

## **JUDGMENT SHEET.**

### **IN THE ISLAMABAD HIGH COURT, ISLAMABAD.** **JUDICIAL DEPARTMENT.**

**W.P. No. 3721/2018.**

Raja Muhammad Umair Khan

Versus

Chairman NAB, Islamabad, etc.

**Petitioner by:** Mr. M. Shahid Kamal Khan, Malik Babar Hameed,  
Malik Khalil Ahmed and Mr. Sikander Zaman  
Cheema, Advocates.

**Respondents by:** Syed Hasnain Ibrahim Kazmi, Advocate.  
Raja M. Aftab Ahmed, AAG.  
Barrister Tariq Khokhar, Additional Attorney  
General, NAB.  
Jahanzaib Bharwana and Sardar Muzaffar Ahmed  
Khan, ADPGs NAB.  
Barrister Rizwan Ahmed, SP NAB.

**Date of Decision:** 10.05.2019.

**MOHSIN AKHTAR KAYANI, J:** Through this writ petition, the  
petitioner has prayed for the following relief:-

*That by way of acceptance of instant writ petition, the respondent No.5 be asked to show under what authority and law he is holding the post of Prosecutor General Accountability, NAB, Islamabad, while the other respondents be asked to show cause why they have failed to uphold the rule of law and due process of law in the interest of justice and fair play.*

2. Learned counsel for the petitioner contends that appointment of respondent No.5 Syed Asghar Haider as Prosecutor General Accountability NAB, Islamabad is not in accordance with law and he has to show his authority of law under which he is holding the post of Prosecutor General NAB; that respondent No.5 remained the permanent judge of Lahore High Court, Lahore and in terms of Article 207(3) of the Constitution of Pakistan, 1973, a judge of High Court shall not plead or act in any Court or before any authority within its

jurisdiction and as such newly appointed Prosecutor General NAB/respondent No.5 has inherent disability that he should not be permitted to act or plead within the territorial jurisdiction of Lahore High Court; that qualification referred in Section 8(a)(i) & 8(b) of NAO, 1999 if read with conjunction, the Prosecutor General shall have the right of audience in all the Courts and due to Article 207(3) of the Constitution of Islamic Republic of Pakistan, 1973, respondent No.5 is not permitted to appear or have right of audience in the jurisdiction of Lahore High Court and such disqualification has not been considered while appointing respondent No.5. Learned counsel for the petitioner has relied upon PLD 2018 SC 337 (Shahid Anwar Bajwa vs. S.M. Asif) and 2010 PLC (CS) 1308 (Sh. Riaz-ul-Haq vs. Federation of Pakistan through Ministry of Law).

3. Conversely, Chairman NAB, Federation of Pakistan represented through AAG and counsel for respondent No.5 have argued their case on the ground that there is no inherent disqualification provided in the NAO, 1999 and respondent No.5 fulfills the criteria referred in Section 8(a)(i) of NAO, 1999, which requires a person qualified to be appointed as a Judge of the Supreme Court and respondent No.5 holds qualification provided under Article 177 of the Constitution of Islamic Republic of Pakistan, 1973, which provides the qualification for the appointment of Supreme Court Judge and the case of respondent No.5 falls within the concept of Article 177 (1)(2)(b) of the Constitution of Islamic Republic of Pakistan, 1973 because respondent No.5 practiced as an Advocate of High Court after obtaining the license of Punjab Bar Council in the year 1980 and minimum requirement of 15 years practice as an advocate of High Court was with respondent No.5 at the time of appointment as Prosecutor General, NAB; that qualification referred in Article 177 (1)(2)(a) of the Constitution of Islamic Republic of Pakistan, 1973 in which 05 years service being Judge of High Court was not the qualification of respondent No.5, who remained

in judicial service being permanent judge of Lahore High Court for 03 years only, therefore, his appointment shall be considered with reference to Article 177(1)(2)(b) of the Constitution of Islamic Republic of Pakistan, 1973; that as per NAO, 1999 Prosecutor General, NAB acts in advisor capacity and unless the Chairman NAB assigns any duty or case to the Prosecutor General NAB then he has to appear before the Court; that Prosecutor General NAB subject to approval of the Chairman NAB may appoint Special Prosecutor to conduct the cases in different Courts of Pakistan arising out of proceedings under the NAO, 1999, which covers requirement of appearance of Prosecutor General NAB before the Courts concerned and in this manner the requirement for appearance in the Lahore High Court jurisdiction has been meted out.

