JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.978/2017
Naseem Khan Afridi
Versus
National Accountability Bureau

Date of Hearing: 16.05.2017
Petitioner by: Mr. Muhammad Akbar Khan, and Raja Khurram Ejaz, Advocates,
Respondent by: Mirza Usman Masood, Special Prosecutor, N.A.B.,
Mr. Sarmad Saleem Shahab, Deputy Director/ Investigating Officer, Rawalpindi, N.A.B.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Naseem Khan Afridi, seeks post arrest bail. The National Accountability Bureau ("N.A.B.") arrested the petitioner on 07.02.2017. He was alleged to have committed offences of corruption and corrupt practices under Sections 9 and 10 of the National Accountability Ordinance, 1999 ("N.A.O."). The grounds of his arrest were stated to be as follows:-

> *"1. That, you Naseem Khan Afridi S/o Bahadur Khan is accused of Corruption and Corrupt practices and involved in misappropriating 2,889 M. tons of Urea worth Rs.121,338,000/- consequently causing loss to the government exchequer and NFML.*
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> *2. That subject investigation is under progress at NAB Rawalpindi on the Corruption & Corrupt Practices under Section 9(a) of NAO, 1999. Accused Naseem Khan Afridi as carriage contractor misappropriated 2,889 M. tons of Urea causing loss to the government exchequer.*
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> *3. That you as qualified carriage contractor of NFML provided transportation services to NFML but did not deliver the said quantity of Urea at required destinations and sold the Urea in open market.*
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> *4. That despite your commitment before Civil Court, Lahore to deliver the 3064 M.Ton Urea to NFML, you only delivered 175 M.Ton and failed to deliver remaining 2889 M.Ton Urea.*
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> *5. That following grounds are available to arrest you:-*
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> *a. Confrontation with available record and with complaint.*
> *b. For interrogation of accused.*
> *c. To recover record in his possession.*
> *d. For recovery of loss caused to national exchequer.*
> *e. That incriminating evidence/material cannot be collected without your arrest.*

f. That there is likelihood of destruction / disappearance of relevant evidence / record of your part.
g. That there is strong likelihood of your abscondment.
h. That you will try to temper the relevant evidence record."

2. Vide order dated 08.02.2017, the learned Judge, Accountability Court, Islamabad, remanded the petitioner in N.A.B's custody for a period of fourteen days. Vide order dated 22.02.2017, the learned Judge Accountability Court spurned N.A.B.'s request for a further remand and sent the petitioner to the judicial lock-up.

3. The petitioner is the sole proprietor of M/s Mairvi Carriage Company, and is engaged in the business of *inter-alia* transportation of imported fertilizer/Urea. The petitioner was awarded contracts for the carriage and transportation of Urea from the seaports in Pakistan to various destinations by the National Fertilizer Marketing Limited ("N.F.M.L."). The allegation against the petitioner is that between September 2013 and April 2014, the petitioner misappropriated 3,064 Metric Tons ("M.T.") of Urea which he was supposed to transport for N.F.M.L. On 14.11.2016, an investigation against the petitioner was authorized. Despite the petitioner commitment that he would deliver 3,064 M.T. of Urea to N.F.M.L, he only delivered 175 M.T. The petitioner was accused of misappropriating 2,889 M.T. of Urea, and thereby causing a total loss of Rs.121,338,000/- to the national exchequer.

4. Mr. Muhammad Akbar Khan, Advocate, learned counsel for the petitioner submitted that the petitioner, who was the sole proprietor of M/s Mairvi Carriage Company, was engaged in the business of *inter-alia* the transportation and carriage of Urea; that N.F.M.L. had awarded cartage contracts to the petitioner for the transportation of Urea from the port cities to various destinations in Pakistan; that N.F.M.L. used to issue Stock Transfer Notes ("S.T.Ns.") to the petitioner; that such S.T.N.s contained necessary particulars such as the quantity of Urea to be transported, the place of origin and destination, and the weight of the shipment; that once the Urea was transported and

delivered to the representative of N.F.M.L. by the carriage contractor, the latter became entitled to payment against freight bills; that on certain occasions delay in the transportation of the Urea is attributable to the factors beyond the control of the carriage contractor; that such factors include but not limited to strikes by transporters, shortage of fuel, political turmoil, law and order situation, and mechanical failure; that it is not uncommon for the stores of N.F.M.L. to run out of space due to which the carriage contractors have to wait for several days to offload the transported goods; that the petitioner entered into several cartage agreements with N.F.M.L. for the transportation of Urea; that such agreements contained arbitration clauses; that during 2013, the representative of N.F.M.L. refused to take delivery of Urea transported by the petitioner; that such refusal by N.F.M.L. caused the petitioner to file writ petition No.20738/2013 before the Hon'ble Lahore High Court; that vide order dated 13.08.2013, the matter was referred by the Hon'ble High Court to the Secretary, Ministry of Industries and Production, who decided the matter in the petitioner's favour vide order dated 09.09.2013.

