IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:
MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, C.J.
MR. JUSTICE GHULAM RABBANI
MR. JUSTICE KHALIL-UR-REHMAN RAMDAY

Constitution Petitions Nos. 20 to 27, 39 & 45 of 2009
H.R Cases Nos. 20424-P, 20982-P/2009 and 19465-P/2010
C.M.A. No.1703 of 2010 in Const. P.39/09

The Bank of Punjab
NIB Bank

...Petitioners

Versus

Haris Steel Industries (Pvt) Ltd & others	...Respondents (Const. P 20/09)
Sheikh Muhammad Afzal, etc.	...Respondents (Const. P 21/09)
Haris Afzal, etc.	...Respondents (Const. P 22/09)
Hamesh Khan & others.	...Respondents (Const. P 23/09)
Muhammad Zia-ul-Haq, etc.	...Respondents (Const. P 24/09)
Haroon Aziz, etc.	...Respondents (Const. P 25/09)
Muhammad Shoaib Qureshi, etc.	...Respondents (Const. P 26/09)
Aziz-ur-Rehman, etc.	...Respondents (Const. P 27/09)
Haris Steel Industries, Ltd.	...Respondents (Const. P. 39 & 45/09)

For the petitioner: *(in Const.Ps. 20-27 &39/09)*	Kh. Haris Ahmad, ASC Mr. Arshad Ali Chaudhry, AOR
For the Petitioner *(in Const. P. 45/2009)*	Nemo
On Court Notice:	Maulvi Anwar-ul-Haq, Attorney General for Pakistan
For respondents	
(in Const.P.22/2010)	Mr.M.S. Khattak, AOR a/w Haris Afzal
(in Const.P.23/2010)	Nemo
(in Const.P.24/2010)	Nemo
(in Const.P.25/2010)	Nemo
(in Const.P.26/2010)	Nemo

(in Const.P.27/2010)	Nemo
For the NAB	Mr. Irfan Qadir, P.G. NAB Mr. Akbar Tarar, Addl. P.G. NAB
For state Bank	Raja Abdul Ghafoor, ASC/AOR
For Foreign Office	Nemo
For F.I.A.	Nemo
For Govt. of Punjab	Ch. Khadim Hussain Qaiser, Addl. A.G. Mr. Hassan Akhtar, Dy. Secy. Home
Date of hearing:	07.07.2010.

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JUDGMENT

GHULAM RABBANI, J.- This order shall dispose of CMA No.1703/2010. However, it is deemed necessary to re-capitulate background of the case, which is that M/s Haris Steel Industries, Haider Steel Industries and Prime Steel Industries availed various credit facilities amounting to Rs.720 millions, Rs.325 millions and Rs.1000 millions respectively during the period 2005 -2008 from the Bank of Punjab against mortgaged property belonging to different persons. Ostensibly 23 independent Accounts were opened in the name of different proprietorships from March, 2006 to April, 2007 in different Branches of Bank of Punjab. During the month of May, 2007, in a routine audit, it was revealed that 23 accounts pertained to fake accounts holders and were not adequately secured and credit facilities had been advanced and finances disbursed by the Branch Managers in visible haste. The Bank Management took action against the Branch Managers by initiating disciplinary proceedings. The Directors/Proprietors of the above mentioned Steel Industries took step forward and offered to

take over the entire liabilities against 23 accounts and the bank's management agreed to the same. During the time of appropriation it transpired that value of the mortgaged properties were shown more than the actual value. In June, 2006 this fraud for the first time came in a news item appearing in daily "The News" dated 21.6.2007 when the State Bank of Pakistan took action by calling a report from the Bank. The matter was taken up by the NAB authorities and DG NAB authorized an inquiry under Section 18(c) of the NAO, 1999. The Chairman, NAB authorized arrest of various persons involved in the scam and Accountability Court issued search warrants of the Premises belonging to Sh. Afzal (Principal accused). The accused filed writ petitions against the order of the Chairman, NAB as well as the NAB Courts. A number of Writ Petitions were also filed by the other accused; all these were clubbed together. The accused approached the Supreme Court by filing Const. Petitions for transfer of all the Writ Petitions filed in the matter pending before the Lahore High Court directly to the Supreme Court of Pakistan and later on all the Writ Petitions were ordered to be transferred from Lahore High Court, Lahore to Islamabad High Court, Islamabad.