4. Arguments heard, record perused.

5. Perusal of record reveals that petitioner has challenged the very appointment of respondent No.5, who was appointed vide notification dated 24.01.2018 as Prosecutor General NAB, however, prayer clause referred in the instant writ petition is only confined to the extent that respondent No.5 be asked to show that under what authority he is holding the post of Prosecutor General NAB and as such the notification of appointment of respondent No.5 as Prosecutor General NAB has not been challenged, even the vires of law as well as qualification factor has not been challenged, therefore, this Court is only confining itself to the extent of question raised in the prayer clause of instant writ petition.

6. In order to resolve the controversy, I have gone through the requirement mentioned in Section 8 of the NAO, 1999 which is reproduced hereunder for ready reference:-

**8. Prosecutor General Accountability. (a),--**

*(i) The President of Pakistan, in consultation with the Chairman NAB, may appoint any person, who is qualified to be appointed as*

*a Judge of the Supreme Court, as Prosecutor General Accountability.*

*(ii) The Prosecutor General Accountability shall hold independent office on whole time basis and shall not hold any other office concurrently.*

*(iii) The Prosecutor General Accountability shall hold office for a [nonextendable] period of three years.*

*(iv) The Prosecutor General Accountability shall not be removed from office except on the grounds of removal of a Judge of Supreme Court of Pakistan.*

*(v) The Prosecutor General Accountability may, by writing under his hand addressed to the President of Pakistan, resign his office.*

*(b) The Prosecutor General Accountability shall give advice to the Chairman NAB upon such legal matters and perform such other duties of a legal character as may be referred or assigned to him by the Chairman NAB and in the performance of his duties, he shall have the right of audience in all Courts established under this Ordinance and all other Courts including the Supreme Court and a High Court and Tribunals.*

*(c) The Prosecutor General Accountability, with the approval of Chairman NAB, may appoint Special Prosecutors to conduct prosecution of cases and to appoint advocates to institute or defend cases, appeals, petitions, applications and all other matters before any court <sup>7</sup>[or tribunal including the High Courts and Supreme Court in matters arising out of or relating to proceedings under this Ordinance.*

*(d) In case the Prosecutor General Accountability is absent or unable to perform the functions of his office due to any reason whatsoever, any other Law Officer of the NAB, duly authorised by the Chairman NAB, shall act as the Prosecutor General Accountability.*

7. While considering the above provision of NAO, 1999, requirement provided for the appointment of Prosecutor General NAB are:-

(i) Consultation of Chairman NAB with the President of Pakistan.

(ii) Person who is qualified to be Judge of Supreme Court.

Whereas, no other qualification has been referred. I have asked the learned counsel for the petitioner as to which parameter for appointment of Prosecutor General NAB has been challenged by him, whereby learned counsel contends that petitioner has only assailed the part (ii) where the qualification of Judge of Supreme Court has been referred, therefore, the notification and appointment by President of Pakistan in consultation with the Chairman NAB is not under challenge.

8. The requirement to appoint Judge of Supreme Court has been referred in Article 177 of the Constitution of Islamic Republic of Pakistan, 1973, which is as under:-

*177. Appointment of Supreme Court Judges.- 119[(1) The Chief Justice of Pakistan and each of the other Judges of the Supreme Court shall be appointed by the President in accordance with Article 175A.]*

*(2) A person shall not be appointed a Judge of the Supreme Court unless he is a citizen of Pakistan and-*

*(a) has for a period of, or for periods aggregating, not less than five years been a judge of a High Court (including a High Court which existed in Pakistan at any time before the commencing day); or*

*(b) has for a period of, or for periods aggregating not less than fifteen years been an advocate of a High Court (including a High Court which existed in Pakistan at any time before the commencing day).*

