

Form No:HCJD/C-121

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Case No: Writ Petition No. 5948 of 2016

Alamdar Hussain **VS** NAB etc.

S.No. of order/proceeding	Date of order/proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
---------------------------	--------------------------	--

19.12.2016		M/s Muhammad Amjad Pervaiz, Muhammad Nawaz Chaudhry, Sultan Mehmood Khan and Anwaar Hussain, Advocates alongwith the petitioner. Syed Faisal Raza Bokhari, Special Prosecutor for NAB with Muhammad Ramzan Khan, Deputy Director/I.O. Mr. Nadeem Siddiqui, Advocate/Legal Advisor for Bank of Punjab.
------------	--	---

By order dated 24th February 2016 this Court admitted the petitioner to ad interim pre-arrest bail as he anticipated his imminent arrest by the National Accountability Bureau (NAB) in connection with an inquiry (*lateron upgraded into investigation and ultimately a Reference No.68/2016 also submitted*) under the National Accountability Ordinance, 1999 (*hereinafter to be referred as "NAO, 1999"*) against him with respect to the offence of corruption and corrupt practices by misuse of authority, illegal gains through corrupt/dishonest/illegal means, which is cognizable under section 9 (a), punishable under section 10 of NAO, 1999 and schedule thereto.

2. Precisely, the facts necessary for adjudication of instant petition are that on receipt of complaint from the Bank of Punjab (*hereinafter to be called as "the Bank"*) against Alamdar Hussain (petitioner) and others on the allegation of misappropriation of Bank leased assets, an inquiry was authorized by the National Accountability Bureau which was later on up-graded into investigation. As per investigation, the petitioner Alamdar Hussain applied in 2006 for loan facility of Rs.2.1 million for the construction of Shed and Rs.7.00 Million for purchase

of 175 buffaloes under Kissan Dost Livestock Development Scheme introduced by the Bank of Punjab. The loan facility was granted to the accused only for stated purposes of construction of shed for dairy farm and purchase of buffaloes, whereas, the accused Alamdar Hussain dishonestly and fraudulently disposed of the bank leased animals and misappropriated the proceeds thereof in connivance with other accused persons. The accused did not repay even a single penny to bank. Consequently, the accused misappropriated the funds of the bank and caused loss of Rs.22,299,848/- to the bank.

3. Learned counsel for the petitioner argued that above proceedings under the NAO, 1999 were initiated against the petitioner on receipt of complaint from the Bank of Punjab against Alamdar Hussain (petitioner) and others on the allegation that he procured finance facility from the Bank of Punjab (BOP) under Kissan Dost Finance Scheme. The finance facility procured by the petitioner was duly secured against adequate collateral mortgage and security and due to the circumstances beyond his control, the petitioner could not earn the expected profit and suffered substantial loss and damage, therefore, he could not return the amount as per agreement and the bank filed a suit for recovery of loan before the Judge Banking Court, Lahore which is still pending. The bank also filed a private complaint u/s 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 (hereinafter to be called as the "*Ordinance*") before Banking Court No.IV, which was dismissed at preliminary stage vide order dated 07.11.2014. The bank also approached respondents No.1 and 2 for initiation of proceedings under NAO. The learned counsel adds that matter in hand is between a customer and the Bank; the Financial Institutions (Recovery of Finances) Ordinance, 2001 being a special law has laid comprehensive mechanism for prosecution of offences relating to a customer and the Bank; the Ordinance, 2001 *ibid* is not only later in time, the same has also been given overriding effect over other laws, therefore, the NAB does not have the jurisdiction to intervene into the

matter on this score alone. Further submits that offence of criminal breach of trust is not mentioned in the schedule of NAO, 1999, thus, the assumption of jurisdiction by the NAB in the peculiar circumstances of this case, is also an attempt to convert civil lis into criminal litigation with a malafide intent, as such, the petitioner is entitled for confirmation of bail before arrest.

4. On the contrary, the learned Special Prosecutor for NAB assisted by learned counsel for the Bank, vehemently opposed this petition on the grounds that the bank leased assets, i.e. buffaloes were entrusted to the accused for his benefit but he dishonestly, fraudulently and with mala fide intention misappropriated the bank leased assets by committing the breach of trust. He also contends that the petitioner had claimed loss, but in this respect no evidence is available with him and even otherwise, the petitioner had no right to dispose-off bank leased animals without permission of the bank. Lastly adds that the NAO, 1999 is a special law, it has overriding effect on other laws and the provisions of section 31-D of NAO, 1999 are not applicable in the instant case, hence, this petition is liable to be dismissed.

5. We have heard the learned counsel for the petitioner as also learned Special Prosecutor for NAB assisted by learned counsel for the Bank and have also perused the record with their able assistance.

