JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 739 of 2021

Saad Sumair
VS
National Accountability Bureau (NAB) through its Chairman and 2 others.

PETITIONER BY:	Barrister Umer Aslam Khan, Advocate.
RESPONDENTS BY:	Sardar Muzaffar Ahmed Khan Abbasi, Deputy Prosecutor General, NAB. Syed Ishfaq Hussain Naqvi, Advocate on behalf of Sindh Bank. Mr. Mubashir Karim, A.D/I.O, NAB. Mr. Farhan Ashraf Khan, Group Business Head North, Sindh Bank.

DATE OF HEARING: 23-06-2021.

BABAR SATTAR, J.- Through this petition the petitioner Saad Sumair son of Muhammad Abu Baker seeks pre-arrest bail in proceedings which are pending before the National Accountability Bureau **("NAB").** At the time of filing of this petition a call-up notice dated 01.02.2021 had been served on the petitioner which in relevant part states the following:

> *"Whereas, during the course of inquiry/investigation, it has been revealed that you being benami Director of M/s Paramount Builders & Developers (Pvt) Limited obtained fraudulent finance facility of Rs.300 Million from Sindh Bank Limited which was misappropriated and is still outstanding. In this regard, you submitted application for Plea Bargain in this subject case and were required to submit Plea Bargain Affidavit to this office for processing of your PB application. However, despite lapse of considerable time, the same has not been submitted by you as yet."*

2. The petitioner was admitted to ad-interim bail by order dated 23.02.2021. During the pendency of the petition warrant of arrest was issued by the Chairman, NAB dated 09.04.2021 along with grounds for arrest. The basic allegation against the petitioner is that he committed the offence of corruption and corrupt practices falling under section 9(a)(iv) and (xii) of the National Accountability Bureau Ordinance, 1999 **("NAB Ordinance")** in his capacity as an employee and associate of accused Muhammad Younis Kudwai on whose behalf he has been acting as "dummy" CEO/Director of M/s Paramount Builders and Developers (Pvt.) Limited **("Paramount Builders")**, which is a benami company of Omni Group. The grounds for arrest stated that shares of Paramount Builders were transferred in the name of the petitioner on 10.11.20216 in order to obtain a fraudulent finance facility from Sindh Bank Limited. That the petitioner became a signatory to the bank account of the Paramount Builders and signed cheques for withdrawal of proceeds of finance facility from the account of Paramount Builders for

payment to Abdul Jabbar, Nadeem Ahmed, Marshal Home Builders, Abid Enterprises, Shabbir Associates and Man Power. That by misappropriating Rs.300 million of finance facility the petitioner caused a huge loss to the Sindh Bank and committed the corruption and corrupt practices as defined under section 9(a)(iv) & (xii) of the NAB Ordinance. That the petitioner possessed crime proceeds and subsequently transferred such proceeds in various other accounts and consequently renders him liable to money laundering under section 3 (a)(b)(c)&(d) of the Anti-Money Laundering Act, 2010. Additional grounds of arrest have been stated as follows:

a. *Evidence collected so far, directly connects you with the commission of offence.*

b. That there is likelihood of destruction/ disappearance of relevant evidence/record at your end.

c. That incriminating evidence/material related to transfer of company in your name, obtaining fraudulent finance facility and its utilization cannot be collected without your arrest.

d. That there exists strong apprehension of your abscondence.

3. Learned counsel for the petitioner stated that the petitioner owns 50% shares of Paramount Builders and is one of the directors and has no criminal record. That the petitioner was included in the investigation as an accused in respect of grant of illegal finance facility by Sindh Bank Limited **("Sindh Bank")**, during which he was illegally confined without being presented before a court and was

coerced into signing Plea Bargain Form in 2019. Subsequently Reference No. 2 of 2019 was filed in respect of fake bank accounts, which is pending adjudication before the learned Accountability Court. The learned counsel for the petitioner submitted that Paramount Builders had obtained a loan amounting to Rs.300 million from Sindh Bank for a period of five years, extendable for further period of two years **("Finance Facility")**. The company owned valuable properties in Lahore described as Land No. 86-C, Block C, Model Town, Lahore measuring 2 kanals and 19 marlas and Land No. 97-C, Block C, Model Town, Lahore measuring 5 kanal 19 marlas **("Properties")**, which were mortgaged by the Sindh Bank Limited and the Finance Facility issued was therefore a fully secured mortgage-backed facility. He submitted that the Paramount Builders after paying mark up in the amount of 57.742 million defaulted on its payments and the bank filed a recovery suit No. 49909/2019 under section 9 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 **("Financial Institutions Ordinance")** for recovery of Rs.331.9 million before the learned Lahore High Court. In response to such recovery suit the Paramount Builders filed an application for leave to defend on 16.10.2019 which is still pending. He further stated that a reference under section 22(5) of the Benami Transactions (Prohibition) Act, 2017 **("Benami Act")** was filed against Paramount Builders alleging that the company was holding the Properties have been mortgaged by Sindh Bank as benami properties on

