

# **IN THE SUPREME COURT OF PAKISTAN**

(Appellate Jurisdiction)

**Present:**

Mr. Justice Ejaz Afzal Khan  
Mr. Justice Mushir Alam

**Civil Petitions No.1885 and 2259 of 2017**

Against the judgment dated 30.3.2017 passed  
by the Peshawar High Court, Peshawar in WPs  
No.832-P & 843-P of 2017.

Olas Khan  
Chairman, NAB thr. Its Chairman and others

(in CP 1885/17)

(in CP 2259/17)

**Petitioner(s)**

**VERSUS**

Chairman, NAB thr. Its Chairman and others  
Sahibzada Alamgir

(in CP 1885/17)

(in CP 2259/17)

**Respondent(s)**

For the Petitioner(s):  
(in CP 1885/17)

Syed Mudassar Ameer, ASC

For the Petitioner(s):  
(in CP 2259/17)

Mr. Inamul-Haq, Spl. Prosecutor, NAB  
Mr. Arshad Qayyum, Spl. Prosecutor, NAB  
Mr. Junaid Iqbal, IO

For the Respondent(s):  
(in CP 1885/17)

Mr. Inamul-Haq, Spl. Prosecutor, NAB  
Mr. Arshad Qayyum, Spl. Prosecutor, NAB  
Junaid Iqbal, IO

For the Respondent(s):  
(in CP 2259/17)

Mr. Shumail Butt, ASC

Date of Hearing:

03.08.2017

**ORDER**

**Mushir Alam, J.-** Through this common judgment we intend to decide CPLA No.1885 of 2017 by the petitioner Olas Khan, challenging judgment dated 30.3.2017 passed by the learned Bench of the Peshawar High Court, in Writ Petition No.832-P of 2017, declining bail to him in NAB Reference and through the same judgment conceded bail to *Saibzada Alamgir*, facing trial under same NAB Reference under section 497 Cr. P.C, which exercise of Jurisdiction under code of Criminal Procedure has been impugned and cancellation of bail is sought by the Chairman NAB through CPLA No.2259 of 2017.

2. Learned Special Prosecutor, NAB has with vehemence questioned the Jurisdiction of High Court to concede bail to a person

accused of an offence under section 9 (a) of the NAB Ordinance, 1999. According to him section 9(b) of the Ordinance *ibid*, is non-obstinate provision and all offences under the NAO, 1999, are made non-bailable and general provisions regulating pre-arrest or post-arrest bail or release of person from detention, suspension of sentence, in terms of Section 426, 491, 497, 498, and 561-A of the Code of Criminal Procedure Code, 1908 have been excluded in application. To support his contentions he placed reliance on large number of cases from different High Courts and of this Court reported as Mrs.Shahida Faisal and others versus Federation of Pakistan and others (2001 SCMR 294) and Anwer Saifullah Khan versus The State and three others (2001 SCMR 1040), wherein it has been held that jurisdiction of both the Accountability Court as well as the High Court is ousted in terms of Section 9(b) of the Ordinance, *ibid* in the matter of bail to a person facing reference under the National Accountability Bureau Ordinance, (NAO, 1999). Though in both the cited cases, it was held that jurisdiction to concede bail under Article 199 of the Constitution would be available. In the case of Syed Zafar Ali Shah and others versus General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869) in paragraph 7 of the operative part at page 1222 it was also observed that “*validity of the National Accountability Ordinance will be examined separately in appropriate proceedings at appropriate stage*”.

3. Challenge to the jurisdiction of High Court to concede bail to persons facing reference for charged under the NAO, 1999 is not novel; and has been agitated time and again since very inception of the NAO, 1999. Section 9 (b) *ibid*; prior to amendment read as follows:-

*“All offences under this Order shall be non-bailable and notwithstanding anything contained in sections \*(426, 491), 497, 498 and 561-A or any other provision of the Code or any other law for the time being in force no Court, including High Court shall have jurisdiction to grant bail to any person accused of any offence under this Order.”*  
(\*Inserted by Ordinance IV/2000 dated 3.2.2000).

