JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD

JUDICIAL DEPARTMENT.

Writ Petition No.4563/2016

Sultan Ahmed	**Versus**	**National Accountability Bureau, & others**
Petitioner by:		Mr. Rizwan, Advocate for petitioner.
Respondents by:		Sardar Muzaffar Ahmed Khan, Sr. Prosecutor NAB. Saleem Ahmed Khan I.O. NAB.

Writ Petition No.4762/2016

Salim Isharat Hussain	**Versus**	**National Accountability Bureau, & another**
Petitioner by:		Mr. Khalid Ranjha & Mr. Waqar Ahmed Warracih, Advocates.
Respondents by:		Sardar Muzaffar Ahmed Khan, Sr. Prosecutor NAB. Saleem Ahmed Khan I.O. NAB.

Writ Petition No.16/2017

Arshad Farooq Faheem	**Versus**	**National Accountability Bureau & others**
Petitioner by:		Mr. Ghulam Mustafa Kandwal & Mr. Mahmood Awan, Advocates.
Respondents by:		Sardar Muzaffar Ahmed Khan, Sr. Prosecutor NAB. Saleem Ahmed Khan I.O. NAB.

Writ Petition No.56/2017

Dr. Muhammad Ali	**Versus**	**National Accountability Bureau, etc.**
Petitioner by:		Mr. Shah Khawar, Advocate.
Respondents by:		Sardar Muzaffar Ahmed Khan, Sr. Prosecutor NAB. Saleem Ahmed Khan I.O. NAB.
Date of hearing:		02.03.2017

JUDGMENT

MOHSIN AKHTAR KAYANI, J. Through this single order, we intend to decide all the above mentioned petitions.

2. Through these writ petitions, the petitioners have prayed for grant of post-arrest bail till the final decision of reference pending before learned Accountability Court-I, Islamabad, whereby all the petitioners have been arrayed as accused in the interim reference filed by the National Accountability Bureau (NAB) with the allegations that all the petitioners being member of Drug Regulatory Authority of Pakistan (DRAP) knowingly and dishonestly allowed the increase in prices of medicines of pharmaceutical companies in violation of Drug Act, Rules/Regulations and caused huge financial loss to public at large.

3. As per statement of allegations, grounds of arrest referred by the NAB authorities in the reference are that, petitioners Sultan Ahmed, Salim Isharart and Arshad Farooq Faheem have been found involved in commission of corruption and corrupt practices being member of 5th & 6th DPC meeting in connivance with other members being beneficiaries who knowingly and dishonestly have given undue and illegal price increase to certain drugs in violation of Drug Act and rules/regulations, without asking for relevant latest import invoices of the raw material / finished drugs and costing data or prescribed proforma. Even petitioners allegedly gave illegal price increase on incomplete costing data/inflated import invoices of raw material and finished drugs on the basis of data submitted by pharmaceutical companies which was not verified/checked while granting price increase. Besides that, petitioner Arsahd Farooq Faheem being CEO DRAP knowingly and dishonestly become Chairman of 5th & 6th DPC meeting despite the fact that he was also a Chairman of Registration Board at the relevant time period which is in violation of Section 11-A of the Drug Act, 1976.

4. Petitioner Dr. Muhammad Ali being member of 5th & 6th DPC meeting, in connivance with other members and beneficiaries, knowingly and dishonestly has given undue and illegal price increase to certain drugs in violation of Drug Act and rules/regulations, without asking for relevant current import invoices of the raw material / finished drugs and costing data or prescribed proforma. Petitioner Dr. Muhammad Ali even gave illegal price increase on incorrect costing data/inflated import invoices of raw material and finished drugs as the data submitted by the Pharmaceutical companies which

was not verified/checked while granting price increase. Petitioner Dr. Muhammad Ali as Chairman sub-committee filed a concocted report with malafide intentions, duly signed by him alongwith Saleem Isharat, Chief Drug Inspector, a representative of Secretary Health, Govt. of Sindh and Saeed Allahwala a rep of PPMA, on the basis of sub-committee meeting in Hon'ble Sindh High Court through Deputy Attorney General on 22.02.2013 in suit No.943 of 2012 to facilitate un-lawful/unauthorized price increase to the medicines of M/s Zam Zam Corporation Karachi despite the fact that the same was not approved by Competent authority. Hon'ble Sindh High Court passed the consenting decree in favor of M/s Zam Zam Corporation as a result whereof M/s Zam Zam Corporation increased prices of 12 drugs.