behalf of Younis Kudwai, Aslam Masood, Minahil Majeed, M/s Rubicon Private Limited, Princeton Builders & Developers and M/s Parathenon Private Limited. And after applying provisions of the Benami Act retrospectively to the purchase of Properties by Paramount Builders from Summit Bank on 13.12.2012, the Adjudicating Authority Bench-II Lahore declared the Properties as being held benami. The learned counsel for the petitioner stated that Paramount Builders had filed an appeal against such order under section 44 of the Benami Act, and by operation of law the impugned order stood suspended. He submitted that it was in this background that the impugned call-up notice was issued to the petitioner on 01.02.2021. He submitted that NAB had passed a freezing order under section 12 of the NAB Ordinance against the Properties and such freezing order was confirmed by the learned Accountability Court No.1 while adjudicating reference No. 2 of 2019 on 06.04.2021. He further submitted that the Sindh Bank by letter dated 24.05.2019 had written to Chairman, NAB seeking permission for sale of Properties for settlement of the Finance Facility. That on 07.05.2021 Paramount Builders submitted a settlement proposal for Debt-Property Swap under the Regulations of the State Bank of Pakistan for Debt-Property Swap. In response to such proposal Sindh Bank responded to Paramount Builders on 19.05.2021 stating that the NAB by letter dated 10.03.2021 had issued freezing order dated 05.03.2021 in respect of the Properties and had also taken the original property document

in its custody. Through the said letter Sindh Bank communicated its agreement, in principle, to the Debt-Property Swap subject to State Bank of Pakistan rules and regulations and the NAB freezing order. He submitted that prior to the issuance of the Finance Facility the Sindh Bank had sought evaluation reports and assessed market value of said properties which had come out to be Rs.400 million. He stated that the Sindh Bank once again sought the property value in 2019 and according to one evaluation report the value of the Properties was approximately Rs.421 million and according to another evaluation report, the value was Rs.449 million. The learned counsel for the petitioner submitted that it was in view of the current market value as well as forced sale value of the Properties, which was significantly higher than the total outstanding amount under the Finance Facility, that Sindh Bank had granted an approval in principle on 18.05.2021 to accept the Debt-Property Swap proposed by Paramount Builders. That but for the freeze order passed by NAB in relation to Properties and confirmed by the learned Accountability Court, the mortgage-backed Finance Facility was fully secured and could be settled immediately through Debt-Property Swap between Sindh Bank and Paramount Builders as both parties were ready and willing to proceed with such swap. His contention was that the question of any loss to the public exchequer simply did not arise as the value of the security in lieu of outstanding Finance Facility far exceeded the outstanding amount under such Finance Facility

and in the absence of NAB's freezing order the Properties could be swapped and handed over to the bank to settle the Finance Facility. He contended that the prospect of purported loss to Sindh Bank and the public exchequer had been manufactured by the actions of NAB that had slapped a freeze order upon the Property. He submitted that call-up notice and warrant of arrest had been issued in breach of section 31D of the NAB Ordinance which mandates that no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans can be initiated or conducted by NAB against any person, company or financial institution without reference from the Governor, State Bank of Pakistan. He further submitted that President of Sindh Bank who is also an accused in the NAB investigation against the issuance of finance facilities by Sindh Bank had already been granted bail by this Court in W.P No. 4166/2019 wherein it had been held that compliance with requirements of section 31D of the NAB Ordinance was mandatory. He also submitted that the entire series of actions against the petitioner in the instant matter had mala fide writ large over it. He contended that the petitioner is alleged to have connived with Abdul Jabbar in relation to the offence in question, who has been behind bars since 2018 and yet NAB has not investigated him for purposes of investigation in relation to which it seeks to arrest the present petitioner. The learned counsel for the petitioner submitted that in view of the language of call-up notice which was issued to procure a plea-bargain affidavit

from the petitioner and subsequently the issuance of warrants of arrest upon the petitioner's failure to indulge in plea-bargain reflects that the sole purpose of exercise of powers of arrest is to coerce the petitioner into admitting wrong doing and turning into an approver against other accused in the fake accounts case. He contended that such use of powers of arrest by the Chairman NAB under section 18(e) and 24(a) of the NAB Ordinance was tantamount to colorable exercise of authority which was liable to be judicially reviewed.

4. Learned Deputy Prosecutor General NAB responding to legal objections contended that section 31D of the NAB Ordinance was not applicable to the present case as it involved grant of a fraudulent finance facility with the connivance of officials of Sindh Bank for a fraudulent purpose. He submitted that Finance Facility had been afforded to Paramount Builders to undertake construction projects in Lahore but that proceeds from the Finance Facility had been distributed by the petitioner to third-party beneficiaries. He contended that the charge against the petitioner was that he was benamidar and was holding shares in the Paramount Builders for the benefit of Younis Kudwai and had secured the Finance Facility by mortgaging the Property belonging to the company to funnel money from Sindh Bank to third party beneficiaries identified by Younis Kudwai and his associates. He submitted that the agreement between Paramount Builders and Sindh Bank in relation to Debt-Property Swap proposal had no value as the allegations against officials of

the Sindh Bank and the petitioner were that they had all connived in grant of the Finance Facility. He further contended that the Property was acquired by Paramount Builders and its directors in a benami transaction as had been established by the order passed by the Adjudicating Authority Benami Zone 2, Lahore under the Banami Act. He contended that establishment of Paramount Builders and repeated transfers of its shares to benamidars was part of a larger financial scam to layer proceeds of finance facilities and conceal the real beneficiaries of finance facilities afforded by Sindh Bank to benami companies such as Paramount Builders. He further contended that pending proceedings under the Financial Institutions Ordinance as well as under the Benami Act did not bar exercise of authority by Chairman NAB under the NAB Ordinance to order the investigation in which warrants of arrest had been issued against the petitioner. He also drew the attention of the Court to the principles that govern the grant of pre-arrest bail to and relied on ***Hidayat Ullah Khan Vs. The Crown*** **(*PLD 1949 SC Lahore 21)*, *Manzoor and 4 others Vs. The State (PLD 1972 SC 81)*, *Murad Khan Vs. Fazal-e-Subhan and another (PLD 1983 SC 82)***, and ***Rana Muhammad Arshad Vs. Muhammad Rafiq and another (PLD 2009 SC 427)***. He concluded his arguments by stating that warrant of arrest had been duly issued and there existed sufficient evidence on record connecting the petitioner to an offence

under section 9(iv) and 9(xii) of NAB Ordinance and that the petitioner was required to for purposes of investigation.