5. Furthermore, it was submitted that the petitioner also filed an application under Section 20 of Arbitration Act, 1940 against N.F.M.L. before the learned Civil Court at Lahore; that N.F.M.L. had withheld an amount of Rs.44,313,101/- due and payable to the petitioner on account of the carriage services, in addition to Rs.15,000,000/- deposited by the petitioner as security; that since the petitioner was unable to pay the truck drivers who had transported the Urea on the petitioner's instructions, they refused to offload the Urea and sold it in the open market; that the said loss of Urea was due to the non-payment of the petitioner's freight bills by N.F.M.L; that officials in the N.F.M.L. harbour a personal grudge against the petitioner; that the inquiry initiated against the petitioner by N.A.B. is for a *malafide* purposes; that the petitioner appeared before N.A.B. on 06.06.2016, in response to the call up notice

issued by the N.A.B. on 26.05.2016; that the investigating officer was pressurizing the petitioner to enter into Voluntary Return or Plea Bargain; that the petitioner decided not to appear before N.A.B. due to the pressure tactics adopted by the investigating officer; that if a proper rendition of accounts is carried out, N.F.M.L. will have to pay huge amounts to the petitioner; that the case against the petitioner is wholly dependent on documentary evidence, which is already in the possession of N.A.B; that there is no possibility of the petitioner tempering with the evidence; that since the petitioner has already been remanded to judicial custody, he is no longer required for interrogation; that till date a reference against the petitioner has not been filed; and that the petitioner undertakes to cooperate in the investigation being carried out by the N.A.B. Learned counsel prayed for the writ petition to be allowed, and for the petitioner to be enlarge on bail.

6. On the other hand, Mirza Usman Masood, learned Special Prosecutor N.A.B. submitted that there was sufficient material available on the record to connect the petitioner with the offences of corruption and corrupt practices; that the offences which the petitioner has been accused of fall within the ambit of the prohibitory clause under Section 497 Cr.P.C.

7. Furthermore, it was submitted that the investigation against the petitioner as well as officials of N.F.M.L. was authorized on 14.11.2016; that during the inquiry proceedings call up notices dated 02.08.2013, 27.08.2013, 09.09.2013, 12.06.2014, and 10.07.2014 were issued by N.A.B. to the petitioner, but the latter failed to join the inquiry or to appear before the investigating officer; that warrants of arrest were issued against the petitioner on 02.09.2014, but he was finally arrested on 07.02.2017 by N.A.B; that the petitioner appeared before the investigating officer after obtaining interim bail from the Hon'ble Lahore High Court; that the petitioner was arrested after he withdrew his petition from the Hon'ble Lahore High Court; that the petitioner was a sole proprietor of M/s Mairvi Carriage Company; that the said company had been providing

carriage services to N.F.M.L. since 2010; that a carriage contactor becomes entitles to payment against freight bills only after the Urea is delivered to N.F.M.L's designated stores, and the signed and stamp Stock Transfer Notes are submitted and verified by N.F.M.L. after matching them with the Daily Transaction Report; that between September 2013 and April 2014, the petitioner misappropriated 3,064 M.T. of Urea; that despite reminders and show cause notices issued by N.F.M.L, the petitioner failed to deliver the outstanding Urea; that the petitioner undertook before the learned Civil Court that 3,064 M.T. of Urea would be delivered in three installments, but he delivered only 175 M.T. of Urea; that presently the petitioner is liable to deliver the remaining 2,889 M.T. of Urea against 58 Stock Transfer Notes; that even though M/s Mairvi Carriage Company had been blacklisted on 22.08.2014, it managed to execute further carriage contracts with N.F.M.L; that the petitioner's failure to deliver 2,889 M.T. of Urea has caused a loss of Rs.121,338,000/- to the national exchequer; that on 28.11.2016, the petitioner submitted an application to the investigating officer for the settlement of the matter, but the said application was turned down vide letter dated 26.12.2016; that the petitioner had committed the offence of corruption and corrupt practices cognizable under Section 9(a)(xi) of the N.A.O. Learned Special Prosecutor, prayed for the writ petition to be dismissed.

8. We have heard the contentions of the learned counsel for the petitioner as well as the learned Special Prosecutor, N.A.B. and have perused the record with their able assistance.

9. It is not disputed that the petitioner is the sole proprietor of M/s Mairvi Carriage Company. The petitioner was awarded contracts by N.F.M.L. for the transportation of Urea of different quantities from the port cities to various destinations in Pakistan. The petitioner was accused of failing to deliver 3,064 M.T. of Urea, and selling it in the open market. Subsequently, the petitioner and N.F.M.L. came to an understanding in proceedings before the Court of learned Civil Judge, Lahore,

under which the petitioner agreed to deliver the outstanding Urea of 3,064 M.T. in three installments as follows:

(i) *The first installment of 1022 M.T. of Urea was to be delivered on 12.11.2014;*

(ii) The second installment of 1021 M.T. of Urea was to be delivered on 27.11.2014; and

(iii) The third installment of 1021 M.T. of Urea was to be delivered on 12.12.2014.