5. Learned counsel for petitioners contended that the petitioners are innocent and have falsely been implicated in the reference filed by the NAB authorities under the NAO, 1999; that it is the prerogative of the DRAP to regulate pricing and formulate mechanism for the fixation of price of therapeutic goods under Drug Regulatory Authority Act, 2012 and any allegation regarding increase in the pharmaceutical products prices does not fall under the NAO, 1999 and NAB authorities have no jurisdiction to assume the role of DRAP. Learned counsel further argued that in order to fix the Market Retail Price (MRP) different factors are to be considered in the said process in which increase in exchange rate of foreign currencies, increase in price of drugs by the suppliers, increase in transportation and logistics costs give rise to a hardship case for any company to apply to DRAP in order to re-fix the prices whereas U/S 12 of the Drug Act, 1976 maximum retail price for a product can be fixed through a notification in official gazette and once a maximum price is fixed by the Federal Government, the said drug falls within the purview of controlled drug. Similarly, if the price has not been fixed through a notification in official gazette the said drug is called de-controlled drug and the price factor can be determined through the open market competition, therefore, NAB could not assume the said role of determination of market price of the drugs. Learned counsel further argued that the NAB authorities have not collected any evidence regarding illegal gain nor there is any allegation of illegal gain on the petitioners.

6. Learned counsel for Dr. Muhammad Ali further argued in addition to above mentioned grounds that petitioner Dr. Muhammad Ali being Chairman sub-committee filed a report duly signed by him alongwith Saleem Isharat, Chief Drug Inspector, a representative of Secretary Health, Govt. of Sindh on the basis of sub-committee report before Hon'ble Sindh High Court through Deputy Attorney General on 22.02.2013 in suit No.943 of 2012 filed by M/s Zam Zam Corporation Karachi as a result whereof consenting decree was passed by the Court; that the competent authority challenged the said decree through Saeed Allahwala U/S 12 (2) CPC and revision petition was dismissed by Hon'ble Sindh High Court holding that no fraud or misrepresentation has been committed; that the allegations are baseless and NAB can not sit as Court of appeal on the order passed by the Hon'ble Sindh High Court in Civil Suit No.943/2012 and even there is no incriminating material available against the petitioner; that after dismissal of JM No.37/2012 and JM No.20/2012 in Civil Suit No.943/2012 the NAB could not have proceeded against the officials on the basis of allegations that the consenting order/decree has been obtained on the basis of misrepresentation and fraud; that the question of alleged criminality can only be observed by the NAB Court in trial, however, on the basis of judicial order it is a case of further inquiry; that section 38 of the Drugs Act, 1976 provides Indemnity to the officials regarding their acts in good faith; that there is no violation of section 11-A of the Drugs Act, 1976 and there is no misuse of authority of petitioners on record even no monetary benefit has been received by the petitioners; that the co-accused Muhammad Iqbal was granted bail after arrest in W.P. No.4657/2016 vide order dated 05.01.2017 by learned Division Bench of this Court, therefore, rule of consistency is also applicable in the present case. In last learned counsel contended that the proposed loss caused to the public at large has already been recovered by the NAB authorities from the other co-accused who entered into plea bargain with NAB authorities, therefore, nothing is to be recovered from the present petitioners even the investigation has been completed and they are no more required for the purpose of investigation. Learned counsel for petitioners relied upon *PLD 2002 Lahore 458 "M. Anwar Saifullah Khan versus The State", PLD 2002 Lahore 95 "Dr. Farooq Sattar*

versus The State and others", 2004 MLD 1231 [Lahore] "Ch. Muhammad Tariq versus The State", 2005 SCMR 1291 "National Accountability Bureau versus Khalid Masood and another" and *2016 P.Cr.L.J 79 "Sarfraz Ahmed and another versus the Chairman National Accountability Bureau (NAB) through Chairman and others".*