6. As shall be seen from the above contentions of learned counsel for both the parties, pre-arrest bail has been sought primarily on legal grounds i.e. applicability of National Accountability Bureau Ordinance, 1999 or the Financial Institutions (Recovery of Finances) Ordinance, 2001, in the peculiar facts and circumstances of the instant case. This being the position, this court has no other option but to deal with legal propositions involved herein, as any nominated accused cannot be left at the mercy of the

Investigating Agency to establish the charge of a particular offence against him and to investigate the matter. This court has ample jurisdiction while deciding bail application after examining the available record, whether any particular offence under which the Investigating Agency is trying to arrest the accused, prima-facie, attracts in the circumstances of the case or not? Hence to resolve this controversy, the crucial point to be considered while deciding the writ petition for grant of pre-arrest bail is whether the Financial Institutions (Recovery of Finances) Ordinance, 2001 will hold the field having the overriding effect over the NAO, 1999 or not? However, before entering into legal questions, it may be reiterated that the allegation against the petitioner is quite simple, i.e., he managed to procure finance facility to the tune of Rs.2.1-Million for construction of shed and Rs.7.0-Million for purchase of the buffalos under Kissan Dost Live Stock Relevant Scheme introduced by the Bank of Punjab but he usurped the said amount for his own.

7. From the respective contentions of leaned counsel for the parties, it has been observed that legal controversy can be summarized in the following manner:-

- i) *Amongst the two Ordinances i.e. the Financial Institutions (Recovery of Finances) Ordinance, 2001 and the National Accountability Ordinance, 1999, which one is applicable to the case of the petitioner?*

8. The National Accountability Ordinance, 1999 was promulgated on 16th November, 1999 and its preamble clause provides its purpose i.e. to provide for effective measures for the detection, investigation, prosecution and speedy disposal of cases involving corruption, corrupt practices, misuse or abuse of power or authority, misappropriation of property, taking of kickbacks, commissions and for matters connected and ancillary or incidental thereto; for the recovery of outstanding amounts from those persons who have committed default in the

repayment of amounts to Banks, Financial Institutions, Governmental agencies and other agencies and for the recovery of state money and other assets from those persons who have misappropriated or removed such money or assets through corruption, corrupt practices and misuse of power or authority. Afterwards, the National Institutions (Recovery of Finances) Ordinance, 2001 was promulgated by repealing the Banking Companies (Recovery of Loans, Advances, Credits and Finances) Act, 1997 with specific purpose to recover loans, advances, credits and finances.

9. Regarding the controversy as to which of the two i.e. Financial Institutions (Recovery of Finances) Ordinance, 2001 or the National Accountability Ordinance, 1999, would have overriding effect, it may be quoted here that Financial Institutions (Recovery of Finances) Ordinance, 2001 by means of Section 4 thereof, provides that:-

“4. Ordinance to override other laws.—The provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

Similarly, Section 3 of the National Accountability Bureau Ordinance, 1999, provides that:-

“3. Ordinance to override other laws.— The provisions of this Ordinance shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.”

As shall be seen from the above, both these legislations contain non obstante clause, providing that the provisions of each Ordinance would prevail notwithstanding anything to the contrary contained in any law for the time being enforce. Perhaps this is the cause of conflict in the provisions of the aforementioned legislative instruments i.e. Financial Institutions (Recovery of Finances) Ordinance, 2001 and the National Accountability Bureau Ordinance, 1999.

10. The learned Special Prosecutor NAB has laid much emphasis on Section 3 and 9(x) of the NAO, 1999, but it is a fact is that the Financial Institutions (Recovery of Finances) Ordinance, 2001 was promulgated on 30th of August, 2001, which is not only later in time, but its section 4 also provides an overriding clause. Thus, this court is of the clear view that if the legislators had an intention to bring the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 under the pale of National Accountability Bureau Ordinance, 1999, then they could at the very beginning formulate or afterwards could amend the Financial Institutions (Recovery of Finances) Ordinance, 2001 accordingly. In this situation, when the Financial Institutions (Recovery of Finances) Ordinance, 2001 was neither originally drafted nor subsequently amended in the above terms, the legislators explicitly made their intention clear that with regard to the matters between financial institutions and their customers, this enactment shall hold the field and despite Section 3 of the NAB Ordinance, the provisions of Financial Institutions (Recovery of Finances) Ordinance, 2001 shall have the overriding effect and will be applicable to all other persons in general except those covered by the Financial Institutions (Recovery of Finances) Ordinance, 2001. The sole purpose for not drafting the Financial Institutions (Recovery of Finances) Ordinance, 2001 or subsequently amending the same, appears to be that as normally in a case of loan from financial institution, the loans are protected by mortgage, warranties and covenants made by or on behalf of the customer to a financial institution, including warranties and covenants with regard to the ownership, mortgage, pledge, hypothecation or assignment of, or other charge on assets or properties, thus the financial institution can recover the amount by adopting appropriate process before the appropriate forum by way of filing a suit for recovery or could proceed by way of filing a private complaint and the court of competent jurisdiction under the Ordinance, *ibid*, could proceed under the mandate of powers provided in Section 7(1) and 7(1)(b) of the