4. In terms of Section 9 (b) of NAO, 1999 as reproduced above all offences under the NAO, 1999 are non-bailable and general provisions regulating suspension of sentence, order in the nature of *habeas corpus*, pre-arrest and or post-arrest bail in exercise of power under Sections 426, 491, 497, 498, and 561-A of the Code of Criminal Procedure Code, 1908 have been excluded in application. Both the cases of Mrs. Shahida Faisal (Supra) and Anwer Saifullah Khan (Supra) relied upon by the learned Special Prosecutor, NAB are based on the exposition of un-amended section 9(b) of NAO, 1999 as reproduced above and the judgments in the cited cases were penned down on 10.7.2000 and 21.2.2001 respectively and prior to judgment rendered by a four member Bench of this Court in the celebrated judgment rendered on 24.4.2001 in the case of Khan Asfandyar Wali and others versus Federation of Pakistan through Cabinet Division Islamabad and others (PLD 2001 Supreme Court 607), when this Court had the occasion to examine the *vires* of various provisions including section 9(b) of NAO, 1999. In paragraph 197 at page 885 of the cited judgment, principle laid down in the case of Syed Zafar Ali Shah (PLD 2000 Supreme Court 869) was reiterated that the “*the power of Superior Courts under Article 199 of the Constitution remaining available to their full extent, notwithstanding anything contained in any legislative instruction enacted by the Chief Executive Whereas, section 9(b) of the NAB Ordinance purports to deny all Courts, including the High Court the jurisdiction under section 426, 491, 497, 498 and 561-A of Code of Criminal Procedure or any other law for the time being in force to grant bail to any person accused on an offence under the NAB Ordinance. 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. Accordingly, the same be amended accordingly.”*

5. Consequent upon judgment rendered in the case of Khan Asfandyar Wali (PLD 2001 SC-607 @ 885), through Ordinance No. XXXV of 2001 dated 10.8.2001 (PLJ 2001 Federal Statute 403), in Section 9(b) *ibid*; after the words “no Court” words, “Including High Court” were omitted. The amended provision, now read as follows:-

*“All offences under the Order shall be non-bailable and notwithstanding any thing contained in sections 426,491, 497, 498 and 561A or any other provision of the Code or any other law for the time being in force no Court,\*\* shall have jurisdiction to grant bail to any person accused of any offence under this Order.” (\*\*Including High Court” omitted)*

6. It may be observed, that merely omission of words “*including High Court*” in section 9(b) of the NAO, 1999 did not effect the legal implication; nor made any impact on overall scheme of the provision regulating either pre-arrest or post-arrest bail; offences under the NAO, 1999 remained non bailable and a person accused of an offence there under, in view of non obstinate language used in section 9(b) *ibid*; remedies available to general Courts of criminal jurisdiction under “*sections 426, 491, 497, 498 and 561-A or any other provision of the Code or any other law for the time being in force*” remained beyond the pale of NAO, 1999.

7. NAO, 1999 is a special statute, hybrid in nature, it is fusion of criminal liability and civil obligations, enacted with an aim to take effective measures for detection, investigation, prosecution and speedy trial of cases involving corruption, corrupt practices, misuse or abuse of power, and misappropriation of property and recovery of the same from the beneficiary or those found to have misappropriated such property and restoration of the same to the rightful owner thereof. It create special genre of offences and wrongs.