2. The Bank of Punjab filed listed Const. Petition No.20 of 2009 under Article 186-A read with Article 187 of the Constitution of Islamic Republic of Pakistan with the prayer that Writ Petition pending before Islamabad High Court be heard by this Court. Preliminary hearing of the case took place on 27.5.2009 when this Court ordered notices to be issued to the parties with directions to

maintain status-quo in respect of alienation of properties belonging to the accused.

3. In the meanwhile CMA No.2403/2009 was filed on 30.7.2009 with the prayer that order dated 29.9.2008 restraining the NAB from taking proceedings under the Reference to enable continuation of proceedings in investigation and the reference may be vacated because on account of pendency of the cases before Islamabad High Court the proceedings before the NAB were stayed. On this an order was passed by this Court on 3.8.2009. Relevant para therefrom is reproduced hereinbelow:

> *"The learned Prosecutor General, NAB who has appeared, stated that he is ready to extend full cooperation to the DG, FIA. However, his apprehension was that as the Islamabad High Court and this Court had issued restraint orders against the arrest of Hamesh Khan, the process of bringing him back to Pakistan was not being pursued/followed up. We may clarify that we have issued direction to Hamesh Khan through is counsel Mr. Talib H. Rizvi, ASC time and again for appearance before this Court but he has not honoured the orders of this Court. We, therefore, observe that there shall not be any restraint order or impediment in the way of the NAB in bringing him to Pakistan and producing him in Court. The NAB authorities are free to take all necessary steps expeditiously to do the needful with the cooperation of the FIA. As the DG, FIA is also head of Interpol, the Prosecutor General will have a meeting with him today and shall chalk out a comprehensive plan to ensure the presence of Hamesh Khan before this Court as early as possible but not beyond the period of seven days. "*

It would not be out of context to note that to ensure transparent investigation, inquiry and proceedings in the above noted case a comprehensive order was passed on 27.5.2010. Relevant paras therefrom are reproduced hereinbelow:

"2. In response to the processes issued from time to time to procure the attendance of the accused, it was reported that the then President of the BoP, namely, Hamesh Khan had left the country in violation and in defiance of the orders passed by the Interior Ministry, placing his name on the Exit Control List (ECL), and restraining him from leaving the country. Similarly, one Sheikh Afzal and his family members, including his son Sheikh Haris had also left the country. The NAB authorities, however, commenced proceedings against them under the National Accountability Ordinance, 1999 (NAO 1999), by initiating the requisite investigations and inquiry. It was reported then that a huge amount of about nine billion rupees had been misappropriated in just one of the transactions involving the said Haris Steel Mills. The NAB officials and the FIA, headed at that time by Mr. Tariq Khosa as its Director General, made concerted efforts, on the directions of this Court, to bring the absconding accused back to Pakistan to face proceedings before this Court as also before the NAB authorities.

3. It may be noticed here for the sake of record that at the very initial stages, i.e. in the year 2008 this Court, as it then stood constituted, was approached and an order had been secured for the transfer of the cases pending before the Lahore High Court to the Islamabad High Court. This aspect has got its own factual background, which need not be detailed at this stage but which would be mentioned in its requisite details when this matter is being finally disposed of by this Court. Besides the NAB and the FIA, the Foreign Office was also associated at a later stage, and these functionaries, in pursuance of the directions of the Court to achieve the object, adopted various strategies and ultimately succeeded in achieving the object. As a result thereof, all the concerned persons, including Hamesh Khan, a former President, BoP involved in the present proceedings as also in the proceedings pending before the NAB authorities/courts were brought back to Pakistan. Some of the respondents and the accused persons before the NAB courts entered into voluntary plea bargain and surrendered their movable and immovable properties to return the allegedly misappropriated amounts of money of the BoP. The said exercise is still continuing and is presently passing through its different phases. The act of the NAB, the FIA and of the Foreign Office in bringing the said absconding accused back to the arms of law is really creditable as it is very rare that the availability of such like persons, once they had left the country, could ever be secured in such a short span of time. Naturally, this was the result of the cooperation, which was also

extended to the Pakistani authorities by the respective governments of various foreign countries, including Malaysia, UAE and the USA from where they have been brought back to Pakistan. Progress of the cases, however, continued during this period. Meanwhile, after his arrest, Sheikh Afzal accused made disclosures before the NAB authorities, through a hand written statement mentioning how the allegedly misappropriated amounts were distributed by him to various prominent personalities named therein and stated also that he was ready to settle his accounts with the BoP. It is to be noted that Sheikh Afzal was also produced in this Court when he brought his statement in writing, which was placed on record.

