

JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

WRIT PETITION NO.2908 OF 2014

TANVIR HUSSAIN MANJI

VS.

NATIONAL ACCOUNTABILITY BUREAU *and another*

Petitioner by : **Mr. Abid Jalil, Advocate.**

Respondents by : **Mr. Muhammad Rafay Maqsood,
Special Prosecutor, NAB.
Mr. Zahid Usman, A.D./I.O., NAB.**

Date of Hearing : **02.03.2023.**

SAMAN RAFAT IMTIAZ, J.

1. Through the instant petition the Petitioner [Tanvir Hussain Manji], *inter alia*, seeks a declaration that the demand of 15% incidental charges / interest on the amount of plea bargain under Section 25(b) of the National Accountability Ordinance, 1999 (“**NAO, 1999**”) is illegal, improper, unjust, without lawful authority and jurisdiction and is in violation to the provisions of NAO, 1999 and consequential relief restraining the Respondents from demanding the said incidental charges / interest from the Petitioner.

2. The facts of the case, as gathered from the court file, briefly stated are that the Petitioner was charged under Section 9(a) of the NAO, 1999 in the case of Tawana Pakistan Project. He was arrested on 31.01.2013 in the said case. The Petitioner offered a plea bargain which was approved by the Chairman of Respondent No.1 [National Accountability Bureau (“**NAB**”)] in the amount of Rs.161,096,427/- plus 15 % incidental charges amounting to Rs. 24,164,464/- under Section 25(b) of the NAO, 1999. Thereafter the plea bargain was approved by the Accountability Court-I, Islamabad vide Order dated 26.02.2013 and the Petitioner was released. The Petitioner has filed representations dated 26.11.2013, 16.01.2014, and 06.05.2014 to NAB against the imposition of 15% incidental charges, but in vain, hence the instant petition.

3. The learned counsel for the Petitioner submitted the demand of 15% incidental charges / interest on the amount of the plea bargain is *ultra vires* the NAO, 1999 and as such illegal, unlawful, and without justification. He relied upon *Asghar Ali Vs. National Accountability Bureau*, 2016 PCr.LJ 477 and *Haji Khan Muhammad Vs. Government of Pakistan, National Accountability Bureau*, 2013 PCr.LJ 1571.

4. On the other hand the learned Special Prosecutor, NAB firstly objected to the maintainability of the petition on account of laches. The learned Special Prosecutor, NAB drew the Court's attention to the affidavit submitted by the Petitioner under Section 25(b) of the NAO, 1999 for the purpose of plea bargain wherein the Petitioner agreed to pay 15% incidental charges amounting to Rs.24,164,464/- as plea bargain. In answer to a specific query raised by the Court he explained that although incidental charges are not specifically mentioned in the NAO, 1999, however, pursuant to Section 25(b) of the NAO, 1999 where the accused offers to return to NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence under this Ordinance, the Chairman, NAB, may in his discretion, accept the offer on such terms and conditions as he may consider necessary, and if the accused agrees to return to NAB the amount determined by the Chairman, NAB, the latter shall refer the case for the approval of the Court for the release of the accused. Therefore, he submitted that 'incidental charges' are covered under the 'terms and conditions' considered necessary by the Chairman, NAB as provided for in Section 25(b) of the NAO, 1999 and which were agreed to by the Petitioner. He relied upon *Zaheer Afzal Chatha Vs. National Accountability Bureau*, 2018 PCr.LJ Note 9 to argue that the Petitioner cannot renege from the terms and conditions of the plea bargain subject to which he was released.

5. We have heard the learned counsel for the Petitioner and the learned Special Prosecutor, NAB and have also perused the available record.

6. It is an admitted position that there is no provision in the NAO, 1999 which expressly empowers NAB to demand 'incidental charges' as part of the plea bargain. However, the argument raised on behalf of NAB is that the payment of incidental charges constitutes the 'terms and conditions' on which the Chairman, NAB accepted the offer of plea bargain of the Petitioner Accused

under Section 25(b) of the NAO, 1999, which in turn has been agreed to by the Petitioner and as such cannot be reneged.

7. Examination of Section 25(b) of the NAO, 1999 indicates that it firstly envisages an offer from the accused to return to NAB the assets or gains acquired or made by him in the course, or as a consequence, of any offence. The Chairman, NAB in turn can accept such offer subject to such 'terms and conditions' as he may consider necessary. If the accused agrees to the return of the amount so determined by the Chairman, NAB then the Chairman, NAB shall refer the case for the approval of the Court, or as the case may be, the Appellate Court and for the release of the accused.