8. Amended provision of section 9(b) *ibid*; came up for consideration of this Court in the case of Muhammad Saeed Mehdi versus The State and 2 others (2002 SCMR 282) and at page 289, view expressed by the full Bench of the Lahore High Court in the case of Anwer Saifullah v. The State and four others (PLD 2000 Lahore 564) “that the High Court had jurisdiction under Article 199 of the Constitution to grant bail to a person accused of an offence under NAB Ordinance in appropriate cases in that the bar of jurisdiction there under being in the nature of legislative enactment could not take away the jurisdiction of the High Court under Article 199 of the Constitution” was approved. In another case reported as Ch. Zufiqar Ali versus The State (PLD 2002 Supreme Court 546) in the concluding part of paragraph 8 at page 552 it was held “After the amendment, the jurisdiction of the Accountability Court for grant of bail remained ousted, whereas after the omission of words “including the High Court” the High Court has jurisdiction to grant bail in NAB cases under Article 199 of the Constitution as held in the case of Khan Asfandyar Wali” which view was also affirmed in the case of Abdul Aziz Khan Niazi versus The State through Chairman, NAB, Islamabad (PLD 2003 Supreme Court 668) in paragraph 7 at page 675, it was held that “the refusal of bail by the High Court in its constitutional jurisdiction merely for the reason that the concept of discretion for grant of bail under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 is different to that of under section 497/498 Cr.P.C is not proper. The discretion of High Court under the Constitution and under ordinary law in bail matter is based almost on same principle.” This view was followed in the case of Haji Ghulam Ali versus The State through A.G., N.W.F.P., Peshawar (2003 SCMR 597); wherein, this Court had the occasion to analyze the legal implications of section 9(b) of the NAB Ordinance, 1999 as amended, at page 602 of the cited judgment it was held “We may point out that the use of word “notwithstanding” in the said section would still exclude the

applicability of section 497 Cr.P.C in the cases under NAB Ordinance, 1999. However, as held in above said Judgment (Ch. Zulfiqar Ali supra) the power of High Court for grant of bail in writ jurisdiction would be available and an accused of an offence under NAB Ordinance, 1999 is at liberty to take any ground for grant of bail on the basis of which bail can be granted under section 497, Cr.P.C. The conclusion is that even after amendment in section 9(b) of NAB Ordinance, 1999 the legal position regarding the maintainability of a bail application under section 497, Cr.P.C in a case under the said Ordinance was not changed” at page 604 it was further affirmed that “In amended section 9(b) of NAB Ordinance, 1999, except the omission of words “High Court” no change was made, therefore, the legal position regarding maintainability of bail application under section 497 Cr.P.C before the High Court in the case under the NAB Ordinance, 1999 would remain as such and an accused of such an offence cannot maintain a bail application before the High Court under section 497, Cr.P.C.” In the case of Chairman, National Accountability Bureau, Islamabad and another versus Asif Baig Muhammad and others (2004 SCMR 91), this Court declined to interfere in bail granting order passed by the High Court in exercise of jurisdiction under Article 199 of the Constitution, 1973.

9. The view expressed by this Court in the case of Anwer Saifullah Khan (Supra) was successively followed and resonates in the cases of Ch. Zulfiqar Ali (PLD 2002 SC 546), Muhammad Saeed Mehdi (2002 SCMR 282), Muhammad Jehangir Badar versus The State and others (PLD 2003 Supreme Court 525), Abdul Aziz Khan Niazi versus The State through Chairman, NAB, Islamabad (PLD 2003 Supreme Court 668), Chairman, National Accountability Bureau, Islamabad and another versus Asif Baig Muhammad and others (2004 SCMR 91 @ 93), National Accountability Bureau versus Khalid Masood and another (2005 SCMR 1291) and recently in the case of Himesh Khan versus National

Accountability (NAB) Bureau, Lahore and others (2015 SCMR 1092, paragraph 7 & 8 @ 1095) and so also in un-reported judgment **dated 26.8.2016** titled as Chairman NAB versus Bakht Zameen & another (in CP No.1542 of 2016), in all such cases bail was considered under Article 199 and or Article 184 of the Constitution of Pakistan, 1973 respectively and not under section 497 Cr.P.C.