4. The concerned authorities of the NAB have been submitting periodical progress reports. On 26.05.2010, a detailed report was filed, but the learned Prosecutor appearing on behalf of the NAB failed to convince the Court about the positive steps being taken in this behalf. We feel that there are, prima facie, reasons which have hindered them in conducting an across-the-board investigation of the case. This Court had, while deciding the case of Dr. Mubashir Hasan v. Federation of Pakistan (PLD 2010 SC 265), for reasons mentioned therein suggested to the government for removal of the Chairman of the NAB. The statement of Sheikh Afzal also revealed that he had paid an amount of Rs.3,50,00,000/- to Mr. Babar Awan and other lawyers, according to him, for getting favourable decisions from the High Court and from this Court. It is also an admitted fact that the said Mr. Babar Awan is now the Law Minister of the country and according to the Rules of Business, the NAB is an attached department of the Law Ministry, though otherwise it is an independent institution, which is required to function independently to avoid injustice to any of the parties involved in the cases falling under the NAO, 1999. This could not have been the only reason. Few days ago, Mr. Irfan Qadir has been appointed as the Prosecutor General of the NAB against whom also it had been alleged by the above-mentioned Sheikh Afzal that he had been receiving huge amounts of money from him for the purpose of making payments to the lawyers whose names have been mentioned by him in the statement with assurances to him that favourable orders would be secured for them from the concerned courts including this Court. There are also available on record, statements of some other persons including Irfan Ali who is a witness of making of the said payments. Above all, no sooner Hamesh Khan was brought back to Pakistan, there were a number of rumours and speculations about the involvement of some well-

placed political and non-political influential personalities in the said Bank scam.

5. We do appreciate that despite all these odds, the concerned authorities have done their best but it has become necessary in the above-noticed circumstances that there should be a highly transparent inquiry/investigation to ensure that everyone involved in the case is dealt with according to law and no injustice is done to anyone. It is to be noted that Article 10-A of the Constitution ensures, as a fundamental right, a fair trial of the accused facing the charges. Needless to add that even in absence of this provision of the Constitution, the Courts in Pakistan had been putting their best efforts in order to ensure fair and independent trials, but after incorporation of this new provision in the Constitution, it has also become all the more important that the investigations and inquiries should be fully transparent. On having seen the report, which was submitted on 26.05.2010 and discussing various aspects of the matter when Hamesh Khan was produced before this Court, we realized that the Chairman NAB, in exercise of his powers, needed to personally look into the matter. Therefore, Raja Aamir Abbas, Deputy Prosecutor General, who has remained associated with these proceedings before this Court throughout and had held meetings with the officials of the Foreign Office, the NAB, the FIA and others from time to time, was asked to discuss this matter with the Chairman, and bring all these factors to his notice because in the interest of this nation and to save its wealth, everyone, including the Supreme Court is bound to take necessary steps for the purpose of recovering moneys belonging to the public exchequer, whether inside or outside the country.

6. Today, he submitted a report wherein different teams have been constituted, comprising officers of the NAB, who according to the Chairman had a known reputation of honesty. Having gone through the said report, however, we noticed that there was no officer of a senior rank having requisite experience and expertise in the matter of investigations in these teams because conducting investigations of criminal cases itself is an independent subject and the ultimate fate of a criminal case also depends upon the same. As it is in our notice that Mr. Tariq Khosa, former D.G., FIA, who is now the Acting Secretary, Narcotics Division, Government of Pakistan, remained associated with this case for a considerable period of time and it was on account of the efforts made by him, in collaboration with the NAB and the FIA that he had successfully achieved the object by utilizing his official position as D.G. FIA, which is a

renowned investigation agency of the country. He is one of the most senior and experienced police officers who has also been the Inspector General of Police. He now also has the honour of being a Member of the Executive Committee of INTERPOL. Raja Aamir Abbas, Deputy Prosecutor General was, therefore, asked to discuss this aspect of the matter also with the Chairman because this Court feels that in the absence of a highly skilled person, such a high profile case could not be investigated properly.

