, instead he conducted the entire investigation from his office in Karachi relying on letters written to him by various people in order to establish the nature and extent of the assets owned by the Durrani family as well as the identity and role of the alleged front men. This omission is more surprising in light of the fact that NAB even has a Regional Office in Sukkur, which is relatively close to where Mr. Durrani's assets are held and is suggestive of the investigation being carried out in a very casual manner, to say the least. In this regard, the investigating officer may have lost focus of the fact that under the Police Rules, 1934 it is the duty of an investigating officer to find out the truth of the matter under investigation; his object is to discover the actual facts of the case and to arrest the real offender or offenders and that he shall not commit himself prematurely to any view of the facts for or against any person.

16. The learned Special Prosecutor argued that for the purposes of determining the income generated from the assets of Mr. Durrani, NAB had relied upon the income tax returns filed by Mr. Durrani for the period 2008 to 2013 and the assets declaration he had made to the Election Commission of Pakistan. NAB has also relied on a statement submitted by Mr. Durrani regarding the income he has generated from these assets. This evaluation of the investigating officer has not taken into account the fact that Mr. Durrani was not penniless before 2008 (or as a matter of fact 1985) and that he may also be a beneficiary of a large amount of family owned lands which had been in the family for generations. Whether a mis-declaration made before the Federal Board of

Revenue or the Election Commission of Pakistan is sufficient to conclusively establish the nature, extent and quantum of assets owned and income generated is also an area which cannot be decided in a bail seeking petition.

17. It appears that the investigating officer of the case may not have taken into account that the Durrani family has substantial landholding which may not all stand in the name of Mr. Siraj Durrani, yet landholding the benefit of which is shared by the whole family. No investigation appears to have been conducted for the period prior to 2008 which again is surprising as NAB should have known that Mr. Durrani came from an agricultural family. The known sources of income and the income generated from them, in our view and upon a tentative assessment, requires further inquiry. We have noticed that in a number of cases, accused have got the benefit of weak investigations. It must be kept in mind that it is one thing to have a strong suspicion about a person's guilt and quite another to prove it in a court of law. The prosecution department should ensure that the investigation carried out and the evidence collected is of such a nature and strength that it can withstand closer scrutiny when the case is in court.

18. Tacitly, the prosecution has also based its argument on the profile of the petitioners. In this regard we would like to say that perceptions may be stronger than reality but courts of law cannot base their decisions on perceptions and presumptions unless the same are warranted by law. Each citizen pursuant to Article 25 of the Constitution is ensured the equal protection of law. Also, it must not be lost sight of that Article 10-A gives every citizen the right of a fair trial.

19. The learned Special Prosecutor has defended the investigation into the sources of income by relying heavily on the argument that the onus of proof was on Durrani to prove his innocence pursuant to section 14(c) of NAO 1999. In this regard, we would like to refer to the judgment of the Honorable Supreme Court in the *Ghani-ur-Rehman* (supra) case where the Court (in paragraph 6 of the judgment) observed as follows:

"The law now stands settled that in order to prove commission of an offence under section 9(a)(v) of the National Accountability Ordinance, 1999 it has to be proved by the prosecution as to what were the known sources of income of the accused person at the relevant time and that the resources or property of the accused person were disproportionate to his known sources of income and it is after such proof has been led and the necessary details have been provided by the prosecution that the onus shifts to the accused person to account for such resources or property because mere possession of any pecuniary resource or property is by itself not an offence but it is failure to satisfactorily account for such possession 'of pecuniary resource or property that makes the possession objectionable and constitutes the relevant offence."

In view of our observations above, we are of the tentative view, that at this preliminary stage it cannot be conclusively said that the investigation into the sources of

income was of such standard which would lead to the applicability of the presumption contained in section 14(c), which as noted above does not automatically come into play and thus Mr. Durrani should be given a fair opportunity to explain how he acquired the properties in question which he claims to own and if he is able to do so the presumption would not be applicable. Only after he has failed to have provided reasonably satisfactory explanations as to how he acquired his assets will the presumption kick in.

20. There is a manner that is prescribed in law for a law enforcement agency to search a home of a person. Most regrettably, it appears, that the search conducted by NAB of Durrani's house was conducted in a crude and unprofessional manner without following the procedure laid down in section 103 Cr.P.C. The investigating officer, upon a query, replied that he was not even aware of the provisions of section 103. There were no respectable persons from the neighborhood who were even requested to accompany the NAB team for the search. NAB was aware that there were only young women in the home, yet, no professionalism was prima facie shown during a raid that lasted several hours. The search could have been conducted in a respectful and professional manner complying with all legal requirements and respecting the dignity and self respect of the inhabitants and their home, yet, a brash approach was adopted as if a dwelling harboring terrorists or hardened criminals was being raided. The memo of recovery prepared at the spot shows two NAB officials and one of the daughters of Mr. Durrani as witnesses to the recovery. At this stage, it would not be unreasonable to doubt the free will of a traumatized young lady in signing the memo. What would be the impact of such a search and seizure is a question for the trial court to decide after evidence produced has been evaluated by it, however, at this stage, the manner in which the search was conducted makes what was actually recovered from the premises a case of further inquiry.