5. This Court by order dated 07.06.2021 has summoned an official of the Sindh Bank to clarify whether or not Sindh Bank had agreed to the Debt-Property Swap with Paramount Builders. Mr. Farhan Ashraf Khan, Group Business Head North, Sindh Bank appeared and acknowledged that an agreement in principle to undertake Debt-Property Swap to settle the outstanding amount under the Finance Facility had been reached and the agreement would be signed once the freezing order against the Property was lifted.

6. The learned counsel for the petitioner stated in rebuttal that there was nothing on record to establish that shares of Paramount Builders had been transferred to the petitioner without consideration and further that no question of connivance between Sindh Bank and Paramount Builders ever arose in the instant case as the security against which the Finance Facility was issued far exceeded the total value of the Finance Facility. Given that no question of loss to Sindh Bank was conceivable in view of the value of the mortgaged Properties, the question of any loss to public exchequer did not arise. He further submitted that the petitioner was not a public office holder but the share holder and director of a private company and as there was no question of loss to the public exchequer in relation to Finance Facility, NAB had no jurisdiction in the matter. He further submitted that proceeds

from the Finance Facility had been used for legitimate purposes including, *inter alia*, to repay outstanding loans made by share holders and directors of the company for purposes of procuring the Properties from Summit Bank in 2013 and such repayment of loan was a declared purpose for obtaining the Finance Facility. He argued that as the Properties had been acquired by Paramount Builders from Summit Bank through a written sale agreement and the Properties remained in the name of Paramount Builders and was mortgaged by Sindh Bank to secure a Finance Facility issued by Sindh Bank to Paramount Builders, the question of the Properties being benami could not arise. He further contended that as the entire investigation revolved around acquisition of Finance Facility by Paramount Builders from Sindh Bank and use of proceeds of such Finance Facility alone, the allegation that payments made from the amount received from the bank under such Finance Facility amounted to money laundering was ludicrous.

7. We have heard the learned counsel for the parties and perused the record with their assistance.

8. We are at a loss to fully comprehend the offense being imputed to the petitioner by NAB. Paramount Builders purchased the Property from Summit Bank on 13.12.2012 for a consideration of Rs. 190 million as stated in the agreement to sell. At the relevant time no shares were owned by the petitioner and he was also not a director of the company. He

acquired shares in the company and was then appointed as a director of Paramount Builders on 10.11.2016. After the petitioner's appointment as director, Paramount Builders applied to Sindh Bank for grant of the Finance Facility in the amount of Rs. 300 million on 14.11.2016. At that time of such application the title of the Properties was already in the name of Paramount Builders. NAB has placed no share transfer deeds on record to establish whether or not any consideration was paid by the petitioner for acquisition of shares of Paramount Builders. There is also no material on record to establish that the Finance Facility was acquired in a fraudulent manner. Such allegation makes little sense in view of the fact that Sindh Bank was issuing the Finance Facility backed by the mortgage of valuable real estate, the value of which according to evaluation reports solicited by Sindh Bank at the time of approval of the Finance Facility was approximately Rs.400 million. Given that the loan facility was fully secured against Property that provided the bank with a cushion in a range of approximately Rs.100 million over and above the maximum value of the Finance Facility, the allegation that such facility was procured through fraud does not sound appealing. There is also nothing on record to establish that proceeds from the Finance Facility were disbursed to Younis Kudwai or other individuals on the instruction of Younis Kudwai or that Younis Kudwai is otherwise the real beneficiary of the Finance Facility or that proceeds from the loan were not used to settle the liabilities of Paramount Builders or for

purposes unrelated to the business of the company. Given that the present value of the Property – both market and forced sale value – exceeds the total outstanding amount under the Finance Facility, the question of loss to Sindh Bank or the public exchequer does not arise. Had it not been for the present investigation being conducted by NAB into the affairs of Paramount Builders and the freeze order in relation to the Properties, Sindh Bank and Paramount Builders could easily enter into the Debt-Property Swap that they have principally agreed to, and settle the Finance Facility. Such agreement would obviate the possibility of any loss being caused to the public exchequer.

9. The argument on NAB's behalf that the Properties have been declared as benami under the Benami Act and consequently a loss to public exchequer due to Paramount Builders' default under the Finance Facility is also not convincing. The Benami Act has its own scheme and prescribes penalties for those who breach provisions of such statute as well as remedies against an order passed by an adjudicating authority under the Benami Act. It is true that an order in relation to Properties has been passed by an adjudicating authority. But such order remains suspended by virtue of the appeal filed by Paramount Builders against such order under section 44 of the Benami Act. Till such time a judgment that the Properties are held benami and liable to be confiscated under provisions of the Benami Act attains finality, no criminal proceedings can be conceived under the

NAB Ordinance based on the presumption that the Properties might eventually be declared the product of a benami transaction, and that once such declaration attains finality the Finance Facility issued by Sindh Bank would become an unsecure facility and a failure of Paramount Builders to settle it would then cause loss to the public exchequer. It would also remain to be determined whether NAB can charge a person for holding benami assets when holding of benami assets has been defined as an offence under the Benami Act, which is a special law later in time to the NAB Ordinance and contains section 56 which gives such law overriding effect over all other laws for the time being in force, including the NAB Ordinance. Based on the record produced in relation to the investigation, in which NAB seeks to arrest the petitioner and in view of the arguments of the learned Deputy Prosecutor General, it seems that NAB has come to the conclusion that the petitioner has some role in the jigsaw puzzle of fake accounts that the NAB is endeavoring to solve; except that the present investigation has been ordered without a clear idea as to what the wrong doing might be that the petitioner may be liable for in relation to the fake accounts cases being investigated by NAB. NAB has failed to make out a case as to what the exact offence is that the petitioner is liable for. There is no incriminating material on record establishing either that petitioner is a benamidar or that he has played a role in procuring a Finance Facility from Sindh Bank fraudulently or that there is real likelihood that such Finance

Facility will remain outstanding and cause a loss to the public exchequer in view of the present value of the property, which far exceeds the amount outstanding under the Finance Facility.