10. After the above mentioned understanding, the petitioner only delivered 175 M.T. of Urea to N.F.M.L. The remaining 2,889 M.T. of Urea has till date not been delivered by the petitioner to N.F.M.L. Learned counsel for the petitioner did not dispute the submission made by the learned Special Prosecutor, N.A.B. that the petitioner had again made an offer to N.A.B. for a settlement by delivering the outstanding Urea of 2,889 M.T. This offer was not accepted by the N.A.B., which suggested that the petitioner could apply for Plea Bargain.

11. On 18.10.2016, the petitioner had filed writ petition No.2522/2016 before the Hon'ble Lahore High Court (Rawalpindi Bench) praying for the grant of pre-arrest bail. Apparently, the petitioner was admitted to ad-interim bail. N.A.B. had filed parawise comments to the said writ petition. N.A.B. had contested the said writ petition by filing written comments. In paragraph-20 of the said written comments it was pleaded that N.F.M.L. had confirmed that Rs.44,313,101/- on account of freight bills, and Rs.15,000,000/- as security deposited by the petitioner, was lying with N.F.M.L. Furthermore, the petitioner was accused of misappropriating 2,889 M.T. of Urea worth more than Rs.103,195,080/-. On 23.01.2017, writ petition No.2522/2016 was dismissed as withdrawn.

12. Now, it is a matter of record that N.A.B, in its written comments to writ petition No.2522/2016 had pleaded that 2,889 M.T. of Urea, allegedly misappropriated by the petitioner, is worth more than Rs.103,195,080/-. In the written comments to the instant writ petition, N.A.B. has pleaded that the 2,889 M.T.

of Urea not delivered by the petitioner has caused a loss of Rs.121,338,000/-. N.A.B. has enhanced the figure of the loss only in a matter of a few months by about approximately Rs.18 Million. Nevertheless, it is an admitted position that N.F.M.L. had withheld payment of Rs.44,313,101/- from the petitioner for the deliveries of Urea already made. In addition to the said amount, the petitioner's security deposit to the tune of Rs.15 Million is also lying with N.F.M.L. Both the said figures add up to Rs.59,313,101/-, which amount is admittedly with N.F.M.L. Learned counsel for the petitioner submitted that the petitioner would deliver the outstanding Urea of 2,889 M.T. provided the above mentioned amount due and payable to the petitioner is released. We are not here to facilitate a deal between the petitioner and N.F.M.L. This is a petition under Article 199 of the Constitution for post arrest bail. What we are concerned with whether or not the petitioner is entitled to the concession of bail given the fact that the petitioner had not delivered 2,889 M.T. of Urea to N.F.M.L. The excuse put up by the petitioner that the drivers of the trucks carrying this Urea to the stores of N.F.M.L. had sold it in the open market, cannot be accepted. It was the petitioner's responsibility to deliver the Urea entrusted by N.F.M.L. to the petitioner. The petitioner could either transport and deliver the Urea by using his owns trucks or hiring the services of other transporters. In the latter case, the petitioner would be fully responsible for the actions of such transporters.

13. The learned Special Prosecutor has also brought on record, the petitioner's letter dated 26.11.2016 containing an offer for a settlement with N.A.B. In the said letter, the petitioner has taken the position that it will deliver 2,889 M.T. of Urea within a period of four to five months in consignments of 300-500 M.T. Upon the delivery of such consignments, the petitioner wanted N.F.M.L. to pay the freight bill for each consignment, and also to release the already withheld amount and the security deposit. This offer was not accepted by N.A.B. which gave the option to the petitioner to apply for Plea Bargain.

14. The learned Special Prosecutor could not indicate a date by when the reference in the case would be filed. The petitioner has now remained incarcerated for more than three months. The petitioner, having remained in N.A.B. custody for two weeks, has been sent to the judicial lock up, where he has not been questioned by the investigating officer. The learned counsel for the petitioner undertook on behalf of the petitioner that the petitioner shall fully cooperate in the investigation, and appear before the investigating officer as and when required.

15. In view of the fact that 2,889 M.T. of Urea was not delivered by the petitioner, and that an amount of Rs.59,313,101/- (i.e. the withheld payment for the Urea delivered by the petitioner, in addition to security deposited by the petitioner) is with N.F.M.L, we are inclined to allow this petition by admitting the petitioner to bail subject to the deposit of cash security of Rs.43,881,979/- (i.e. Rs.103,195,080/- minus Rs.59,313,101/-) with the N.A.B., in addition to one surety in the like amount to the satisfaction of the Additional Registrar (Judicial), of this Court. The said cash security shall be placed by the N.A.B. in an interest bearing account. The petitioner shall deliver his passport to the N.A.B, if not delivered already. There shall be no order as to costs.

16. Bail allowed conditionally.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

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