10. Contention of the learned Special Prosecutor, NAB that jurisdiction pertaining to grant of bail by the High Court is concurrent jurisdiction with the trial Court, therefore, ouster of jurisdiction of the Accountability Court ousts the jurisdiction of the High Court, has not impressed us. Accountability Court has no jurisdiction to grant either pre-arrest and or post-arrest bail, as provisions of Cr.P.C regulating grant or otherwise pre-arrest and or post-arrest bail in cases under NAO, 1999 in view of non-obstinate provisions of section 9(b) of NAO, 1999 are inapplicable. However, position as regards High Court and this Court is altogether different, superior Courts exercise jurisdiction under Article 199 and 184 respectively of the Constitution, 1973 to consider and grant bail or otherwise, in cases under NAO, 1999 and not under section 9(b) and or 17(c) the NAO, 1999, which jurisdiction, neither can be taken away nor, made subservient through sub-ordinate legislation. Contention of the learned Special Prosecutor NAB is correct to the extent that the assumption of jurisdiction by the Peshawar High Court to concede bail under section 497 Cr.P.C to the Respondent *Sahibzada Alamgir (in CPLA 2259 of 2017)*, is not available. However, in view of the stated legal position, *such objections* retreats merely of form bereft of any substance. Exercise of jurisdiction by the High Court to concede bail in instant case cannot be set at naught merely because such jurisdiction was erroneously assumed under section 497 Cr. P.C, though admittedly jurisdiction to concede bail or otherwise was very much vested in the High Court under

Article 199 of the Constitution of Pakistan, 1973, and such assumption of jurisdiction in the given facts and circumstance can always be considered under Article 199 of the Constitution, 1973. It is now settled position in law that merely citing or relying on wrong provision of law to assume jurisdiction over a *lis* is of no consequence, provided the Court other wise has jurisdiction under the Constitution, statute or any other provision of law to pass order as has happened in the instant case. For reference one may see Mst.Safia Bibi versus Mst.Aisha Bibi (1982 SCMR 494), Jane Margrete William versus Abdul Hamid Mian (1994 SCMR 1555), Rauf B Kadir versus State Bank of Pakistan and another (PLD 2002 Supreme Court 1111).

11. While assuming jurisdiction under section 497 Cr.P.C learned bench of the High Court, was influenced and has misconstrued section 17 of the NAO, 1999 which makes the provisions of Cr.P.C including procedure for session trial (per chapter XX-A of the Cr.P.C) applicable, unless otherwise, provided in the NAO, 1999 itself. Section 17 (c) *ibid*; librated the Accountability Court from the procedural and technical trapping of Criminal Procedure Code, giving it authority not only to “*dispense with any provision of the Code*” and at the same time empowered it “*to follow such procedure as it may deemed fit in circumstances of case.*” [17(c) *ibid*;] However, freedom to “*follow such procedure as it may deemed fit*” does not empower the Accountability Court or for that matter the High Court to assume jurisdiction and or invoke provisions of Cr.P.C, which are specifically excluded by virtue of section 9(b) *ibid*; from application in cases triable under NAO, 1999 in ostensible exercise of power under section 17(c) *ibid*; of the NAO, 1999. Such enabling power of the Accountability Court were conditioned by this Court in the case of Khan Asfandyar Wali (PLD 2001 SC 607@ 926), “*not exercise its discretion arbitrarily but on sound judicial principles by*



assigning valid reasons.,” such exercise of discretion was also held to be “Justiciable in exercise of Constitutional jurisdiction of Superior Court”. Excluding the words “including High Court” from Section 9 (b) *ibid*; as noted above has not brought about any change on overall scheme of the provision regulating matters under the exclusionary provisions of Code of Criminal Procedure mentioned therein including Sections 497 and 498 Cr.P.C regulating pre-arrest and post-arrest bail.

12. Judgment in the case of Muhammad Saeed Mehdi (2002 SCMR 282) was not appreciate by the learned bench of the High Court in its true perspective. In the judgment it was specifically observed that the “High Court has jurisdiction to grant bail in NAB cases under Article 199 of the Constitution” relevant part of paragraph 8 of cited judgment is reproduced in preceding paragraph 8 above and, perhaps attention of the learned bench was also not drawn to the cases of Haji Ghulam Ali, supra. (2003 SCMR 597) @ 602, Himesh Khan versus National Accountability Bureau (2015 SCMR 1092 @ 1095) In view of the forgoing discussion, conclusion of the learned Bench of the Peshawar High Court; as contained in paragraphs 12 to 15 of the impugned judgment to the effect that High Court by virtue of section 17 (c) *ibid*; can import and or exercise power contained in Sections 491, 496, 497, 498, 561-A Cr.P.C, is not correct exposition of law, to such an extent impugned order cannot be sustained.;

Now adverting to the merit of the respective Petitions.