10. Let us now consider case law on grant of bail in relation to NAB Ordinance as laid down by superior courts.

11. The seminal judgment for purposes of the law on pre-arrest bail is ***Hidayat Ullah Khan Vs. The Crown (PLD 1949 Lahore 21)***. A full bench of the learned Lahore High Court had interpreted provisions of the Code of Criminal Procedure, 1898 to hold that:

> *"As I have pointed out above, the High Court has power to "direct that any person be admitted to bail", and giving these words their full weight, I see no escape from the conclusion that the power extends not only to the grant of bail to persons who are in the custody of the High Court or of an inferior Court or a police officer, but also includes a power to give directions that should be admitted to bail who are not in custody. As I have pointed out above in examining the provisions of sections 496, 497 and 498, the powers given to the High Court by the last-mentioned section and by subsection (5) of section 497 includes a power to control the direction of police officers and Courts of first instance as regards all the matters entrusted to them, with one possible exception, namely, as regards enhancement of the bail demanded."*

The authority of the High Court to "direct that any person be admitted to bail" was thus founded in statute and not imagined by the learned Lahore High Court as an equitable remedy. The

relevant considerations guiding the exercise of such authority were explained as follows:

> *"… in a proper case, the High Court has power under section 498, Criminal Procedure Code, to make an order that a person who is suspected of an offence for which he may be arrested by a police officer or a Court, shall be admitted to bail. The exercise of this power should, however, be confined to cases in which, not only is good prima facie ground made out for the grant of bail in respect of the offence alleged, but also, it should be shown that if the petitioner were to be arrested and refused bail, such an order would, in all probability, be made not from motives of furthering the ends of justice in relation. to the case, but from some ulterior motive, and with the object of injuring the petitioner, or that the petitioner would in such an eventuality suffer irreparable harm."*

12. ***Hidayat Ullah Khan*** was laid down at a time when the country had just been liberated from the shackles of colonial rule. The drafting of a new Constitution was underway and the newly founded Sate was still being administered under The Government of India Act, 1935, which was more of a procedural law that did not delineate the substantive or fundamental rights of the citizens. Obviously it had been drafted by the British to administer colonial India and not to regulate the relationship between an autonomous and independent people and a state administered by their elected representatives. It was later when the fundamental rights of citizens were guaranteed by the Constitution that the Supreme Court underscored that protection of such rights was a paramount consideration for exercise of High Court's power to grant pre-arrest bail.

13. ***Hidayat Ullah Khan*** which remains good law, was reiterated by the august Supreme Court in ***Murad Khan Vs. Fazal-e-Subhan and another (PLD 1983 SC 82)***, which emphasized that the driving consideration for a High Court in ordering pre-arrest bail is the right of a citizen to liberty and his reputation. It held that:

> *"The Court should seriously apply its mind before passing the order of pre-arrest bail. I must, however, make it clear that Courts are the guardians of liberty, of citizens. The abuse of power by the police to rope in innocent persons in order to humiliate them and to cause irreparable loss to their reputation should be equally kept in view. The golden principles in Hidayat Ullah Khan's case must strictly be followed."*

It explained that, "*one of the main considerations for grant of bail is whether the prosecution is motivated by malice so as to cause irreparable injury to a citizen's reputation and liberty*," and further that, "*this Court always thought it necessary to look for such circumstances which would furnish the assumption that the police was motivated by political considerations or other ulterior reasons, before granting pre-arrest bail*."

14. The rule against pre-trial punishment had already been laid down by the apex Court in the apt-quoted case of ***Manzoor and 4 others Vs. The State (PLD 1972 SC 81)*** in the following terms:

> *"It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death*

> *or transportation, unless reason able grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run."*

15. After promulgation of NAB Ordinance, 1999 a question arose as to whether in view of section 9(b) of the NAB Ordinance, someone accused of an offence under NAB Ordinance could be enlarged on bail by the High Court. The august Supreme Court in ***Khan Asfandyar Wali Vs. Federation of Pakistan (PLD 2001 SC 607)*** clarified that, *"it is well settled that the Superior Courts have the power to grant bail under Article 199 of the Constitution, independent of any statutory source of jurisdiction such as section 497 of the Criminal Procedure Code, section 9(b) of the NAB Ordinance to that extent is ultra vires the Constitution".*

16. The august Supreme Court most recently in ***Tallat Ishaq Vs. National Accountability Bureau through Chairman and others (PLD 2019 SC 112)*** that section 9(b) does not fetter the jurisdiction of the High Court under Article 199 of the Constitution, which laying down guidelines for the High Courts for exercise of such authority. It was emphasized that:

> *"The object of criminal law is to ensure availability of the accused to face trial and not to punish him for offence allegedly pending final determination by a competent court of law. It is well settled principle of law that grant of*

> *bail cannot be withheld as punishment on accusation of non-bailable offence against an accused. An accused is entitled to expeditious and inexpensive access to justice, which includes a right to fair and speedy trial in a transparent manner without any unreasonable delay."*

The guidelines laid down in ***Tallat Ishaq***, included inter alia, the following:

> *"In an appropriate case through exercise of its jurisdiction under Article 199 of the Constitution a High Court may grant bail to an accused person arrested in connection with an offence under the National Accountability Ordinance, 1999 and section 9(b) of the said Ordinance does not affect the jurisdiction for a High Court conferred upon it by the Constitution. The constitutional jurisdiction of a High Court is, however, an extraordinary jurisdiction meant to be exercised in extraordinary circumstances and not in run of the mill cases or as a matter of course."*

17. It was also held by the apex Court in ***National Accountability Bureau through Chairman Vs. Murad Arshad and others*** ***(PLD 2019 SC 250***) that, "*the jurisdiction under Article 199 of the Constitution is therefore to be exercised to prevent miscarriage of justice and abuse of NAB Ordinance, 1999. Such jurisdiction is not to be exercised as a substitute of power under sections 426, 491, 497, 489 and 561-A of the Code of Criminal Procedure, 1898 liberally and indiscriminately converting High Court into wholly court of ordinary criminal jurisdiction*." Likewise, ***Chairman, National Accountability Bureau, Islamabad Vs. Mian Muhammad Nawaz Sharif (PLD 2019 SC 445)*** reiterated the dicta in ***Tallat Ishaq*** and held that in cases under NAB Ordinacne, "*bail may be granted*

through exercise of constitutional jurisdiction of a High Court only in extraordinary circumstances and in case of extreme hardship…"

18. In ***Mst. Sughran Bibi Vs. The State*** ***(PLD 2018 SC 595)*** a larger bench of the august Supreme Court endorsed the law laid down by a full bench of the Lahore High Court in ***Khizar Hayat and others Vs. Inspector General of Police (Punjab), Lahore and others*** ***(PLD 2005 Lahore 470)*** on the manner in which power to arrest is to be exercised and reproduced the said in relevant part:

> *"21. One of the cardinal principles of criminal law and jurisprudence is that an accused person is presumed to be innocent until proved guilty before a court of law. However, of late we have noticed a growing tendency on the part of the complainant party to insist upon arrest of an accused person nominated by it in the F.I.R. and an increasing willingness, nay eagerness, on the part of the investigating officer of a criminal case to affect arrest of the accused person even before initiating or launching a proper investigation of the allegations levelled in the F.I.R.. Such an approach has been found by us to be absolutely against the spirit of the relevant law, to be wrought with inherent dangers to cherished liberty of citizens who may ultimately be found to be innocent and to amount to putting the cart before the horse!"*

19. Post ***Sughran Bibi*** it is settled that the State must not exercise it police powers to arrest a citizen merely because a report or complaint has been filed against him which is under investigation. The exercise of the power of arrest must neither be mechanical nor arbitrary, and if it is motivated by ulterior motives or collateral purpose not conceived by law and not in the

interest of justice, such exercise of the State's police powers shall be deemed malafide and is liable to be judicially reviewed. It was held in ***Khalil Ahmed Soomro and others Vs. The State (PLD 2017 SC 730)*** that:

> *"Although for grant of pre-arrest bail one of the pre conditions is that the accused person has to show that his arrest is intended by the prosecution out of mala fide and for ulterior consideration. At pre-arrest bail stage, it is difficult to prove the element of mala fide by the accused through positive/solid evidence/materials and the same is to be deduced and inferred from the facts and circumstances of the case and if some events-hints to that effect are available, the same would validly constitute the element of mala fide."*

20. There are a number of judgments by superior courts that highlight the distinction between considerations regulating the grant of pre-arrest bail versus post-arrest bail. Over time, the emphasis of the court's focus in considering grant of pre-arrest bail has been equally on (i) the entitlement of an accused to be released on bail, and (ii) the manner in which the decision to arrest an accused has been reached and powers of arrest have been exercised. The latest pronouncement of the august Supreme Court on pre-arrest bail in ***Shahzada Qaiser Arfat Vs. State (PLD 2021 SC 708)*** clarifies the law on how the power of arrest is to be exercised by the police as well as how power is to be exercised by the courts in considering the question of bail in the following terms:

> *"5. No doubt, a police officer has, under Section 54 of the CrPC, the power to arrest a person who has been involved in any cognizable offence or against whom a complaint*

has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Having the power to arrest is one thing but the justification for the exercise of that power is quite another. A police officer that makes arrest of a person must be able to justify the exercise of that power in making the arrest apart from his having the power to do so. He cannot make arrest of a person, only because he has the power to do so. He must also show sufficient grounds for making the arrest."

"6. The power of the High Courts and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process and fair trial. Prearrest bail is in the nature of a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose for making arrest of the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa. Reluctance of the courts in admitting the accused persons to pre-arrest bail by treating such a relief as an extraordinary one without examining whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offence and for what purpose his arrest and detention is required during investigation or trial of the case, and their insistence only on showing malafide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct, especially after recognition of the right to fair trial as a fundamental right under Article 10A of Constitution of Pakistan, 1973. Protection against arbitrary arrest and detention is part of the right to liberty and fair trial. This Court has, in many cases, granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offences and has not required independent proof of malafide on part of the Police or the complainant before

> *granting such relief. Despite non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the malafide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove malafide on their part."*

21. Let us once again revert to the question of bail in a case under the NAB Ordinance. In a detailed judgment, a Division Bench of this Court in ***W.P No. 769/2019*** (***Amjad Mustafa Malik Vs. Director General, National Accountability Bureau & 4 others)*** reflected on the scheme of the NAB Ordinance and the law laid down by the apex Court to then highlight the constitutional rights at stake when a bail matter comes before the High Court. In view of the scheme of NAB Ordinance and especially section 18 and 24 of NAB Ordinance, this Court held that, "*a plain reading of the provisions of the NAB Ordinance unambiguously shows that the power to arrest has been expressly restricted to and can only be used 'for purposes of an inquiry or investigation*'." It was held that:

> *"There must be sufficient incriminating material to justify arresting an accused. The 'incriminating material' must be of the nature which, prima facie, indicates involvement of the accused in the commission of the offences under the Ordinance of 1999. The material brought on record should, prima facie, show existence of criminal intent or motive, mens rea, element of conscious knowledge and participation with the object of obtaining illegal gain or benefit. In the absence of these crucial elements, arrest of an accused would amount to an abuse of the power to arrest vested under the Ordinance of 1999. Mere allegations of misuse of authority would not justify*

> *depriving an accused of liberty because an irregularity or wrong decision sans criminal intent, mens rea and illegal gain or benefit does not attract the offences under the Ordinance of 1999. The power of arrest under the Ordinance of 1999 cannot be exercised in an indiscriminate, reckless or wanton manner because there are conflicting fundamental rights guaranteed under the Constitution which cannot be ignored."*

The fundamental rights in question and related matters in a bail matter have been enumerated in detail in ***Amjad Mustafa Malik***, and the relevant excerpts are as follows:

> **Right to be presumed innocent:** "*In order to justify an arrest of a person in a non-violent crime, who is presumed to be innocent, the authority empowered in this regard has to show that there were no other less intrusive means or alternatives*."
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> **Onus of proof:** *"[D]espite the reverse onus of proof contemplated under section 14, the presumption of innocence of an accused remains unaffected till he or she, as the case may be, has been handed down conviction by a learned court after the conclusion of a trial."*
>
> **Right to dignity:** *"[A]n arbitrary, indiscriminate and reckless exercise of the executive power to arrest during an inquiry or investigation under the Ordinance of 1999 would be in violation of the constitutionally guaranteed right and the explicit recognition that human dignity is inviolable. Arresting a person in an alleged white collar crime by exercising the executive power in a mechanical and arbitrary manner, or unnecessarily, has serious consequences. It can cause irreversible damage to the reputation of a person."*
>
> **Right to liberty**: *"Keeping in view the value and importance of the fundamental rights of liberty and freedom of movement, the exercise of the executive power to arrest must be strictly circumscribed by the*

object which is intended to be achieved and not excessive or disproportionate. In a nutshell, the right to liberty, being a sacred shield against abuse of statutory power vested in an executive authority, must be jealously guarded as the duty of a Constitutional Court."

Principle of Proportionality. *"In order to protect the most crucial and fundamental rights, such as the right to liberty and not to be subjected to degrading and humiliating treatment, courts have developed and applied the principles of proportionality, reasonableness and the need to use the least intrusive alternatives as tools for judicially reviewing the exercise of executive power which results in detention or arrest."*

Considerations re white collar crime: *"The detection and investigation of offences dealt with under the Ordinance of 1999 requires highly trained professionals having expertise in forensic accounting, money laundering, data mining and data analysis etc. If the investigator of a white collar crime is unable to conduct effective inquiry and investigation without arresting an accused then it raises serious questions regarding competence and professionalism."*

22. It was held by the august Supreme Court in ***Anwar Ahmad Khan v. The State*** **(1996 SCMR 24)** that: "*It is well-settled principle that where investigation is mala fide or without jurisdiction, the High Court in exercise of its Constitution jurisdiction under Article 199 is competent to correct such proceedings and pass necessary order to ensure justice and fair play. The investigating authorities do not have the entire and total authority of running investigation according to their whims*."

23. The requirements of conducting an inquiry or investigation in relation to a violent crime versus a white-collar crime cannot be lost on a constitutional court exercising judicial review powers over the State's decision to arrest a citizen. Consequently, the distinction between pre-arrest and post-arrest bail as understood in relation to investigation of offences under the Pakistan Penal Code, 1860 might not be as pertinent in relation to the NAB Ordinance. The restraint applied by granting more leeway to the police in its exercise of arrest powers under section 54 of Cr.P.C is in consonance with the settled law that courts are loath to interfere with the conduct of investigation, which falls within the domain of the executive, and the discretion exercised by the police in collecting evidence for purposes of prosecution or detention of an accused to prevent a repeat of the offence or destruction of evidence in the immediate aftermath of a crime having been committed. But the concept of physical recovery of incriminating evidence, including weaponry, or management of the crime scene does not equally apply to white-collar crime as it does to violent crime. As white-collar crime undertaken by public office holders largely involves documentary evidence, which is often in the custody of State or regulatory authorities or juristic persons, which cannot be easily destroyed by an individual accused, considerations such as preservation and collection of evidence or prevention of a repeat offence posing a threat to the public if the accused is not apprehended, are not fully attracted in the investigation of white-collar crime.

24. The aforesaid discussion around case law guiding exercise of the court's power while considering grant of pre-arrest bail can be summarized as follows:

1. The authority of the High Court in granting pre or post-arrest bail in relation to offences under NAB Ordinance, emanates not from statute but from Article 199 of the Constitution, which power is exercised to judicially review a decision of the executive authorities, (i.e. Chairman NAB in relation to NAB Ordinance) to arrest a citizen and exercise of such judicial review power is subject to all guiding principles that otherwise guide High Court's exercise of its extraordinary constitutional jurisdiction under Article 199.

2. The judicial review power is exercised to enforce the fundamental rights of a citizen and what is at stake is nothing less than the rights of liberty and dignity, and the right of equality and to be treated equally under law, which rights guaranteed under Articles 4, 9, 14 and 25 of the Constitution, together form the foundation of the framework of fundamental rights guaranteed by the Constitution, upon which are assembled all other auxiliary fundamental rights.