7. We are informed that a meeting was accordingly held by the Chairman, NAB with Mr. Tariq Khosa, Acting Secretary, Narcotics Control Division and minutes of the said meeting have been placed on record. Mr. Tariq Khosa also appeared along with the Chairman, NAB and submitted that subject to approval by the competent authority he would obey the judicial orders because being a public servant, he was in fact a servant of law."

4. It shall not be out of place to mention that Constitution Petition No.20 of 2009 was followed by Constitution Petitions No.21 to 27,39 & 45 of 2009, praying for different reliefs under various provisions of the Constitution including Article 184(3) thereof seeking, *inter-alia*, the intervention of this Court for protection of the said huge amounts of public money of at least a million innocent depositors and to come to their rescue as their life-savings and consequently, their Fundamental Right to property was under serious threat.

5. When this Court had taken cognizance of the matter about a year ago, it transpired, to our horror:-

(i) that billions of rupees of public money had been doled out by the Bank of Punjab to a group of persons but in fake names or in the names of persons who did not exist or in the names of businesses and factories which were sham;

(ii) that these huge loans and advances had been made by the said Bank either without any securities or where securities had been taken, the same comprised properties which were non-existent or were highly over-valued;

(iii) that it was not just these billions of around a million depositors which were at stake but what was under serious threat was the very existence of the Bank of Punjab which was a project of the Government of Punjab; and further

6. Therefore, finding constitutionally obligated to defend the constitutionally guaranteed public rights and realising the severity of the threat and the magnitude of the damage, the matter was taken up on almost fortnightly and at times even on weekly basis for almost one year now. As a result of the orders passed by this Court and on account of the consequent and appreciable efforts of all the concerned agencies and officials, what has been managed so far beside that achieved as mentioned hereinabove, is as under:-

(i) valuable moveable and immovable assets and properties of the accused persons were traced and identified not only in Pakistan but also in Malaysia and U.A.E. and on account of requests made by the NAB and others to these foreign governments for Mutual Legal Assistance, most of the said properties have since been attached and frozen and the ones owning these properties had even executed General Powers of Attorney in favour of the

NAB/The Bank of Punjab which are now at their disposal;

(ii) according to report of the NAB dated 28.5.2010 (CMA No.1482/2010), an amount of ***RUPEES 1518.602 MILLION*** *had since been paid back to the Bank of Punjab* ***IN CASH****; around* ***125 IMMOVABLE PROPERTIES COMPRISING PLOTS, HOUSES AND APARTMENTS*** *had since been placed by the accused persons at the disposal of the Bank of Punjab;* ***JEWELLERY AND EXPENSIVE WATCHES*** *worth about 101 million rupees also stood placed by the accused at the disposal of the said Bank and around* ***THIRTY vehicles*** *including a Porsche, Range Rovers, B.M.Ws, Mercedes, had also been handed over by the accused persons to the said Bank;*

(iii) this Court has, with the consent and with the representation of the parties including the accused persons, set up a committee headed by a former Judge of this Court to sell al these properties, the proceeds whereof will again go to the victim Bank; and

(iv) the NAB, the Foreign Office and the F.I.A. are reported to be actively pursuing encashment and receipt of money likely to accrue from the above-mentioned properties, Bank Accounts and share-holdings of the accused persons in the above-noticed foreign countries.

It could thus be said that on account of the intervention of this Court and the consequent efforts made by all concerned, almost all the accused persons were in place and equally importantly, the

repayment of the enormous amount of money in question had since been almost secured.

