

## ORDER SHEET

# LAHORE HIGH COURT, LAHORE

## JUDICIAL DEPARTMENT

Writ Petition No.174343/2018.

Major (R) Muhammad Zulfiqar Ali 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
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6.3.2018. Mr. S.M. Zeeshan Mirza, Advocate assisted by Mr. Zahir Abbas, Advocate for the Petitioner.  
Mr. Arif Mehmood Rana, Special Prosecutor for NAB (on Court's call).

This constitutional petition assails the vires of order dated 10.2.2018 passed by the learned Accountability Court No.3, Lahore, whereby he declined the request of the Petitioner to postpone the decision of ACR No.65/2008 till the maturity of ACR No.06/2010 and to decide both the references through a consolidated judgment.

2 Brief facts giving rise to this constitutional petition are that the NAB authorities received numerous complaints against the management of Punjab Small Industries Corporation Employees Cooperative Housing Society, Lahore (the "Society"). The competent authority authorized an inquiry into these complaints which was subsequently upgraded to investigation. The allegations against the management were not only of massive corruption but also of diverse nature. Nevertheless, they could be categorized under two heads, i.e. (a) illegal sale of the Society's land and misappropriation of sale proceeds, and (b) misuse of authority and commission of fraud in allotment of plots of the Society for which two independent investigations were ordered. Eventually, two separate references bearing ACR No.65/2008 and ACR

No.06/2010 were filed in the Accountability Court which are presently pending before Accountability Court No.3, Lahore. The Petitioner is the ex-General Secretary of the Society and an accused in both these references. He made an application before the learned Accountability Court with following prayers:

"Under the expounded facts and submissions, it is most humbly prayed that in the greater interest of justice, both the references bearing No.06/10 and reference No.65/08 may be decided through a consolidated/single judgment or at least the judgments be pronounced simultaneously.

It is further prayed that in compliance of the order passed by August Supreme Court and for the decision desired for qua the distinguished characters or similarities the instant reference which is at final stage may be adjourned till the similar stage of the connected Reference No.06/10 and both may be decided on the day."

The learned Accountability Court dismissed the aforesaid application vide impugned order dated 10.2.2018. Aggrieved, the Petitioner has filed the instant petition before this Court.

3. The learned counsel for the Petitioner contended that ACR No.65/2008 and ACR No.06/2010 were inter-connected and intertwined. NAB had no legal justification for filing separate references and they need to be consolidated. In the alternative he argued that even if a consolidated charge was not framed in the two references, they could go side by side and be decided through a single judgment. He added that ACR No.65/2008 was still at the stage of evidence and decision of that case be kept pending till the maturity of ACR No.6/2010.

4. The learned Special Prosecutor for NAB vehemently opposed this petition. He contended that the Petitioner's plea had no substance and was frivolous. The two references had no commonality and could not be clubbed. They proceeded on distinct facts and even the set of accused persons was different. He further contended that the Petitioner had made a similar request in an earlier round which was declined by this Court

and also by the Hon'ble Supreme Court of Pakistan. He prayed that this petition be dismissed.

5. Arguments heard. Record perused.

6. Broadly speaking, the question involved in the instant case is whether there can be a joint trial of ACR No.65/2008 and ACR No.06/2010 by framing a joint charge and, if not, whether proceedings in the two references can be allowed to proceed side by side and then they should be decided through a consolidated judgment. The answer to the first part of the question is contained in Section 233 which is to be read in conjunction with Sections 234, 235, 236 and 239 of the Code of Criminal Procedure, 1898 (the "Code"). The said Sections are very much relevant for our present proposes on the authority of Section 17 of the National Accountability Ordinance, 1999 (the "NAO"), which ordains that subject to the exceptions mentioned therein the provisions of the Code apply to the proceedings under the NAO unless they are inconsistent with it.

7. The general rule set out in Section 233 of the Code is that there should be separate charge and a separate trial for every distinct offence. Section 233 is reproduced hereunder for ready reference:

**233. Separate Charges for distinct offences.** For every distinct offence of which any person is accused there shall be a separate charge and every such charge shall be tried separately, except in the cases mentioned in Sections 234, 235, 236 and 239.