21. It was also not satisfactorily explained to us as to what was the pressing need to arrest Durrani when even by NAB's own admission he was cooperating fully with the inquiry being conducted. The learned Special Prosecutor, NAB has defended the arrest solely on the ground that under the law, the Chairman, NAB had the power to issue an arrest warrant for a person even during the stage of inquiry. There is absolutely no cavil to what the learned Special Prosecutor has argued but it must be ensured that there are solid grounds to make arrests and that a person is not deprived of his liberty on whimsical and arbitrary reasons. We are also unable to understand the wisdom behind NAB arresting people at the inquiry stage unless the suspect is not co-operating with the investigating officer to whom the investigation is assigned; tampering or attempting to tamper with witnesses or evidence or there are strong reasons that he is likely to flee from the jurisdiction or for some other valid reason. The record reveals that the

investigation in the case was authorized well after the arrest of Durrani. It is correct that the legislature has empowered the Chairman, NAB to issue an arrest warrant at the inquiry stage, however, such a power must be pressed into action very carefully and cautiously, as it tends to make inroads into the fundamental rights guaranteed by the Constitution. It must also be kept in mind that the Honorable Supreme Court in the case of **Khan Asfandiyar Wali vs Federation of Pakistan (PLD 2001 SC 607)** has held that *“the power conferred on Chairman NAB is not uncontrolled and his discretion is to be exercised judiciously having regard to the provisions of section 24-A of the General Clauses Act, 1897”*.

22. The investigating officers are the face of NAB on the ground. Their conduct reflects on the entire institution. NAB is the premier anti-graft agency of the country. It has many feathers in its cap. We are, however, optimistic that the learned Chairman, NAB shall direct that the training, discipline and professionalism of his officers on the ground are further enhanced. Procedures of search and arrest should be revisited. The spirit of Article 14 of the Constitution that the dignity of man and, subject to law, the privacy of home, is inviolable, should further be inculcated in his officers. The state has far-reaching powers to investigate, prosecute, try and punish. In a democratic society it is expected that these powers should be exercised with respect for the autonomy and dignity of each individual and his home. It would be a sad day for NAB as an institution with its well educated and trained investigating officers if it was perceived as adopting a *“thana culture”* which would do irreparable damage to its prestige, respect and reputation as a fair and impartial investigating agency, in the eyes of the public who must have confidence, faith and trust in the conduct of NAB during its investigations.

23. We have deemed it necessary to briefly address the search and arrest of Durrani as it is a reflection of a certain mindset that NAB had at the time. It would also not be out of place to mention that the Honorable Supreme Court in **Sughran Bibi vs The State (PLD 2018 SC 595)** (though not a NAB case) has observed that: *“Ordinarily no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest and for such justification he is to be guided by the relevant provisions of the Code of Criminal Procedure, 1898 and the Police Rules, 1934. According to the relevant provisions of the said Code and the Rules a suspect is not to be arrested straightaway or as a matter of course and, unless the situation on the ground so warrants, the arrest is to be deferred till such time that sufficient material or evidence becomes available on the record of investigation prima facie satisfying the investigating*

officer regarding correctness of the allegations levelled against such suspect or regarding his involvement in the crime in issue.”

In our view the observations made above would be equally applicable to a NAB case.

24. The grounds warranting arrest of Mr. Durrani which have been shown to us by NAB and which are on record bear no signature of the authority which has issued them. Learned Special Prosecutor NAB expressed his inability to show us the original of the said grounds of arrest from which it could be determined as to what were the risks that warranted an immediate arrest of Mr. Durrani at the inquiry stage. The unholy rush to arrest Mr. Durrani whilst he was in Islamabad prima facie appears to be wholly unjustified and does not reflect well on NAB.

25. We are of the opinion that Mr. Durrani deserves the concession of bail as on a tentative assessment it appears that there are a number of aspects of his case which make it a case of further inquiry. The remaining petitioners are alleged to be the front men of Mr. Durrani. As we have concluded that Mr. Durrani is entitled to bail, the benefit will also flow to the alleged front men who are on interim pre-arrest bail especially as it can be inferred from our above discussion that there appear to be tinges of malafide on the part of NAB floating on the face of the record. We have hence not discussed their roles in greater detail.

26. In view of the above discussion, petitioner Agha Siraj Durrani is admitted to post arrest bail subject to his furnishing a solvent surety in the amount of Rs. 1,000,000 and a P.R. Bond in the like amount to the satisfaction of the Nazir of this Court. As the learned Special Prosecutor has expressed NAB's anxiety of the petitioner being a flight risk, the Ministry of Interior is directed to place the name of the petitioner on the Exit Control List. The interim pre-arrest bails granted to the remaining petitioners are confirmed on the same terms and conditions.

27. The observations contained herein are of a tentative nature and the learned trial Court is not to be influenced in any manner whatsoever while hearing and deciding the case at trial.

JUDGE

JUDGE