9. The above referred Article provides different qualification factors:-

- (i) A person so appointed must be citizen of Pakistan
- (ii) He remained a Judge of High Court for a period of 05 years
- (iii) Having 15 years of practice as an advocate of the High Court

10. The above provision of Article 177(2)(a)(b) in the Constitution of Islamic Republic of Pakistan, 1973 is separated with the word "OR", which shows that a person must have either of any qualification provided in Article 177 (2)(a) or provided in 177 (2)(b), therefore, in my humble estimation the person who has been nominated or whose name has been processed for the purpose of appointment of Prosecutor General NAB should have either 05 years of permanent position as a Judge of the High Court and this qualification be considered by the President of Pakistan in consultation with the Chairman NAB but case of respondent No.5 has not been considered under this qualification as he was never a judge of High Court for 05 years, although he remained permanent judge for 03 years, therefore his such qualification with reference to Article 177(2)(a) the Constitution of Islamic Republic of Pakistan, 1973 is not relevant and respondent No.5 has not been considered on this criteria rather his case has been processed in terms of Article 177 (2)(b) of the Constitution of

Islamic Republic of Pakistan, 1973, whereby respondent No.5 obtained Punjab Bar Council license as an advocate High Court in 1980 till his elevation as a Judge of High Court, therefore, minimum requirement for the post of Prosecutor General NAB is in order as respondent No.5 has 15 years of practice as an advocate of High Court.

11. Now comes to the objection of the petitioner and as per his stance Article 207(3) of the Constitution of Islamic Republic of Pakistan, 1973 does not permit a Judge of Supreme Court to plead or act in any Court of Pakistan and for a judge of High Court he shall not plead or act before any Court within its jurisdiction and as such, the said restriction has been claimed as inherent disqualification in the appointment of respondent No.5 as Prosecutor General NAB by the petitioner.

12. In order to resolve the said controversy, I have gone through the history of the said provision in the constitutional background as argued by learned Additional Attorney General, who has referred constitutional provision of Government of India Act, 1935 in similar type of proposition for the appointment of Advocate General of Province in terms of Article 55 of Government of India Act, 1935, which is reproduced as under:-

**Government of India Act, 1935**

*55.---(1) The Governor of each Province shall appoint a person, being a person qualified to be appointed a judge of a High Court, to be Advocate General for the Province.*

13. The Additional Attorney General has also referred similar provisions of other constitutions, which are as under:

**Constitution of Islamic Republic of Pakistan, 1956:**

*72(2) No person shall be qualified for appointment as Advocate General unless he is qualified for appointment as a Judge of a High Court, but no person shall be appointed as Advocate General if he is or has been a Judge of the Supreme Court or of a High Court.*

**Constitution of Islamic Republic of Pakistan, 1962**

*36.---(1) The President shall appoint a person who is qualified to be appointed as a Judge of the Supreme Court to be Attorney General for Pakistan.*

*(2) The Attorney General shall perform such duties as the President may direct.*

*(3) In the performance of his duties, the Attorney General shall have the right of audience in all Courts in Pakistan.*

*85.---(1) The Governor of a Province shall appoint a person who is qualified to be appointed as a Judge of a High Court to be Advocate General for the Province.*

*(2) The Advocate General shall perform such duties as the Governor may direct.*

14. By submission of above referred provision of previous three Constitutions the learned Additional Attorney General persuaded this Court to believe that the disqualification given in the Constitution of Islamic Republic of Pakistan, 1956 in which a restriction was imposed upon the ex-judges of High Court and Supreme Court to be appointed as Advocate General was intentionally omitted in the subsequent constitution.

15. In essence, the above referred example gives the true intent of law makers when they have omitted certain restrictions/embargos for the appointment of Advocate General and Attorney General in the subsequent constitutions and as such, the omissions were well within the knowledge of legislature while framing the new constitution and no one is allowed to assume the previous restrictions and embargos in the present Constitution which were intentionally omitted.

16. While considering the above background, if the analogy drawn by the petitioner's side has been accepted in *toto*, then very appointment of Chairman NAB, who is retired Judge of Supreme Court, should have been challenged and petitioner has been confronted with such question, who conceded that he has not challenged the appointment of Chairman NAB on the said touchstone and he confines his case to the extent of Prosecutor General NAB.