8. In *Sri Ram Varma v. The State* (AIR 1956 All. 466), a Full Bench of the Allahabad High Court explained the rationale behind Section 233 as under:

"The rules forbidding the joinder of charges have been framed for the benefit of the accused. The underlying idea is that if too many charges are grouped together against an accused person, he might be handicapped or embarrassed in conducting his defence. Moreover, there is a likelihood of the jury or the Judge being unconsciously prejudiced against the

accused when a large number of accusations are brought against him.”

9. The expression “distinct offences” is not defined in the Code. However, the Illustration to Section 233 indicates that it means the offences which have no connection with each other. In *Ramesh M. Udeshi v. The State* (2002 PCr.LJ 1712) while dilating on this issue a Division Bench of the Karachi High Court observed that they may be classified under the following heads (though the list is not exhaustive):

- (a) Offences falling under different sections of the same penal enactment.
- (b) Offences falling under different penal enactments.
- (c) Offences committed on different occasions even though they may fall under the same section.
- (d) Offences committed against different persons.
- (e) Offences committed by different persons individually though they may be of the same kind, as where three persons were charged with being drunk.
- (f) Allegations of misappropriation against accused not in respect of any single amount but relating to different specific amounts received by him on different dates from different persons.

10. In the instant case, perusal of the record reveals that ACR No.65/2008 is against the Petitioner and two others and the allegation is that they sold the Society's land in Mauza Lidher and Chung Khurd without the approval of the Registrar Cooperatives and the General Body and thereby misappropriated sale proceeds amounting to Rs.13,837,750/- in aggregate. They are accused of having committed criminal breach of trust of the property of the members of the Society and are charged for offences under Clauses (iii), (iv), (x) and (xii) of Section 9(a) of the NAO. On the other hand, ACR No.6/2010 is against six accused, including the Petitioner, and the allegation against them is of misuse of authority, fraud in allotment, cancellation, replacement of plots, making double/triple allotment of same plots, reducing size of plots and cheating the public-at-large to get illegal gains. Besides, there is

an allegation of maintaining a parallel bank account for the Society's funds and misappropriation of public money amounting to Rs.35,83,475/-. In this reference the Petitioner is charged with offences under Clauses (iii), (iv), (vi), (ix), (x) and (xii) of Section 9(a) of the NAO. It is thus evident that the charges in the two references are distinct and fall within the mischief of different provisions of the NAO. The number of accused persons is also different and the set of witnesses cited by the prosecution in the two references also varies. Therefore, they must proceed independently.

11. Section 234 of the Code stipulates that a person accused of more offences than one of the same kind may be charged with and tried at one trial subject to two conditions, namely, they were committed within the space of twelve months from the first to the last of such offences, and secondly, the number of said offences does not exceed three:

**234. Three offences of same kind within one year may be charged together.** (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences, whether in respect of the same person or not, he may be charged with, and tried at one trial for, and number of them not exceeding three.

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Pakistan Penal Code or of any special or local law:

However, clause (d) of Section 17 of the NAO dispenses with both the aforementioned conditions in respect of offences tried by the Accountability Court and provides that it may hold a joint trial for offences of the same kind committed during the space of any number of years. The said clause is reproduced hereunder:

d. Notwithstanding anything in Section 234 of the Code, a person accused of more offences than one of the same kind committed during the space of any number of years, from the first to the last of such offences, may be charged with and tried at one trial for any number of such offences.

The expression “offences of same kind” is defined in Section 234(2) as offences which are punishable with the same amount of punishment under the Pakistan Penal Code or of any special or local law. One may argue that corruption and corrupt practices have myriad facets and different acts may constitute distinct offences under various clauses of Section 9 of the NAO but they would be reckoned as “offences of the same kind” within the meaning of Section 234(2) of the Code as they carry the same punishment under Section 10(a) of the NAO. This may be true but the provisions of Section 234 are not mandatory. The Court has discretion to try offences of the kind mentioned therein jointly but is not bound to do so. In *The State v. Mirza Azam Beg, P.C. and another* (PLD 1964 SC 120), the Hon’ble Supreme Court of Pakistan ruled:

“The provisions of sections 235 and 239 of the Criminal Procedure Code vest, in our view, a discretion in the Court to try offences of the kinds indicated therein jointly in the circumstances therein mentioned, but there is nothing in them to indicate that the Court is bound to try such offences or persons together in every case. The discretion vested in the Court by these sections is expected like any other discretion vested in a Court of law to be exercised upon sound judicial principles and in the light of the facts and circumstances of each case.”