7. Conversely, learned Senior Prosecutor NAB alongwith Investigation Officer of the case argued that the interim reference has been filed whereas final reference will be submitted on completion of investigation; that pre-arrest bails of the petitioners were dismissed on merits, therefore, the instant petitions are not competent on the same grounds. Reliance is placed upon *2004 SCMR 864 "Yaroo versus The State"* & *2008 SCMR 839 "Seema Fareed & others versus The State & another*". Learned Senior Prosecutor further argued that the DAG submitted a report before the Hon'ble Sindh High Court on the basis of which a consenting decree was passed by the Court, therefore, he has been arrayed as accused and call up notice has been issued to him; that Mst. Um-e-Laila Assistant Drug Controller who appeared before Hon'ble Sindh High Court on 11.03.2013 as witness in the instant matter and the petitioners have been extended benefit to M/S Zam Zam Corporation and other pharmaceutical companies by way of illegal increase in the prices of drugs; that the bail granted to Muhammad Iqbal co-accused in W.P. No.4657/2016 by learned Division Bench of this Court is not similar to the roles of the present petitioners as Muhammad Iqbal being representative of the company has no official capacity to act as public servant whereas present petitioners are the public servants who are custodians and protectors of the rights of citizen of Pakistan on behalf of the Federation of Pakistan, that all the petitioners are government officials who are under obligation to use their authority in accordance with law and all acts performed under their official capacity in accordance with rules and regulations are given protection in terms of section 38 of the Drugs Act, 1976. Learned Senior Prosecutor NAB relied upon *PLD 2016 Supreme Court 276 "The State versus Anwar Saif Ullah Khan", 2015 SCMR 1716 "Ch. Muhammad Ashfaq versus The State and others", 1997 SCMR 1521 "Muhammad Nawaz versus Muhammad Nawaz alias Naji and 4 others" and 2016 SCMR 1965 "Imran Mohsin versus The State".*

8. Arguments heard, record perused.

9. From the perusal of record it has been observed that the NAB has filed interim reference No.17/2016 against 15 persons including the present petitioners with the allegation that officers/officials of Ministry of National Regulations & Services and others are involved in illegal increase in prices of drugs through 5th & 6th Drug Pricing Committee (DPC) meetings, it has further been alleged that prices of drugs are fixed as per section 12 of the Drugs Act, 1976 by DPC duly constituted by the Federal Government whereby the regulations for conduct of business of DPC were approved by the Federal Government in 2010 and a meeting was held on 09.10.2012 constituted province-wise sub-committees to assist DPC and referred 74 cases for its scrutiny as per their jurisdiction however, Sub-committee for Sindh also considered cases of those drugs which were either not referred by DPC or already rejected by DPC whereas Dr. Muhammad Ali, Chairman of the Sub-Committee, Secretary/Member of DPC out of way supported M/s Zam Zam Corporation and submitted a report before the Hon'ble Sindh High Court in Civil Suit No.943/2012 whereby a consent decree was passed vide judgment/decree dated 11.03.2013. As a result of said decree M/s Zam Zam Corporation derived financial gain on the basis of increase in prices of their 12 drugs. It has further been observed that the price increase extended to 12 drugs of M/z Zam Zam Corporation has not been processed in accordance with law and as a result of 5th & 6th DPC meeting following companies have illegally gained benefit of millions of rupees:-

S#	Name of company/firm	DPC Meeting	No of product	Wrongful Gain (M. Rs.)
1.	Maple Pharmaceuticals (Pvt.) Ltd	5th	1	22.75
2.	M/s Akhai Agencies	5th	1	18.98
3.	M/s Galaxy Pharma Pvt. Ltd.	6th	2	373.75
4.	Excel Health Care Laboratories (Pvt) Ltd.	6th	4	72.60
5.	Saffron Pharmaceutical (Pvt.) Ltd.	6th	5	40.37
6.	M/s Martin Dow Ltd.	6th	3	66.09
7.	M/s Zam Zam Corporation	-	12	98.42
Total Wrongful Gain (Rs. In Million)				**692.96**

Besides the above referred wrongful gain extended to the companies referred in the above mentioned table the total loss caused to the public at large is Rs.1078.08 million (approx) by the said companies only due to acts, orders and approvals of present petitioners whereby the company/firm namely M/s RG Pharmaceutical (Pvt.) Limited returned the

liability of Rs.385.12 million through plea bargain at the initial stage whereas rest of the companies have returned an amount of Rs.705.12 million to the NAB authorities and admitted in their undertaking before the I.O. that the above referred amount has been received on the basis of price increase given by the present petitioners. In order to understand the working of Drug Regulatory Authority and its role, we have gone through the Drug Regulatory Authority of Pakistan Act, 2012 whereby the DRAP has been established U/S 3 of the Act and the composition of the Authority has been referred U/S 4 of the Act whereas the functions and powers have been defined in section 7 of the Act. CEO shall also act as Secretary of the policy board which consists of Secretary of the concerned Division, Secretary of the concerned Department, Government of Balochistan, Sindh, Khyber Pakhtunkhwa, Punjab, Gilgit-Baltistan, FATA and six experts from the public and private sector, the policy board shall convene its meetings for the regulations and conduct of its business in which the board shall monitor and supervise all the functions and authorities. The DRAP has been established for the effective coordination and enforcement of the Drugs Act 1976. In order to determine the role of Dr. Muhammad Ali, we have gone through the statement of Ume Laila, Assistant Drug Controller, DRAP Karachi who categorically stated that Dr. Muhammad Ali Director Admin DRAP has converted the attendance sheet of sub-committee meeting held at Karachi in order to take benefit of the meeting. Similarly, Zaheeruddin M. Babar, Ex-Deputy Director Controller Pricing DRAP recorded his statement in which he categorically alleged that a meeting was held on 19.09.2012 with the then CEO DRAP Arshad Farooq Faheem and Member DPC Muhammad Ali for reconsideration of DPC with reference to possibilities of legal complication which might arise as Chairman DPC and Director Appellate Board was same i.e. Secretary of the Division whereas the Chairman DPC hears the appeals against his own decision as Chairman Appellate Board which is not legally justified but as per advice of Arshad Farooq Faheem, CEO, and Dr. Muhammad Ali, Member DPC, the name of CEO was proposed as Chairman DPC. The above referred conduct clearly falls in the category of conflict of interest referred in section 11-A of the Drugs Act, 1976 wherein "*No person who is a member of the Appellate Board, Central Licensing Board, a*