8. In essence, in case the Chairman, NAB accepts the offer made by the accused subject to terms and conditions imposed by him the same would constitute a counter offer. Therefore, such counter offer would only result in an agreement upon acceptance by the accused of the 'terms and conditions' introduced by the Chairman, NAB. It was urged that the Petitioner has agreed to such counter offer by way of the Affidavit for the Agreement under Section 25(b) of NAO, 1999 dated 26-02-2013 and as such cannot renege from it especially after having availed the benefit of such agreement.

9. The question before us is whether the Chairman, NAB can require the accused to make payment of additional amounts as 'incidental charges' under the guise of 'terms and conditions' as provided for under Section 25(b) of the NAO, 1999 and whether a binding and enforceable contract comes into being upon the acceptance of such terms and conditions by the accused person. Let us begin by considering what 'incidental charges' are.

10. As per Black's Law dictionary, 11th Edition the word 'incidental' means "*subordinate to something of greater importance; having a minor role*". Whereas, the word 'charge' has been defined in a case reported as *Pakistan Agriculture Storage Vs. Crescent Jute Products*, 2004 CLD 849 as:

"The expenses which have been incurred or disbursements made in connection with a contract, suit or business transaction."

11. A combined reading of the meaning of the words, 'charge' and 'incidental' leads to the conclusion that 'incidental charges' are subordinate/ancillary/subsidiary expenses incurred in connection with a contract,

suit or business transaction. In the context of a plea bargain ‘incidental charges’ would indicate expenses incurred by NAB in connection with the plea bargain.

12. The Lahore High Court as well as the Balochistan High Court have already held in judgments reported as *Asghar Ali* and *Haji Khan Muhammad* (*Supra*) that imposition of 15% incidental charges by NAB as part of plea bargains is totally illegal and without lawful authority being in violation of Section 25 of the NAO, 1999. This shows that such imposition is not unique to the Petitioner’s case but that NAB is imposing incidental charges in plea bargain matters in routine. Yet the learned Special Prosecutor for NAB had no explanation as to what expenses, if any, are incurred by NAB in connection with plea bargains, which would justify recovery of incidental charges. Therefore it transpires that there is neither any provision of law expressly permitting NAB to recover any amount as ‘incidental charges’ nor an explanation as to how NAB incurs such expenses or proof thereof.

13. The fact that the Petitioner agreed to pay such amount is immaterial given an accused person seeking his/her liberty does not have equal bargaining power with NAB. The first and foremost condition to make an agreement a contract as stipulated under Section 10 of the Contract Act, 1872 (“**Contract Act**”) is that it be made by the free consent of the parties. The term “consent” has been defined under Section 13 *ibid* to mean when two or more persons agree upon the same thing in the same sense. Whereas Section 14 provides that “*consent is said to be free when it is not caused by:*

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.” [Emphasis added].

14. Each factor which refutes consent as listed under Section 14 has been defined vide the stipulated provisions. Through a process of elimination, we have narrowed down the relevant factor in this case to be “undue influence”, which has been defined under Section 16 of the Act, 1872 as follows:

"16.(1) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

(2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-

(a) where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or

(b) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

(3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other." [Emphasis added].

15. The Supreme Court in the case of *Pakcom Limited and others v. Federation of Pakistan and others*, PLD 2011 SC 44 broke down sub-section (1) of Section 16 of the Contract Act in three essential elements as follows:

*"37. We have also examined as to whether any undue influence was caused by the PTA in the light of provisions as envisaged in section 16 of Contract Act. "On careful survey of section 16 of Contract Act, it seems clear that under subsection (1) of the said section, **three things must be proved before a contract can be said to be induced by undue influence, namely:--***

(i) that the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other;

(ii) that he uses that position; and

(iii) that an unfair advantage over the other has been obtained by the use of that position.