Similarly, in *Ahmad Khan v. Commissioner, Rawalpindi Division and another* (PLD 1965 (W.P) Peshawar 65), the Court ruled that Section 234, 235, 236 and 239 are merely enabling provisions: they are permissive and not mandatory. It said:

“It will be manifest from reading the language of the section that it has two parts and each part lays down a general rule. The first part lays down that for every distinct offence of which any person is accused there should be a separate charge, and the second part lays down that every such charge shall be tried separately, except the cases mentioned in sections 234, 235, 236 and 239. It will, therefore, be plain that criminal cases cannot, like civil suits, be consolidated, and tried together on the same evidence, except within the limits as to the joinder of charges laid down in the Criminal Procedure Code (see Emperor v. Chamask Lal (1941 Bom. 156). Again, sections 234 to 239 are merely permissive and not mandatory, i.e., it is for the prosecution to try the accused

for different offences in one trial as provided by those sections, but in case the prosecution decides to split the charges and try him separately on those charges the accused cannot insist on joinder of charges.” [emphasis added]

12. In the instant case, the NAB decided to bifurcate the charges for valid reasons which we have already discussed. The Petitioner challenged its decision previously in Writ Petition No.6242/2010 and then in Writ Petition No.10271/2011 before this Court but both were dismissed. He filed CPLA No.1486-L of 2011 before the august Supreme Court against order dated 22.6.2011 passed in W.P.No.10271/2011 which was dismissed as withdrawn on 11.6.2014 with the permission to re-agitate the matter before the Accountability Court at an appropriate stage. The Apex Court's order dated 11.6.2014 was as under:

"After making brief submissions, learned counsel for the Petitioner seeks permission to withdraw this petition with the observation that it may be left open for the Petitioner to agitate the same grounds before the Accountability Court at some appropriate stage. Such request is acceded to. This petition is accordingly dismissed as withdrawn with the above observation."

13. The Petitioner has not stated anything in the petition which may show that there is any change in the circumstances which may entitle him to re-agitate the matter before the learned Accountability Court. Even during the course of hearing his learned counsel could not refer to any such circumstance.

14. The second limb of the question that we need to determine is whether a consolidated judgment can be passed in two different trials. Section 366 of the Cr.P.C. deals with the mode of delivering judgment. It reads:

**366. Mode of delivering judgment.**—(1) The judgment in every trial in any Criminal Court of original jurisdiction shall be pronounced or the substance of such judgment shall be explained:

(a) in open Court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to the parties or their pleaders; and

15. The word “judgment” has also not been defined in the Code but it is construed to be the decision of a Court which terminates judicial proceedings pending before it. Section 367 of the Code deals with the language and content of a judgment. It reads as under:

**367. Language of judgment: Contents of judgment.--** (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the Presiding Officer of the Court or from, the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon; and the reasons for the decision; and shall be dated and signed by the Presiding Officer in open court at the time of pronouncing it and where it is not written by the Presiding Officer with his own hand, every page of such judgment shall be signed by him.

(2) It shall specify the offence (if any) of which, and the section of the Pakistan Penal Code or other law under which, the accused is convicted, and the punishment to which he is sentenced.

(3) **Judgment in alternative.** When the conviction is under the Pakistan Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative.

16. Section 367 of the Code ordains that a judgment must contain three things: (i) the points of determination, (ii) the decision thereon, and (iii) the reasons for the decision. The Code does not contain any provision for a consolidated judgment for different trials. Resultantly, there must be a separate judgment for every trial. More importantly, since ACR No.65/2008 and ACR No.6/2010 proceed on different allegations and the evidence recorded (or to be recorded) therein is also distinct they cannot be decided by a consolidated judgment.

17. In view of above, we are of the considered opinion that the distinguishing features of the two



references do not allow them to be clubbed or decided by a consolidated judgment. Any attempt to do so would cause serious miscarriage of justice which cannot be countenanced. The impugned order is based on cogent reasons and does not warrant interference by this Court. This petition is devoid of merit and is hereby **dismissed.**

(ALI BAQAR NAJAFI)  
JUDGE

(TARIQ SALEEM SHEIKH)  
JUDGE

\*M.Khalid\*

APPROVED FOR REPORTING

Judge

Judge