Provincial Quality Board, the Registration Board or a member of Expert Committee shall be a member of the any other board or committee of which he is a member to avoid any conflict of interest." Hence, it has been observed with great concern that Arshad Farooq Faheem CEO DRAP and Dr. Muhammad Ali Member DPC have performed their duties in violation of section 11-A of the Act. The role of DPC in the entire forum is to workout prices to be granted, reduced or enhanced and it makes recommendations to the Federal Government which may approve, amend or refer back its recommendations for further evaluation. From the perusal of 5th DPC minutes of meeting held on 09.10.2012, it transpired that prices of 38 drugs were increased as per agenda but the same were not even signed by the Members and prices of seven drugs out of 38 were increased without any justification even one drug was given price increase on note sheet by the Chairman DPC in violation of the Drug Act, 1976.

10. The minutes of 6th meeting of DPC reveals that meeting was held on 22.01.2013 whereby 64 drugs under hardship category were placed and rest of the drugs cases were deferred or rejected without assigning any reason and 21 drugs were given price increase without justification and catering to relevant costing data submitted by the pharmaceutical companies/firms and certain prices were changed on the note sheet by the Chairman DPC in violation of section 12 of the Drugs Act, 1976. As a result of these exorbitant increases in violation of costing data, M/s RG Pharmaceutical Pvt. LTD, M/s Maple Pharmaceutical Pvt. Ltd., M/s Galaxy Pharma Pvt. Ltd., M/s Excel Health Care Laboratories Pvt. Ltd., M/s Safron Pharmaceuticals Pvt. Ltd., M/s Martin Down Ltd., M/s Akhair Agencies and M/s Zam Zam Corporation have been given a benefit of Rs.1078.08 million. All the petitioners are public servants and while performing their official duties misused their authority and granted undue benefit to pharmaceutical companies/other co-accused who have already entered into plea bargain and returned the amount of Rs.705.12 million, hence prima facie they are connected with the charges of corruption and corrupt practices in terms of section 9-a (vi) NAO, 1999, all the petitioners are persons of authority although, the petitioners claim the indemnity in terms of section 38 of the Drugs Act, 1976 where no suit, prosecution or other legal proceeding shall lie

against Government or any other authority or person for anything which is in good faith done or intended to be done under the said act. We are of the considered view that the indemnity under the Drugs Act, 1976 is only for the acts of good faith and not otherwise specially when procedure for approval of any price of any drug is given under the Drugs Act, 1976 as well as through the Drugs Regulatory Authority of Pakistan Act, 2012. It has been presumed that all the acts will be done in accordance with rules, regulations and procedures however, the petitioners have violated the indemnity as they have not acted in accordance with law and they have not considered the costing data of the pharmaceutical companies while allowing the increase in prices of the drugs without considering the requirements in order to extend favor to the pharmaceutical companies, even in the case of M/s Zam Zam Corporation a concocted report was submitted before the Hon'ble Sindh High Court in civil suit No.943/2012 as a result whereof a consenting decree was passed although, the same was assailed through JM No.20 & 37 of 2013 U/s 12 (2) CPC but both the petitions were dismissed and consenting decree was upheld by the Hon'ble Sindh High Court and as a result of said decree benefit was extended to the M/s Zam Zam Corporation which has been extended to Muhammad Iqbal proprietor of M/s Zam Zam Corporation who has been granted bail after arrest by learned Division Bench of this Court in W.P. No.4657/2016 however, his case is distinguishable from the present petitioners as he is an end-user beneficiary of the increase of the prices whereas present petitioners are officials who have illegally enhanced the prices in violation of rule and law by misuse of their authority as they have no right to depart from the known precedent and customs which reflects their mens rea and guilty mind in context of misuse of authority whereas all the petitioners have a conscious knowledge that they have no authority to act in violation of law even then they have allowed illegal increase. In such like situation the officials are allegedly liable for corruption and corrupt practices, reference in this regard is placed upon ***PLD 2016 SC 276 "The State versus Anwar Saif Ullah Khan"*** wherein it has been held that:-