*Subsection (2) lays down rules for determining under what circumstances a person can be said to be in a position to dominate the will of another, enters into a contract with him and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the onus of proving that the contract was not induced by undue influence rests on the person in a position to dominate the will of the other (PLD 1965 Lah. 729)". Keeping in view the above discussion we have no hesitation in our mind to hold that no undue influence whatsoever was exerted by the PTA. **We are conscious of the fact that in the absence of free consent, contract is not sustainable or enforceable as it does not depict the true intent with the application of mind. It is well settled by now that "consent is free, when the activity of man, by which it is effective, works without obstacles to impede its exercise."** [Emphasis added].*

16. A Division Bench of the Sindh High Court at Karachi in *Amber Ahmed Khan v. Pakistan International Airlines, Karachi Airport, Karachi*, PLD 2003 Karachi 405 on the basis of various apex Court judgments held as follows:

“22. Moreover, our own superior Courts have lastly viewed transactions between the parties enjoying unequal bargaining position with suspicion and have held that undue influence can also be inferred from circumstances. In Hamida Begum v. Murad Begum (PLD 1975 SC 624) their Lordships have held undue influence may be inferred when the benefit is such as the taken has no right to demand either in law or equity and the grantor has no rational motive to give. In Rasheed Ahmed Khan v. President of Pakistan (PLD 1994 SC 36), their Lordships proceeded to hold that undue influence can be inferred on the basis of the capacity of a person to influence the decision of another and not his presence or absence at the time of decision. A Division Bench of this Court in Abdul Rahim v. United Bank (PLD 1997 Karachi 62) has elaborately dealt with the concept of undue influence as a result of economic coercion and we fully subscribe the view recorded therein. We are, therefore, clearly of the opinion that the defendants having taken advantage of the plaintiff's financial difficulties were not even willing to disburse the amount which they had earlier agreed to do despite a clear liability to pay disability compensation exhorted undue influence upon the plaintiff and the acknowledgement in question is of no consequences. We would uphold the findings of the learned Single Judge on this aspect of the case as well. Consequently we would dismiss H.C.A. No.325 of 1999 with costs.” [Emphasis added].

17. Similarly a Division Bench of the Lahore High Court in *A.R. Azhar Vs. Pakistan through Chairman Railway Board P.W.R. Lahore and 5 others*, 1980 PLC (C.S.) 139 explained the concept of undue influence as follows:

“17. ...The plaintiff signed the same in these circumstances and the plaintiff states that he did so not voluntarily but under compulsion to save his honour otherwise he would have been compulsorily retired entailing dishonour and disgrace. The plaintiff urged that a highly qualified person who had served thirty years with a record of incorruptibility, what would he not do to avoid public disgrace and humiliation tarnishing his image at the fag end of life with consequential embarrassment and dishonour to the entire family and friends in the society as it exists? I am quite clear in my mind and sure of conviction that a gentleman would do anything to avoid public disgrace and dishonour. If he acts in such circumstances, it cannot be said that he is acting freely and voluntarily and not under the compulsion of circumstances and if the latter are not valid under the law, the action of the person concerned under the threat of illegalities to be committed against him would be neither voluntary nor free nor that would form basis of any legal act. These are matters of essence and basic to all laws, norms, principles of justice and fair dealings between man and man, and man and State. Reference may be made to classic work on Contract by Chitty, 24th Edition, Volume I, also for the reason that the plaintiff has not been allowed to resume duty because of a term in the Agreement of Service (Exh. P. W. 1/1 and P. W. 1/3). At page 201 of the Book, it is stated:-

"Common law and equity.-To give validity to a contract the law requires the free assent of the party who is to become liable under it. This does not mean that contracts entered into under any form of pressure are void or voidable, "for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice. but to act." Consequently the law has to distinguish between legitimate and illegitimate forms of pressure. Violence to the person, and threats of such violence have long been recognised as illegitimate forms of pressure. The law therefore allows a party to avoid any promise extorted from him by terror or violence, whether on the part of the person to whom the promise is made or that of his agent. Contracts made under such circumstances are said to be made under duress, a term derived from the common law, which took a narrow view as to the facts which would establish the absence of free

consent. At common law, duress consisted of actual or threatened violence or imprisonment. Courts of equity, however, administered the wider doctrine of undue influence, which was applied chiefly to cases where some fiduciary relation existed between the parties, but was not in any way limited to them. Equity might therefore grant relief where the compulsion complained of was something less than that required by the common law. Since the Judicature Act, 1873 it has been the duty of all Courts to administer both doctrines concurrently and cases of coercion must be dealt with in the light of their combined effect."