17. The main thrust of arguments of petitioner's side is the disability of the Prosecutor General being ex-permanent judge of the Lahore High Court, who will not exercise his right of audience as referred in Section 8(b) of NAO, 1999 and the said term "right of audience" has not been explained in the NAO, 1999,

therefore, while considering the principle of interpretation when any term has not been explained in any particular law then its ordinary meaning should have been imported from the dictionary. The term "right of audience" is explained in the Black's Law Dictionary Eighth Edition Bryan A. Garner Editor in Chief defines the same as under:-

**Right of audience.**

*A right to appear and be heard in a given court. The term chiefly used in England to denote the right of a certain type of lawyer to appear in a certain type of court.*

18. Therefore, while dealing with the said definition, I have gone through Section 22 of the Legal Practitioners and Bar Councils Act, 1973, which laid down complete concept of license to an individual for his practice and appearance before different Courts and no person is entitled to practice profession of law unless having valid license of practice and his name is reflected in the roll of Bar. Although, for every position where law graduation is minimum requirement or any post particular with reference to constitution in which the minimum requirement provided under the law that candidate must have valid license issued by Bar Council along with number of years of practice e.g. for the appointment of Judge of High Court, Attorney General, Advocate General, etc. and in terms of Section 5C of Legal Practitioners & Bar Councils Act, 1973, a member of bar council shall cease to be such member if he is appointed to an office of profit in the service of Pakistan, therefore, while considering the above background, question raised by the petitioner's side regarding inherent disqualification referred by him in terms of Section 8(b) of NAO, 1999 has also been considered from diverse angles while considering the restriction of Article 207 of the Constitution of Islamic Republic of Pakistan, 1973 but the answer to the proposition has been given in Section 8(b) of NAO, 1999 wherein the role of Prosecutor General in the law is meant to give advice to the Chairman NAB



upon legal matters and he can only act and plead on the directions assigned by the Chairman NAB in performance of his duties. The provision of Section 8(b) of NAO, 1999 is qualified with word "MAY" be referred to assign or referred by the Chairman NAB gives a view that said provision is directory in nature and by using the term "may" the intention of the legislature is different from the word "shall".

19. From the bare reading of the NAO, 1999 read with the constitutional provisions, this Court is under a legal duty to distinguish between directory and mandatory provisions in the NAO, 1999 with reference to qualification or disqualification of Prosecutor General. To distinguish whether directions of legislature were imperative and whether they were directory, the real question was whether an act has been ordered by the legislator to be done and what were the consequences, if it was not done. Duty of the court was to try to unveil the real intent of the legislature and such exercise entailed carefully attending to the scheme of the Act and then highlighting the provisions that actually embodied the real purpose and object of the Act. The provision in statute was mandatory or directory would be considered in the light of principles laid down in 2018 SCMR 2039 (The State through Regional Director ANF vs. Imam Bux, etc.). The true test for determination as to whether the provisions are mandatory or directory, the word "shall" was used in the provision of law has to be considered in its ordinary grammatical meaning and normally by using such word by legislature branded a provision as mandatory, especially when an authority was required to do something in a particular manner. The use of word shall was not a sole factor which determined the mandatory or directory nature of a provision, it was certainly one of the indicator of the legislative intent.

20. The interpretation given by the apex Court in different cases persuaded this Court to believe that by using word "may" in Section 8(b) of the NAO, 1999,

the law makers have clarified the proposition and created an option in favour of the Prosecutor General for his right of audience and it depends upon the direction of the Chairman NAB, hence, it is not a direct restriction, disqualification or any other negative status, rather it gives rise to an optional duty to the Prosecutor General NAB and it is not the main term and condition of his service to be performed in a strict legal sense as there is no penal consequence referred in this regard in the NAO, 1999, however if the Prosecutor General fails to perform his assigned duties by the Chairman NAB, the competent authority may proceed against the Prosecutor General in accordance with the procedure laid down in Section 8(a)(iv) of the NAO, 1999 subject to the grounds given in Article 209(5)(a)(b)&(6) of the Constitution of the Islamic Republic of Pakistan, 1973.