**Civil Petition No.1885 of 2017**

13. Petitioner Olan Khan in CPLA 1885 of 2017 was declined bail by the Peshawar High Court, Peshawar in Writ Petition No.832-P of 2017 vide impugned judgment dated 30.03.2017.

14. Petitioner was Director General on Farm Water Management, Department and Provincial Project Director for the Project of “Water

Conservation and Productivity Enhancement through High Efficiency (Pressurized) Irrigation System”. Allegation against the present petitioner has been highlighted in the investigation report dated 19.01.2017 available at page 37 (in CPLA 2259/2017), his role is highlighted in paragraph No.10 (1-6) thereof. It is specifically mentioned that he has issued various work orders for the implementation of the scheme without insuring the 20% farmers’ share which is in utter disregard to the Implementation Plan given in PC-1 and he has even released the funds for dropped scheme causing colossal loss to the national exchequer. It was further noted that on physical verification that out of 182 schemes only six schemes are functional and rest of 176 schemes are non-functional resulting in waste of national resources. Learned bench of the High Court on the strength of available record declining bail vide impugned order reasoning is contained in paragraphs 17-19 thereof; which are reproduced as follows:-

*“17. The record reveals that the accused/petitioner had advanced 20% mobilization amount even to those companies, persons, whose works were dropped and even the schemes were not found feasible.*

*18. It is also depicted and palpable on available record that many schemes for which more than 80% amount had released were not existed on grounds but those were commissioned and funds were released with active connivance of the Project director.*

*19. As it is settled principle of law, that deep appreciation of facts, while disposing of bail petition or constitutional petition, in matter of detention, is not requirement of law, but prima facie from the inquiry against the petitioner Olas Khan, sufficient and reasonable documentary proof is available which makes out a case, in term of Section 9 of the NAB Ordinance, 1999 against him so he does not deserve any concession of bail at this stage. So his petition for release on bail in the instant matter is declined and the WP No.843-P/2017 filed by him, is dismissed accordingly.”*

15. Learned ASC for the petitioner that after the 18<sup>th</sup> Constitutional Amendment in July, 2011 the subject project devolved unto respective Provinces, in instant case Khyber Pakhtunkhwa, and that the Petitioner also retired from service in the year 2013 and since July 2011. He is no more associated or responsible for alleged corruption

and or corrupt practice. He laid much emphasis on the judgment passed by the Peshawar High Court in Writ Petition 1208-P of 2014 dated 29.11.2016 wherein, the High Court directed payment of outstanding amount for the work done of the verified and completed schemes.

16. It was therefore, urged that the Petitioner is not responsible. And the present exercise is uncalled. He further relies on the reports so submitted pursuant to the directions of the Peshawar High Court in the referred petition supports the petitioner's claim. He also relied upon report of the representative of NESPAK and HESCON (*page 178 to 180 of CPLA 1885/17*) per direction of the High Court, in the referred Writ Petition to seek exoneration from any corrupt practice as alleged. Learned ASC further referred to letter dated 22.05.2013 (*at page 170*), and argued that adjustment of 20% being farmer share was not deposited for the reason that instead of cash the farmers who were the beneficiary of the project contributed in form of labour as approved by the competent authority, which fact has been certified by the Secretary, Government of Khyber Pakhtunkhwa, Agriculture and Live Stock & Coop: Department, Peshawar. It was contended by the learned ASC for the Petitioner that it is a fit case to enlarge the Petitioner on bail.