Ordinance. By holding so, we are guided by the cases reported in “MUHAMMAD ASIF NAWAZ versus ASJ, ETC” (PLJ 2013 Lahore 606), “ABID MAHMOOD MALIK versus STATION HOUSE OFFICER, POLICE STATION MARGALLA and others” (2013 CLD 508) and “MUHAMMAD IQBAL versus STATION HOUSE OFFICER, POLICE STATION HAJIPURA, SIALKOT and 2 others” (PLD 2009 Lahore 541).

11. In furtherance to the above, we have no hesitation in holding that prima facie Financial Institutions (Recovery of Finances) Ordinance, 2001 is not only a special law but the same being also later in time would prevail over the provisions of the NAO, 1999, and as discussed above, the Ordinance, 2001 has its own comprehensive mechanism to deal with the disputes inter-se the bank and the customer. The august Supreme Court of Pakistan in the case “APOLLO TEXTILE MILLS LTD. and others versus SONERI BANK LTD.” (PLD 2012 SC 268) has held that:-

“18. The Financial Institutions (Recovery of Finances) Ordinance, 2001 i.e. is a special law. It provides a special procedure for the banking suits. The provisions of the Ordinance, 2001 under section 4 thereof override all other laws. The provisions contained in the said Sections require strict compliance.”

Furthermore, in the case “MAHMOOD KHAN ACHAKZAI and others versus FEDERATION OF PAKISTAN and others” (PLD 1997 SC 426), it has been held that whenever there is a special law, it will override the general law and further even if there are two parallel laws, even then law which is latter in time would prevail.

12. The Financial Institutions (Recovery of Finances) Ordinance, 2001 has comprehensively dealt with the liabilities of the customers by including the definition of word “*obligation*” in section 2(e)(i)(ii) and definition of word “*willful default*” in section 2(g), and as admittedly the bank has already filed a suit for recovery, hence, it has to pursue the said suit for recovery of loan, but after a long period of filing of the suit for recovery before the banking court, they thought of

moving the NAB authorities in order to use the said agency for the purposes of recovery of amount which has to be ultimately decided by the banking court.

13. In addition to the above, Section 405 P.P.C. defines “criminal breach of trust” as under:-

“Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to this own use that property, or dishonestly use or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits “criminal breach of trust.”

In the same context Section 20 of the Ordinance, *ibid*, provides as under:-

“20. Provisions relating to certain offences:-

(a) dishonestly commits a breach of the terms of a letter of hypothecation, trust receipt or any other instrument or document executed by him whereby possession of the assets or properties offered as security for the re-payment of finance or fulfillment of any obligation are not with the financial institution but are retained by or entrusted to him for the purposes of dealing with the same in the ordinary course of business subject to the terms of the letter of hypothecation or trust receipt or other instrument or document or for the purpose of effecting their sale and depositing the sale proceeds with the financial institution; or

(b) makes fraudulent mis-representation or commits a breach of an obligation or representation made to a financial institution on the basis of which the financial institution has granted a finance; or

(c) subsequent to the creation of a mortgage in favour of a financial institution, dishonestly alienates or parts with the possession of the mortgaged property whether by creation of a lease or otherwise contrary to the terms thereof, without the written permission of the financial institution.

(d) ”

After comparison of above two reproduced provisions, one from P.P.C. and the other from the Financial Institutions (Recovery of Finances) Ordinance, 2001, it is obvious that the Ordinance, *ibid*, has more effectively dealt with the defaulters of loan and offences with respect to criminal breach of trust. Furthermore, criminal proceedings can also be initiated under the said Ordinance. In the same sequel we are also cognizant of the fact that as discussed above, the definition of Section 405 P.P.C. is fully covered by the Ordinance, *ibid*, in its Section 20 and there is no other opinion that where an accused can be tried or punished under two different statutes, then “*the rule of lenity*” (A rule of construction of statutes that criminal statute ambiguities are resolved in favor of the defendant or accused), would also attract in favour of the petitioner. For this reason also, we are of the view that since the Financial Institutions (Recovery of Finances) Ordinance, 2001 provides a complete mechanism and also caters all probabilities amongst the bank and its customer, therefore, considering the facts of the instant case proceedings the proceeding only under the above Ordinance, is the proper and legal course.