Nearly a hundred years ago, a marriage contracted, under threat of writs and bankruptcy summons, before the Registrar was annulled in the case of *Scott v. Sebright* ((1886) 12 PD 21). It was observed at page 24 of the report that "Whenever from natural weakness of intellect or from fear-whether reasonably entertained or not-either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger". It was observed at page 25 that "In the present instance it is alleged that the worry and distress to which the petitioner was subjected resulted in such a degree of prostration, bodily and mental, as to render her, if not incapable of exercising her reason, at all events unable to resist constraint and pressure brought to bear on her by others for their own ends," and finding on facts in favour of the then plaintiff, the marriage was declared as null and void.

Instead of quoting individual cases, a longish excerpt from the judgment of Lord Denning M. R. in the Court of Appeal In re: *Lloyds Bank v. Bundy* (1975 Q B 326), which refers to numerous decisions may be quoted with advantage:

"The general rule.-Now let me say at once that in the vast majority of cases a customer who signs a bank guarantee or a charge cannot get out of it. No bargain will be upset which is the result of the ordinary interplay of forces. There are many hard cases which are caught by this rule. Take the case of a poor man who is homeless. He agrees to pay a high rent to a landlord just to get a roof over his head. The common law will not interfere. It is left to Parliament. Next take the case of a borrower in urgent need of money. He borrows it from the bank at high interest and it is guaranteed by a friend. The guarantor gives his bond and gets nothing in return. The common law will not interfere. Parliament has intervened to prevent money-lenders charging excessive interest. But it has never interfered with banks.

Yet there are exceptions to this general rule. **There are cases in our books in which the Courts will set aside a contract, or a transfer of property, when the parties have not met on equal terms-when the one is so strong in bargaining power and the other so weak that, as a matter of common fairness, it is not right that the strong should be allowed to push the weak to the wall.** Hitherto those exceptional cases have been treated each as a separate category in itself. But I think the time has come when we should seek to find a principle to unite them. I put on one side contracts or transactions which are voidable for fraud or misrepresentation or mistake. All those are governed by settled principles. **I go only to those where there has been inequality of bargaining power, such as to merit the intervention of the Court.**

The categories.-The first category is that of "duress of goods". A typical case is when a man is in a strong bargaining position by being in possession of the goods of another by virtue of a legal right, such as by way of pawn or pledge or taken in distress. The owner is in a weak position because he is in urgent need of the goods. The stronger demands of the weaker more than is justly due; and he pays it in order to get the goods. Such a transaction is voidable. He can recover the excess: see *Astley v. Reynolds* (1731) 2 Stra.915 and *Green v. Duckett* (1883) Q B D 275. To which may be added the cases of "colore officii", where a man is in a strong bargaining position by virtue of his official position or public profession. He relies upon it so as to gain from the weaker-who is urgently in need--more than is justly due: see *Pigott's case* cited by Lord

Kenyon, C. J. in Cartwright v. Rowley (1799) 2 Esp. 723, 723-724; Parker v. Bristol & Exeter Railway Co. (1851) 6 Exch. 702 and Steele v. Williams (1853) 8 Exch. 625. In such cases the stronger may make his claim in good faith honestly believing that he is entitled to make his demand. He may not be guilty of any fraud or misrepresentation. The inequality of bargaining power-the strength of the one versus the urgent need of the other-renders the transaction voidable and the money paid to be recovered back: see Maskell v. Hornor (1915) 3 K B 106.

The second category is that of the "unconscionable transaction". A man is so placed as to be in need of special care and protection and yet his weakness is exploited by another far stronger than himself so as to get his property at a gross undervalue. The typical case is that of the "expectant heir". But it applies to all cases where a man comes into property, or is expected to come into it-and then being in urgent need-another gives him ready cash for it, greatly below its true worth, and so gets the property transferred to him: see Evans v. Llewellyn (1787) 1 Cox 333. Even though there be no evidence of fraud or misrepresentation, nevertheless the transaction will be set aside: see Fry v. Lane (1888) 40 Ch. D 312, 322 where Kay, J. said:-

'The result of the decisions is that where a purchase is made from a poor and ignorant man at a considerable undervalue, the vendor having no independent advice, a Court of equity will set aside the transaction.'