3. As the decision of the executive branch of the State to arrest a citizen involves curtailment of constitutionally-guaranteed fundamental rights of a citizen, the constitutional court denominated as the machinery for enforcement of fundamental rights, undertakes strict scrutiny of such executive action.

4. It is for the executive authority exercising its extraordinary statutory power to curtail the fundamental rights of a citizen by arresting him, to

establish before the court that such power of arrest is being exercised for the legitimate state purpose of furthering the ends of justice by investigating an individual in relation to an offense when there exists sufficient cause and material on record to link such individual to the offense in question.

5. It is for the executive authority exercising arrest powers of the State to establish that such manner of exercise of power constitutes the means least restrictive of the fundamental rights of the citizen in question, while pursuing the legitimate State purpose of conducting an inquiry or investigation into an offence made out under a penal statute.

6. While courts afford a wider berth to state authorities investigating violent crimes in view of the requirements of investigation in such cases while applying the principles of proportionality, the court would exercise stricter security in relation to white-collar crimes involving documentary evidence, and the executive needs to establish that exercise of arrest powers does constitute the least restrictive means if a balance is struck between the fundamental rights of the individual being investigated and the collective public interest in effective investigation of an alleged offence.

7. The accused seeking pre-arrest bail need not establish mala fide on part of executive authorities, which can be inferred if State authorities fails to discharge the onus of establishing legitimate state purpose for exercise of arrest powers and further that such action constitutes the means least restrictive of fundamental rights while carrying out an effective investigation. The suggestion that a

white-collar crime cannot be investigated without acquiring physical custody of the individual accused ought to be approached with skepticism.

8. Exercise of arrest powers to seek admission of an offence from an accused (or voluntary return in the context of NAB Ordinance) or to coerce the accused into becoming an approver under threat of detention would fall foul of Article 13 of the Constitution that provides a guarantee against self-incrimination, and such purpose of arrest would not constitute a legitimate state purpose for exercise of the state's power of arrest.

25. Let us now apply the principles summarized to the facts of the case as delineated in the first part of the judgment. In the instant case, NAB has placed nothing on record to establish that the consideration for acquisition of shares of Paramount Builders has not been paid by the petitioner or that such consideration has been paid by another person, bringing transactions in the shares of Paramount Builders within the definition of 'benami transaction' under section 2(8) of the Benami Act. It appears that over the two-year period that NAB has been investigating the issuance of Finance Facility by Sindh Bank to Paramount Builders as a benami transaction, it has not even bothered to collect share-transfer deeds recording the trail of sale of shares from 2013 onward from previous members of Paramount Builders to the present members, in order to determine whether or not such transactions were made subject to payment of consideration. Consequently, there is nothing on record to reflect that the petitioner is a 'benamidar' within the

meaning of section 5(da) of NAB Ordinance, holding shares of Paramount Builders as an ostensible owner for the benefit or enjoyment of another accused.

26. Further, if the sole allegation against the petitioner is that he is a benami owner of shares of Paramount Builders, which in turn holds the Properties in relation to which proceedings are now pending in appeal before the Federal Appellate Tribunal under section 44 of the Benami Act, it is unclear how NAB is exercising jurisdiction in relation to such matter. Section 51 of the Benami Act, defines entry in a benami transaction as an offense under the Benami Act and prescribes rigorous imprisonment for a term of one year for anyone guilty of the offense of benami transaction or holding benami property. The prosecution of such offense lies before a Special Court under section 48 of the Benami Act and not before an Accountability Court. Section 56 of the Benami Act then grants overriding effect to provisions of the Benami Act, promulgated in 2017, over anything to the contrary in any other law for the time being in force, including the NAO.

27. The basis of the offense being investigated by NAB in the instant matter is rooted in the sale-purchase transaction in the shares of Paramount Builders, which holds the Properties mortgaged to secure the Finance Facilities. The sale-purchase of shares takes place pursuant to provisions of the Companies Act, 2017. The Companies Act, 2017 is an “administered legislation” as defined in section 2(aa) of the Securities and Exchange

Commission of Pakistan Act, 1997 **("SECP Act")**. Transactions involving sale and purchase of shares of companies are thus transactions undertaken pursuant to the Companies Act, 2017, administered by the Securities and Exchange Commission **("Commission")**. Section 41B(1) of the SECP Act states the following:

> *"Notwithstanding anything contained in any other law, including National Accountability Ordinance, 1999 (XVIII of 1999) and Federal Investigation Agency Act, 1974 (VIII of 1975) no action, inquiry, investigation or proceedings in respect of any regulated activity, regulated securities activity, transaction, process or permission granted under this Act or any administered legislation, shall be taken, initiated or conducted by any Federal or Provincial investigation agency, bureau, authority or institution by whatever name called without reference from the Commission." [The underlining is ours]*

Nothing has been placed on record to establish that investigation in the share purchase transactions of Paramount Builders has been initiated on a reference from the Commission. It thus remains to be determined whether investigation related to purchase of shares of Paramount Builders by the petitioner, as a benami transaction as alleged by NAB, was validly authorized in view of section 41B of the SECP Act read together with provisions of the Benami Act.

28. It is admitted by NAB that it has received no reference from the Governor State Bank of Pakistan to investigate the grant of Finance Facility as an imprudent loan within the meaning of section 31D of the NAB Ordinance. It is

also evident from record and the exchange of communication between Sindh Bank and Paramount Builders that the question of default under the Finance Facility would not be a live issue had it not been for NAB's freeze order in relation to the Properties, now confirmed by the learned Accountability Court, as the bank and the company are willing to enter into a Debt-Property Swap to settle the Finance Facility.