17. Learned Special Prosecutor NAB controverted the stance adopted by the petitioner. He has drawn our attention to the various portions of the Project PC-1, documents of the subject project to show that it was petitioner's responsibility to ensure its due compliance being the Director General, as well Project Director on Farm Water Management, Department. He has placed on record various work orders and the copies of the cheques issued to the contractors without due complaisance of all the requirements and in abdication of his authority as detailed in the PC-1, filed through CMA No.5314 of 2014. He has also drawn our attention to various monitoring letters addressed to the

petitioner to ensure that his “report” reflect true *progress of work, quality of material delivered at site and quality of work mentioned*” and he was directed to address the deficiency as noted in the monitoring reports, which were not paid any heed. As regards the reliance on the proceeding in the High Court by certain contractors, it was urged that such proceedings did not relate to the conduct of the petitioner nor relate to the corruption and corrupt practice committed by persons associated with the monitoring and or execution of the project, therefore of no relevance, It was contended by the Special Prosecutor NAB that the report of the representatives of NESPAK and HEISCON, was also examined by the successors of the petitioner vide letter dated 09.12.2013 (*page 181 of the paper book*) and it was noted that same is based on discrepant contents.

18. We have heard the arguments and perused the record with the assistance of learned ASC for the Petitioner and Special Prosecutor NAB. At the very outset it may be observed that original project period was five years effective July, 2007 to July, 2011. As claimed by the Petitioner subject project, devolved on the Province of Khyber Pakhtunkhwa, in July, 2011 and that the Petitioner retired in the year 2013, fact remains that the corruption and or corrupt practice, of which the Petitioner is accused of pertains to a period prior to devolution of the Project on the Khyber Pakhtunkhwa and or prior to his retirement. We have noted that PC-1, all the work orders, cheques, monitoring reports etc. placed on record through CMAs 5314 of 2017 and CMA 5383 of 2017, were all signed and issued by the Petitioner pertains to the Petitioner during his tenure as the Project Director. As regard the proceeding in Writ Petition 2197 of 2012 and orders passed thereon dated 22.06.2016 before the Peshawar High Court is concerned, as rightly pointed out by the learned Special Prosecutor NAB, same were

not in relation to the conduct of the Petitioner, therefore, have no bearing on the investigation, and or proceedings under the NAO, 1999. The, report of the representative of NESPAK and HEISCON, (*pages 178-180*), also has no bearing on the allegations and charged against the Petitioner. The report does not exonerate the Petitioner, on the contrary it highlights certain deficiencies, in the performance of project, as also noted by the successor to the Petitioner in his letter dated 9.12.2013 (page 181) less commented better it is as it may prejudice case of either side.

19. In view of the foregoing, we are not persuaded by the learned ASC for the Petitioner, to take any exception to the view taken by the Peshawar High Court declining bail to the Petitioner which is accordingly declined, (one may refer to the cases cited as *The State versus Haji Kabeer Khan (PLD 2005 Supreme Court 364)* and *Haji Ghulam Ali versus The State through A.G., N.W.F.P. Peshawar and another (2003 SCMR 597)*). It appears that entire record of the subject Project has been collected; it would not take much time to produce the same and complete the trial preferably within a period of four months.

**Civil Petition No. 2259 of 2017**

20. Now advertent to the case of *Saibzada Alamgir-Respondent (in CPLA 2259 of 2017)*, bail was conceded to him by the Peshawar High Court, in consideration of reasoning set down in Paragraph No.20 of the impugned judgment *inter alia* on the ground “As the inquiry is already completed against the accused, where he had (been) charged only for connivance and no any direct allegation had (been) brought by the NAB, therefore, keeping in view his position and kind of duties, assigned to him as Deputy Director, for the Northern region, he deserves to be released on bail”.

21. We have considered the grounds seeking cancellation of bail of *Saibzada Alamgir-Respondent* and noted that cancellation is sought essentially on the jurisdictional ground and on merit it was not contested

seriously. Jurisdictional grounds have been elaborately dealt with in preceding paragraph. We have gone through the impugned judgment, it is well reasoned. Consideration for cancellation of bail, are altogether different and distinct from consideration for the grant of bail, one may see National Accountability Bureau versus Khalid Masood and another (2005 SCMR 1291).

22. Learned Special Prosecutor, NAB was not able to show any extraordinary or exceptional circumstances that may warrant recall of the order of the grant of bail by the High Court. Accordingly, the Civil Petition No.2259 of 2017 is dismissed and leave declined.

**Judge**

**Judge**

**ISLAMABAD**

Announced by me in open Court  
on 23<sup>rd</sup> October, 2017.

**Judge**

approved for reporting