*This second category is said to extend to all cases where an unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker: see the cases cited in Halsbury's Laws of England, 3rd ed. Vol. 17 (1956), p. 682 and, in Canada, Morrison v. Coast Finance Ltd. (1965) 55 D L R (2d) 710 and Knupp v. Bell (1968) 67 D L R (2d) 256. **The third category is that of "undue influence" usually so called. These are divided into two classes as stated by Cotton, L. J. in Allcard v. Skinner (1887) 36 Ch. D 145, 171. The first are those where the stronger has been guilty of some fraud or wrongful act-expressly so as to gain some gift or advantage from the weaker. The second are those where the stronger has not been guilty of any wrongful act, but has, through the relationship which existed between him and the weaker, gained some gift or advantage for himself.** Sometimes the relationship is such as to raise a presumption of undue influence, such as parent over child, solicitor over client, doctor over patient, spiritual adviser over follower. At other times a relationship of confidence must be proved to exist. But to all of them the general principle obtains which was stated by Lord Chelmsford L. C. in Tate v. Williamson (1866) 2 Ch. App. 55, 61:*

'Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed.

Such a case was Tufton v. Sperm (1952) 2 T L R 516.

The fourth category is that of "undue pressure". The most apposite of that is Williams v. Bayley (1866) L R 1 H L 200, where a son forged his father's name to a promissory note and, by means of it, raised money from the bank of which they were both customers. The bank said to the father, in effect: "Take your choice-give us security for your son's debt. If you do take that on yourself, then it will all go smoothly: if you do not, we shall be bound to exercise pressure". Thereupon the father charged his property to the bank with payment of the note. The House of Lords held that the charge was invalid because of undue pressure exerted by the bank. Lord Westbury said, at pp. 218-219:

"A contract to give security for the debt of another, which is a contract without consideration, is above all things, a contract that should be based upon the free and voluntary agency of the individual who enters into it."

Other instances of undue pressure are where one party stipulates for an unfair advantage to which the other has no option but to submit. As where an employer-the stronger party-has employed a builder the weaker party-to do work for him. When the builder asked for payment of sums properly due (so as to pay his workmen) the employer refused to pay unless he was given some added advantage. *Stuart V. C.* said: "Where an agreement, hard and inequitable in itself, has been exacted under circumstances of pressure on the part of the person who exacts it, this Court will set it aside": see *Ormes v. Beadel* (1860) 2 Giff. 166, 174 (reversed on another ground, 2 De G F & J 333) and *D. & C. Builders Ltd. v. Rees* (1966) 2 Q B 617, 625.

The fifth category is that of salvage agreements. When a vessel is in danger of sinking and seeks help, the rescuer is in a strong bargaining position. The vessel in distress is in urgent need. The parties cannot be truly said to be on equal terms. The Court of Admiralty have always recognised that fact. The "fundamental rule" is

"if the parties have made an agreement, the Court will enforce it, unless it be manifestly unfair and unjust; but if it be manifestly unfair and unjust; the Court will disregard it and decree what is fair and just."

See *Akerblom v. Price* (1881) 7 Q B D 129, 133, per Brett L. J. applied in a striking case *The Port Caledonia and The Anna* (1903) P. 184, when the rescuer refused to help with a rope unless he was paid £ 1,000.

The general principles.-Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on "inequality of bargaining power". By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own coeds or desires, or by his own, ignorance or infirmity, coupled with undue influence or pressure brought to bear on him by or for the benefit of the other. **When I use the word "undue" I do not mean to suggest that the principle depends on proof of any wrongdoing.** The one who stipulates for an unfair advantage may be moved solely by his own self-interest, unconscious of the distress he is bringing to the other. I have also avoided any reference to the will of the one being "dominated" or overcome" by the other. **One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself.** Again, I do not mean to suggest that every transaction is saved by independent advice. But the absence of it may be fatal."

The basis of decisions, I may say so with respect, is the principle that an act not done freely and voluntarily but under pressure impermissible in law, does not bind the doer. It is elementary law seeking justice that circumstances cannot be such nor created thus that a person finds himself losing his honour or surrendering to the demands of another. **If he chooses honour to surrender his right, the choice is obviously neither free nor voluntary but under the compulsion of the circumstances.** In the present case if we recollect that the times were when Martial Law was imposed in the country, the Establishment Secretary of the Government of Pakistan was informing the plaintiff that his case for compulsory retirement was finalized and that he would not be issued any notice or heard in his defence, he better apply for leave to retirement, what could the plaintiff hope but to act as suggested? Nobody with long service of incorruptible character would prematurely like to go voluntarily, except for some private reasons which is not. the case of either party. In the background of circumstances and events, there is no doubt whatsoever that the plaintiff applied for leave preparatory to retirement and signed the notice for termination of service under threat of compulsory retirement which was hollow

as there was nothing to form the basis of the action because the Confidential Reports filed by the defendants do not call for such action.” [Emphasis added].