21. If for the sake of arguments, it is considered that Prosecutor General NAB has right of audience in all High Courts and Hon'ble Supreme Court and being judge of Lahore High Court, Lahore, respondent No.5's right of audience would cease, then too, the said right of audience of respondent No.5 would cease only to the extent of audience in Lahore High Court, whereas, he would have the right of audience in other High Courts as well as in Hon'ble Supreme Court of Pakistan. Hence, the objection raised by the petitioner regarding disqualification of respondent No.5 as Prosecutor General NAB to this extent has also no legs to stand.

22. There is another angle of the entire proposition, which has been referred in Section 8(a)(i) of NAO, 1999, in which the President of Pakistan in consultation with the Chairman NAB appoints Prosecutor General NAB and consultation refers the meaningful consultation in terms of judgment reported as PLD 2008 Lahore 312 (M. Ashraf Khan, Advocate Supreme Court of Pakistan Vs. Secretary

Law, Parliamentary Affairs and Human Rights, Government of the Punjab, Lahore), wherein it has been held that:

*“13. According to Article 140 of the Constitution, the Governor of each Province shall appoint a person, being a person qualified to be appointed a Judge of the High Court, to be the Advocate General for the Province. Thus, it is a constitutional requirement that only such a person should be appointed a Judge of the High Court. According to the Hon’ble Supreme Court of Pakistan, the Chief Justice of Pakistan and the Chief Justice of the concerned High Court are the best persons to judge whether a particular person is qualified to be appointed a Judge of the High Court or not. (Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324). The expression “consultation” was considered by the Hon’ble Supreme Court in Al-Jehad Trust case in appointment of Judges of High Court. Therefore, , if seen in the above backdrop, the spirit of Article 140 of the Constitution requires that Chief Justice of High Court be consulted prior to making an appointment of the Advocate-General.”*

(Underlining provided for emphasis is mine)

As a matter of fact, the President of Pakistan and Chairman NAB has already consulted each other on the appointment of respondent No.5 and while examining the eligibility criteria of the Judge of Supreme Court referred in the Constitution of Islamic Republic of Pakistan, 1973 with requirement of NAO, 1999, both of them have consulted and considered the law on the subject and their meaningful consideration covers each and every aspect while appointing respondent No.5 through notification dated 24.01.2018. The question raised by the petitioner to show under what authority of law respondent No.5 is holding the position of Prosecutor General becomes meaningless having no significance in the light of consultation between the President of Pakistan and Chairman NAB, which was done in accordance with law.

23. The minimum requirement for the purpose of writ of quo-warranto has been laid down in reported cases PLD 2018 SC 114 (Muhammad Hanif Abbasi vs. Jahangir Khan Tareen), 2013 SCMR 1035 (Malik Nawab Sher vs. Ch. Munir, etc.), PLD 2011 SC 516 (Ghulam Shabbir vs. Muhammad Munir Abbasi), and 2017 PLC (CS) 1142 Karachi (Sohail Baig Noori vs. High Court of Sindh).

24. The above referred judgments clearly spell out the requirement that a person filing a writ petition has to inform the Court regarding any appointment which has not been made in accordance with law, whereas the Court has to probe into judicial inquiry and as such the minimum requirement of the writ of quo-warranto is not seen in this case as no disqualification has been pointed out by the petitioner's side as respondent No.5 fulfills all the requirement in terms of Section 8(a)(i) of NAO, 1999. Although, the eligibility and qualification which are required for appointment as Judge of Supreme Court has been provided in Article 177 of the Constitution of Islamic Republic of Pakistan, 1973, but I am of the view that such requirement is only meant and applied in strict sense when judge of Supreme Court has been elevated and not for the post of any authority like Prosecutor General NAB, even though respondent No.5 fulfills the minimum threshold of such eligibility & qualification and petitioner's objection is not tenable with reference to qualification.