7. We were, however, bemused rather shocked, at the grievance rather vociferously raised, not by the accused persons of this case but by the learned Prosecutor General Accountability, Mr. Irfan Qadir, that the above-noticed intervention by this Court in the investigation of the case in question, was an illegal and an un-constitutional interference by it which was likely to "***CAUSE PREJUDICE TO THE CAUSE OF THE ACCUSED PERSONS***". We shall deal with this grief and un-happiness of the learned Prosecutor General in some detail in the succeeding parts of this order as we propose to notice, first, the submissions made by Khawaja Haris Ahmad, Sr. ASC in support of this application under adjudication.

8. With respect to the assumption of the office of the Acting Chairman of the NAB by its Deputy Chairman, it was contended by the learned counsel for the applicant Bank that the same was an illegal and an unlawful act being violative of the provisions of section 6(c) of the NAB Ordinance of 1999. It was argued that the law permitted a Deputy Chairman to act as the Chairman only when the Chairman existed but was temporarily absent or was unable to discharge functions of his office for whatever reason and not when there was no Chairman at all and the office lay vacant. Our attention was drawn to various other provisions in the Constitution which specifically provided for an Acting incumbent of an office even when the office was vacant e.g. Articles 180, 196 and 217 of the Constitution which envisaged

appointment of an Acting Chief Justice of Pakistan; an Acting Chief Justice of a High Court or an Acting Chief Election Commissioner not only when the incumbent was absent or was unable to perform functions of his office but even when such an office had become vacant. Reference had also been made to similar provisions of the Establishment of the Office of Wafaqi Mohtasib (Ombudsman) Order being President's Order No.1 of 1983; to the Office of Ombudsman Ordinances of Sindh, Punjab and Baluchistan; to the Establishment of the Office of the Federal Tax Mohtasib Ordinance, 2000 and to the provisions of the Punjab Ordinances No. XXIX and LVIII of 2002. It was highlighted that whenever the law-giver intended to have an acting incumbent for some office even when the office had fallen vacant, it was always specifically so provided. As against this, the provisions in question of section 6(c) of the NAB Ordinance allowed the Deputy Chairman to act as the Chairman only when the incumbent was absent or was unable to perform his functions and not when the office was vacant.

9. It was, consequently, stressed that the impugned assumption of office by the respondent Deputy Chairman was an unlawful act on his part as a result whereof all actions taken and being taken by him were a nullity in the eyes of law and of no legal effect which could seriously and adversely affect the interests of his client who was a victim of a crime being presently dealt with by the NAB.. It had been resultantly prayed that the competent authority be directed to immediately appoint the Chairman of the NAB to avoid prejudice to the applicant Bank and to a large number of

other persons who were parties in the matters being handled under the said Ordinance of 1999.

10. With respect to the appointment of Mr. Irfan Qadir, Advocate as the learned Prosecutor General Accountability under the N.A.B. Ordinance, it was submitted by Khawaja Haris Ahmed, Sr. ASC that his appointment to the said office was a serious offence against the provisions of section 8(a)(iii) of the National Accountability Ordinance of 1999 which provisions had declared, in unequivocal terms, that the Prosecutor General could hold the said office only for a "***NON-EXTENDABLE***" period of three years. It had been added that since Mr. Irfan Qadir had already held the said office for a full term of three years i.e. from 4.12.2003 to 3.12.2006, therefore, circumventing the said legal command through a fresh appointment was a violation of the said provisions. The case of the applicant Bank was that what the law did not allow to be achieved directly, could not ever be allowed to be acquired indirectly. Reliance in this connection had been placed by the learned counsel on the ***STATUTORY INTERPRETATION*** by Bennion, ***PRINCIPLES OF STATUTORY INTERPRETATION*** by Guru Prasanna Singh and on the cases of ***ZAHID IMRAN AND OTHERS (PLD 2006 SC 109)***, ***IMTIAZ AHMED LALI (PLD 2007 SC 369)***, ***MIAN MUHAMMAD NAWAZ SHARIF (PLD 1993 SC 473)*** and on the case of ***HAJI MUHAMMAD BOOTA AND OTHERS (PLD 2003 SC 979)***.