> *"Misuse of authority so as to gain any benefit or favour for oneself or any other person---Actus reus and Mens rea---Burden of proof---Presumption against accused accepting illegal gratification---Scope---In a case involving a charge under section 9(a)(vi) of the National Accountability*

Ordinance, 1999 the prosecution had to make out a reasonable case against the accused person first and then the burden of proof shifted to the accused person to rebut the presumption of guilt in terms of S.14(d) of the said Ordinance---Mere procedural irregularity in the exercise of jurisdiction may not amount to misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999---Charge of misuse of authority under such law may be attracted where there was a wrong and improper exercise of authority for a purpose not intended by the law, where a person in authority acted in disregard of the law with the conscious knowledge that his act was without the authority of law, where there was a conscious misuse of authority for an illegal gain or an undue benefit and where the act was done with intent to obtain or give some advantage inconsistent with the law---Misuse of authority meant the use of authority or power in a manner contrary to law or reflecting an unreasonable departure from known precedents or custom and also that mens rea or guilty mind, in the context of misuse of authority, would require that the accused person had the knowledge that he had no authority to act in the manner he acted or that it was against the law or practice in vogue but despite that he issued the relevant instruction or passed the offending order."

Similarly, the officials who have exercised their authority while contributing a loss to general public are not entitled to the concession of bail, reference in this regard is placed upon ***W.P. No.1632/2016 "Kamran Saeed versus Chairman National Accountability Bureau, etc.***" passed by learned Division Bench of this Court wherein it has been held that:-

a. *The persons of authority in Government office, state owned organizations who are responsible to prevent the loss of national exchequer but involved in crime and caused loss to exchequer.*
b. *The persons of authority of any designation who are under the obligation and custodian of any asset of state and being in service of federation or attached with the affairs of the state are bound to perform their specific duties to prevent the loss, recover the due amounts, to perform such statutory duties which are required under the law as guardian, protector and to prevent or on behalf of state but did not perform their duties.*
c. *Any person having the authority or sitting on position of authority has not performed his duties by way of negligence, compromise, connivance with the others to cause loss to the national exchequer.*
d. *Any person of authority who could not prevent or raise objection on any corruption or corrupt practices by his senior authority rather kept silent and overlooked illegal actions of superior which resulted into loss to assets of the state or loss to the national exchequer.*
e. *Any individual officer who compromised the command of his superior knowingly that the same is illegal, contrary to law and is an offence which resulted into loss and established financial corruption.*

f. Any individual who has received any illegal benefit due to his official position.

g. Any public officer who has not received any benefit for himself but received any benefit indirectly through his family on the basis of his official position and did not allows any other person under his control from performing their lawful duties to prevent loss to the national assets and public exchequer.

h. Even those officers who though themselves are not directly involved rather facilitated the corrupt practices in their office and official duties.

Even the Hon'ble Supreme Court of Pakistan in ***2016 SCMR 1965 "Imran Mohsin versus NAB, etc***" has held that:

جب قومی احتسابی ادارہ برائے انسدادِ بد عنوانی (نیب) نے ریفرنس عدالت میں دائر کر دیا ہو تو ایسے مرحلے پر عدالتِ عظمیٰ کا باریک بینی سے جملہ واقعات کا جائزہ لینا اور پھر ضمانت پر رہائی دینا مجاز عدالتِ سماعت کی حتمی رائے کو متاثر کرنے میں اہم کردار کرتا ہے۔ لہٰذا اس سے اجتناب کیا گیا۔

10. In view of above we are of the considered view that the petitioners by misusing their officials positions violated the settled norms of law, regulations and rules, allowed the artificial price increase in the pharmaceutical drugs in favor of corporations, companies and firms which resulted into loss of millions of rupees to general public and even they have not acted in accordance with the Drugs Act, 1976 as well as the Drug Regulatory Authority Act, 2012, reference has already been filed, the matter is pending before the NAB Court and in view of ***2016 SCMR 1965 "Imran Mohsin versus NAB, etc***" bail should not be granted as it will affect the final opinion of the NAB, hence, all the petitions are devoid of merits and are hereby dismissed.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on _____

JUDGE **JUDGE**

Irfan Ali

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