25. The limited question raised in the petitioner's case is the restriction provided in Article 207(3) of the Constitution of Islamic Republic of Pakistan, 1973 regarding his service as permanent judge of the High Court and in this regard, petitioner has relied upon recent judgment of the Apex Court reported as PLD 2018 SC 337 (Shahid Anwar Bajwa Vs. S. M. Asif). The Apex Court in the said reported case has not permitted the ex-judge Mr. Shahid Anwar Bajwa of Sindh High Court to practice in the jurisdiction of Sindh High Court on the following analogy:-

*"8. In this backdrop, we shall consider the relevant provisions of the Constitution of 1962 as well as 1973. Article 166(3) of the Constitution of 1962 provided that "A person who has held office as a permanent judge of a High Court shall not plead or act before that court or any court or authority within its jurisdiction"; whereas, Article 207(3)(b) of the Constitution of 1973 provides that "A person who has held office as a permanent judge of a High Court, shall not plead or act in any court or before any authority within its jurisdiction". A plain reading of two provisions makes it abundantly clear that not only the words "that Court"*

*been omitted, as relied upon by the appellant, but also the word "before" has been replaced with the word "in", thus, the whole construction of the provision has been changed. Thus, it can safely be held that by the omission of word "that Court" the intention of the legislature is not to allow the ex-Judge of a High Court to appear as a counsel before that Court. In order to ascertain the real intention of the legislature, it is necessary to keep in mind the provisions of Article 207(3)(a) *ibid*, which provides that "A person who has held office as a permanent judge of the Supreme Court, shall not plead or act in any Court or before any authority in Pakistan". Thus, from this provision the intention of the legislature is clear that a ban has been imposed on a Judge not only to appear before the courts/forums subordinate to that Court but also from the court where he acted as a permanent judge."*

26. The view rendered by the Apex Court in the case of *Mr. Shahid Anwar Bajwa supra* is with reference to practice as an advocate and not as Prosecutor General NAB. This is entirely a different concept as the Prosecutor General NAB is only advisor to Chairman NAB and is not directly pleading the cases, unless directed by the Chairman NAB and for this purpose, Prosecutor General NAB, while exercising his authority in terms of Section 8(C), appoints Special Prosecutors to conduct the cases and to appoint the advocate to institute, defend appeals, applications or any other cases before the High Court or Supreme Court, therefore, situation is answered in the relevant provision of NAO, 1999 and as such, there is no direct disqualification against respondent No.5 nor even he can be considered disqualified on the touchstone of Article 207(3) of the Constitution of Islamic Republic of Pakistan, 1973. The Prosecutor General NAB can perform his duties in advisory capacity as per requirement of the Chairman NAB and even otherwise, if proposition raised by the petitioner is accepted *in toto* then Attorney Generals, who have been appointed being the ex-judge of the High Court, are to be considered disqualified for such position. I have already answered the question in the preceding paragraph that legislature has intentionally omitted such restriction and even legislature has framed the law

being mindful of Article 207 (3) of the Constitution of Islamic Republic of Pakistan, 1973.

27. Keeping in view the above background, I have also considered the other technical aspects of this case in which President of Pakistan in consultation with Chairman NAB has considered respondent No.5 to be qualified person for appointment as Prosecutor General NAB and there is no defect in the jurisdiction and authority of President of Pakistan at the time of issuing notification and respondent No.5 is fully qualified person in terms of Section 8(a)(i) of the NAO, 1999 read with Article 177(1)(2)(b) of the Constitution of Islamic Republic of Pakistan, 1973, therefore, the minimum requirement to challenge the appointment of respondent No.5 in terms of quo-warranto is not visible.

28. Besides the above referred proposition, the petitioner has failed to provide valid reasons for filing the instant writ petition with delay of 09 months as respondent No.5 was appointed on 29.01.2018 as Prosecutor General NAB as per notification and instant writ petition has been filed on 03.10.2018.

29. Keeping in view the above background, instant writ petition is not maintainable on all counts. I have gone through each and every aspect of the appointment of respondent No.5 and could not find any disqualification, nor the petitioner could point out any illegality in the appointment of respondent No.5 as Prosecutor General NAB, therefore, the instant writ petition is misconceived, resultantly, the same is hereby **DISMISSED**.

(MOHSIN AKHTAR KAYANI)  
JUDGE

Khalid Z.