18. The takeaway relevant for us is that a contract entered into under compulsion is not sustainable. Armed with such insight, let us see if the test prescribed by the Supreme Court in *Pakcom Limited (Supra)* to determine the existence of ‘undue influence’ is met in this case.

(i) that the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other;

19. The first thing that must be proved to show ‘undue influence’ is that the relations subsisting between the parties are such that one party should be in a position to dominate the will of the other. The facts of the instant case show that the Petitioner was under arrest since 31.01.2013. It is a basic principle of human conduct that one who is incarcerated desires his freedom and as such is most susceptible to accepting terms, no matter how imprudent they may be, solely to free himself. Given the vulnerability of the accused in such circumstances, NAB was quite obviously in a position to dominate the will of the Petitioner.

(ii) that he uses that position; and

20. Secondly, use or exercise of such dominant position is to be shown. However, as held by the Sindh High Court as well as the Lahore High Court in *Amber Ahmed Khan and A.R. Azhar (Supra)*, such use does not always require proof but can be inferred from circumstances. NAB in this case accepted the Petitioner’s offer of a plea bargain subject to payment of 15% incidental charges. Despite the fact that NAB has no right to demand such incidental charges either in law or equity, the Petitioner while he was deprived of his freedom agreed to the same which indicates the use of undue influence.

(iii) that an unfair advantage over the other has been obtained by the use of that position.

21. Lastly, such use must result in an unfair advantage over the other. NAB obtained an unfair advantage over the Petitioner by extracting an amount from him not otherwise due by using its dominant position over the Petitioner.

22. In view of the foregoing, ‘incidental charges’ as part of the plea bargain appear, on the face of it, to be unconscionable. According to sub-section (3) of Section 16 of the Contract Act, the burden of proof that a contract was not induced by undue influence is on the person who is in a position to

dominate the will of another when he enters into contract with such person and where the transaction appears to be unconscionable. Since NAB was unable to explain what incidental charges, if any, are incurred by NAB in respect of a plea bargain and it is in admitted fact that law does not authorize NAB to charge the same, NAB has failed to discharge its burden of proof.

23. The learned Special Prosecutor for NAB relied upon an unreported judgment of a learned Single Bench of this Court passed in *Zahid Shafiq Vs. National Accountability Bureau*, W.P. No.3068/2016, whereby it was held that the Petitioner could not exclude an integral part of a plea bargain on the allegation of coercion as the same constitutes a disputed question of fact which cannot be adjudicated upon in the exercise of Constitutional jurisdiction. However, in our opinion evidence is not required to be recorded in this case as undue influence can be inferred from the circumstances in light of *Amber Ahmed Khan (Supra)* as NAB has no right to demand the incidental charges either in law or equity as discussed herein above. The case of *Zaheer Afzal Chatha (Supra)* is distinguishable as in the said case the accused person was challenging the amount determined as illegal gains/assets and/or consequential gains, which are justifiable under law.

23. As far as the point of laches is concerned, it is well settled that laches may be condoned where the act of which the petitioner is aggrieved is patently illegal and/or to avoid grave injustice. Reliance is placed upon *Abdul Majid Vs. Mst. Zubeda Begum*, 2007 SCMR 866 and *Hafiz Muhammad Sharaf-ud-Din Vs. District Judge, Khushab*, 2015 MLD 1081. As observed herein above, NAB appears to be in the practice of imposing 'incidental charges' arbitrarily without any basis in law or equity thereby extracting undue benefits from accused persons by taking advantage of its position of dominance and the vulnerability of the accused who is incarcerated. Public functionaries are expected to act fairly and justly and cannot be allowed to profit from the predicament of a person in their custody. Thus, in our view, this is a fit case to condone the delay in invoking the Constitutional jurisdiction of this Court.

24. To conclude, in the absence of law and/or expenses incurred by NAB, the clause of the plea bargain whereby the Petitioner has agreed to pay incidental charges would be unenforceable for lack of free consent.

25. In view of the foregoing we are constrained to hold that clause 2 of the plea bargain entered into by the Petitioner accused is void to the extent of 15% incidental charges amounting to Rs.24,164,464/- and cannot be recovered from the Petitioner. Accordingly, the instant writ is **allowed**.

CHIEF JUSTICE

**(SAMAN RAFAT IMTIAZ)
JUDGE**

Announced in open Court on this 4th day of May, 2023.

JUDGE

JUDGE

JUNAID

**Approved for Reporting
Blue Slip added.**