29. The position taken by NAB is that it is not investigating a loan default or grant of an imprudent loan for purposes of Section 31D of the NAB Ordinance, but the offence of dishonest and corrupt acquisition of a pecuniary benefit by the petitioner, in the form of the Finance Facility from Sindh Bank, for his own benefit and for the benefit of other persons for whom he holds the shares of Paramount Builders consequent to a benami transaction, within the meaning of section 9(iv) of the NAB Ordinance read together with section 9(xii). The 'benami transaction' bit of this allegation has already been discussed above as being backed by no evidence available on record. Even in pursuing the allegation of dishonestly, corruption and illegality in acquisition of the Finance Facility, NAB seems to be conflating (i) share-purchase transactions in securities of Paramount Builders, and (ii) mortgage-backed Finance Facility afforded by Sindh Bank to Paramount Builders, with the fake accounts case in which credit entries randomly showed up in the accounts of indigent citizens who were even unaware that bank accounts had been opened up in their names. Use of terms such as layering and camouflage of money trail would not in of itself cannot be

treated as evidence of a "benami transaction" or fraud in the acquisition of the Finance Facility or utilization of its proceeds. In the present case, there is no ambiguity about the trail of funds in any of the transactions in question. The share-purchase transactions between previous and present members of Paramount Builders are documented and the identity of individuals is known. Paramount Builders purchased the Properties from Summit Bank in 2013 in a sale transaction which is documented as is the consideration for such transaction and the flow of funds. The Finance Facility afforded by Sindh Bank to Paramount Builders is backed by a charge created over Properties, the value of which far exceeds the amount outstanding under the Finance Facility and the bank and the company are willing to settle the facility. This obviously begs the question of what illegality, dishonesty or corruption is involved in the procurement of such Finance Facility, especially when the facility is fully secured by a mortgage and there is no threat of any prospective loss to the public exchequer in view of the present value of the Property. NAB claims that the funds from the Finance Facility have been diverted to the use of third parties, which was not the purpose of such facility. Such flow of funds is also fully documented and in view of the charts placed before this Court, it is unclear how an offense of corruption or dishonesty is made out under the NAO even where a private company utilizes proceeds from a loan in a manner not contemplated at the time of acquisition of such loan, so far as such company is in a position to settle the loan. This would at

best amount to a breach of the terms of the Finance Facility that would empower the bank to declare that a breach of the terms of the loan has taken place and demand that the loan be settled immediately. As already stated, Paramount Builders and Sindh Bank are willing to do so by entering into the Debt-Property Swap. And nothing whatsoever has been placed on record to establish that acquisition and use of proceeds of the Finance Facility somehow constitute the offense of money-laundering under section 3 of the Anti-Money Laundering Act, 2010. We asked the learned Deputy Prosecutor General how the use of funds received pursuant to the Finance Facility could be treated as proceeds of crime. His response was that as the grant of Finance Facility was a fraudulent act, its proceeds constituted proceeds of crime. At bail stage, we would rather not say anything about this line of reasoning in order not to prejudice the interests of any party in the trial proceedings.

30. NAB has failed to make out a prima facie case rendering the petitioner liable for an offense under the NAB Ordinance. It has failed to establish that its inquiry and investigation into the share transactions of Paramount Builders and into the grant of Finance Facility by Sindh Bank is duly authorized in terms of section 41B(1) of the SECP Act and section 31D of NAB Ordinance, respectively. It has failed to establish that it has jurisdiction to investigate an alleged "benami transaction" that falls within the scope of the Benami Act, provisions of which have overriding effect over provisions of NAB Ordinance, and in relation to which proceedings are pending

under the Benami Act and prosecution of an offense under it lies before a Special Court and not before an Accountability Court. Consequently, NAB has failed to establish that there exists a legitimate state objective in arresting the accused to secure the ends of justice, for purposes of which Chairman NAB has issued an arrest warrant in exercise of his powers under section 18(e) of NAB Ordinance read together with section 24(a).

31. There is absolutely nothing on record to establish that assuming physical custody of the petitioner is imperative for investigating the alleged white-collar offence involving transactions that are backed by documentary evidence. NAB has thus failed to make out a case that the means proposed by Chairman NAB to investigate the alleged offence i.e. by arresting the accused, is the least restrictive means of investigating the alleged offence while upholding the fundamental rights of the accused to liberty, dignity and equality, guaranteed by Articles 9, 14 and 25 of the Constitution, read with Article 4. The content of the call-up notice reflects that NAB authorities have been seeking a Plea Bargain Affidavit from the petitioner and his failure to provide the same might have resulted in the issuance of his warrant for arrest. This falls foul of the guarantee under Article 13 of the Constitution, which provides that no person when accused of an offence shall be forced to be a witness against himself. The use of threat of arrest to coerce an accused into admitting an offence is violative of Article 13 and a mala fide exercise of the state’s arrest powers.

32. For the aforesaid reasons, in view of the law laid down by the august Supreme Court in ***Shahzada Qaiser Arfat*** read together with principles enumerated by this court in ***Amjad Mustafa Malik*** we believe that the petitioner has made out a case for judicially reviewing the matter in which Chairman NAB has exercised his powers under sections 18(e) and 24(a) of NAB Ordinance by issuing a warrant for his arrest, which is violative of his fundamental rights. This petition is ***allowed*** and ad-interim bail already granted to the petitioner is hereby confirmed subject to furnishing a bail bond in the amount of Rs.500,000/- or cash in lieu thereof in accordance with the policy of this court, and two sureties in like amount to the satisfaction of the learned trial court.

(MOHSIN AKHTAR KAYANI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open Court on **07.07.2021**.

JUDGE

JUDGE

Approved for reporting.

Saeed.