14. Admittedly, in this case the complainant Bank had already invoked criminal jurisdiction of the Banking Court of competent jurisdiction in terms of Section 20 of the Financial Institutions (Recovery of Finances) Ordinance, 2001 and the proceedings in the suit for the recovery of the finance are already pending before a Banking Court of a competent jurisdiction. Here in this case there is no denial that the finance facility in question was duly secured against adequate collateral in addition to other documents. There is no allegation that the documents prepared for the sanction of loan were bogus; the property subject matter of mortgage was non-existent or that the said property was not in the ownership of the petitioner.

15. Apart from all above, section 31-D of NAO, 1999 in clear terms provides that:-

31D. Notwithstanding anything contained in this Ordinance or any other law for the time being in force, no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or rescheduled loans shall be initiated or conducted by the National Accountability Bureau against any person, company or financial institution without reference from Governor, State Bank of Pakistan:

Provided that cases pending before any Accountability Court before coming into force of the National Accountability Bureau (Second Amendment) Ordinance, 2000, shall continue to be prosecuted and conducted without reference from the Governor, State Bank of Pakistan.”

The above question with regard to non-observance of requirement under section 31D of the of NAO, 1999, came under consideration before the Hon’ble Supreme Court of Pakistan in Suo Moto No.10 of 2015 out of Civil Petitions Nos. 1377 & 1378 of 2015 and on 02.09.2015, the following order was passed by the Apex Court:-

“We were constrained to issue notice to NAB because we observed that a reference was filed under the NAO, although it was apparent that the alleged activities against the respondent fell within the ambit of Section 20 of the Financial Institutions (Recovery of Finances), Ordinance, 2001 for which the exclusive jurisdiction vests with the Banking Courts. Moreover, Section 31(d) of the NAO stipulates that no inquiry, investigation or proceedings in respect of imprudent loans, defaulted loans or re-scheduled loans shall be initiated or concluded by the National Accountability Bureau against any person, company of financial institutions without reference from Governor, State Bank of Pakistan. This prior approval admittedly had not been taken.

2. Faced with this situation, the learned Prosecutor General stated that the inquiries in these matters were initiated in 2013, and according to his opinion, these should be withdrawn. The references will be withdrawn by NAB without delay.

3. We would, however, say to the learned Prosecutor General that very careful review of matters should be undertaken before persons are put through the rigors of the prosecution by NAB.

4. The matter stands disposed of.”

As shall be seen from the above reproduced order of the Hon’ble Supreme Court of Pakistan, since the reference, subject matter of the said case, had not been routed through the Governor, State Bank of Pakistan, the Prosecutor General had to make a statement for

withdrawal of such references. But, here in this case despite specific objection by learned counsel for the petitioner, neither it is stance of NAB authorities that said section does not attract to the case of the present petitioner nor any document could be referred by NAB authorities to say that the requirement of above section was complied with and the reference was forwarded by the Governor, State Bank of Pakistan.

16. One cannot lose sight of the fact that when the law requires a thing to be done in a specific manner, it must be done in that way or not at all. This court in the case “RAHEEL RASHID versus NATIONAL ACCOUNTABILITY BUREAU, ISLAMABAD through Chairman and 2 others” (PLD 2005 Lahore 692) with reference to above Section 31-D, declared that the proceedings as against the accused being destitute of authorization of the Governor of State Bank of Pakistan, the reference did not vest jurisdiction in the National Accountability Bureau or the Accountability Courts. In this view of the matter, when the NAB authorities do not have the authority in the matter, their actions against the petitioner lead to an inference of malafide on their part.

17. As discussed above, here in this case, there is no other view that the finance facility, subject matter of the NAB reference, was duly secured against adequate collateral in addition to other documents. In the same sequel it is not the claim of the Bank authorities that the documents prepared for the sanction of loan were bogus; the property subject matter of mortgage was non-existent; that the said property was not in the specific ownership of the petitioner or that the same was already under some encumbrance. In view of the above noted peculiar facts and circumstances of this case, despite this clear position, without touching the factual aspect of the allegations against the petitioner, the action of the complainant bank in filing a complaint before the NAB and further proceedings by the NAB authorities thereon under the NAB Ordinance, including the attempted arrest of

the petitioner per force of NAB Ordinance, is clear indicator of malafide on the part of the complainant as well as NAB authorities, thus, we consider it to be a fit case for grant of pre-arrest bail to the petitioner.

18. For what has been discussed above, the ad-interim pre-arrest bail granted to the petitioner vide order dated 24th February, 2016 is confirmed subject to furnishing his bail bonds in the sum of **Rs.5,00,000/- (five lac)** with **two sureties each** in the like amount to the satisfaction of the learned trial Court.

19. Needless to observe that the observations made hereinabove are only tentative in nature and are strictly confined to the extent of grant of instant bail. However, petitioner is directed to co-operate with the NAB authorities during investigation, and if reference is filed against the petitioner, he may attend the trial Court regularly.

(Sardar Muhammad Sarfraz Dogar) (Muhammad Qasim Khan)
Judge Judge

APPROVED FOR REPORTING.