11. It had also been argued by the learned counsel that the office of the Prosecutor General Accountability was a high office, the importance of which could be gauged by the fact that as per the

provisions of section 8(a)(i) of the N.A.B. Ordinance of 1999, it was only a person who was qualified to be appointed as a Judge of the Supreme Court of Pakistan who could be appointed as the Prosecutor General and further that the Prosecutor General could not be removed from his office except on the grounds on which a Judge of the Supreme Court could be removed. The office was, therefore, one which was an extremely important office and thus a person appointed to the said office had, of necessity, to be one who was of an impeccable character. The learned counsel, however, placed before us and read out to us the extracts of a statement made by one Sheikh Afzal who was one of the principal accused persons of the above-noticed Bank fraud case. The said extracts of the said statements are reproduced hereunder: -

> ***"MR. IRFAN QADIR, ADVOCATE***
>
> ***Para 1. Sh. Afzal***
>
> *Initially during May, 2008, I engaged services of Mr. Irfan Qadir, advocate to file writ petition against proceedings of NAB and paid him agreed amount of Rs.1.00M as legal fee.*
>
> ***Para 2. Sh. Afzal:***
>
> *When NAB officials raided my house on 18.06.2008, I complained to Mr. Irfan Qadir that he was unable to handle the case. Mr. Irfan Qadir, advocate suggested that we should a panel of famous lawyers who can influence the Court. Mr. Irfan Qadir then informed me that he had contacted and engaged Mr. Waseem Sajjad and Mr. Sharifuddin Pirzada Advocates. I was conveyed by Mr. Irfan Qadir that Mr. Sharifuddin Pirzada would charge legal fee of Rs.10.00 M till finalization of the case.*

Whereas Mr. Waseem Sajjad agreed for Rs.2.00 M till finalization of the case. I managed to deliver Rs.12.00 M in total to Irfan Qadir through my manager Irfan Ali for payment to Sharifuddin Pirzada and Mr. Waseem Sajjad.

IRFAN ALI: *I delivered an amount of Rs. 12.00 M (cash) in June, 2008 to Mr. Irfan Qadir on road near Fortress Stadium, Lahore*

Para 4. Sh. Afzal:

Later on, NAB conducted search of my office on 24.6.2008, I once against asked Mr. Irfan Qadir as to why they were not able to stop all this. Mr. Irfan Qadir again suggested that we should engage Mr. Babar Awan who may have some influence in the Courts. Mr. Irfan Qadir negotiated with Mr. Babar Awan and informed me that he (Babar Awan) was ready to contest our case for an amount of Rs.5.00 M as legal fee till the finalization of the case. Mr. Babar Awan appeared before the LHC on behalf of Harris Group. The legal fee was paid to Mr. Babar Awan through Irfan Qadir.

Para 8, 6th line. Sh. Afzal

Mr. Malik Qayyum later informed me that he had visited Lahore and had a meeting with my counsel Mr. Waseem Sajjad and Irfan Qadir in Pearl Continental Hotel Lahore. Mr. Malik Qayyum further informed me that he had talked to relevant judges of LHC on telephone in presence of my counsel and assured me that relief would be granted to you……..

Para 9. Sh. Afzal:

During June, 2008, I contacted Mr. Sharifuddin Pirzada who told me that he in

consultation with Mr. Malik Qayyum (the then attorney General), Mr. Irfan Qadir Advocate and Mr. Waseem Sajjad Advocate had decided to arrange transfer of the case form LHC to Supreme Court. Mr. Sharifuddin Pirzada told me that he and members of other panel could obtain decisions in their favour from the Supreme Court of Pakistan.

Para 12, 6th sub para. Sh Afzal:

During July, 2008, Mr. Pirzada told me that Irfan Qadir had transferred him Rs.7 M as against agreed amount of Rs.10 M. I had to pay balance Rs.3.00 M to Mr. Pirzada. This amount was paid by Irfan Ali

I contacted Mr. Irfan Qadir who told me that it was his share. I told him not to appear on my behalf any more.

Later on I came to know that Irfan Qadir had delivered only Rs.1.00 M to Mr. Waseem Sajjad and rest is pending. I against paid Rs.1.00 M to Mr. Waseem Sajjad through Irfan Ali in July, 2008.

MR. BABAR AWAN, ADVOCATE

Para 4, 3rd line. Sh. Afzal:

.....Mr. Irfan Qadir again suggested that we should engage Mr. Babar Awan who may have some influence in the Courts. Mr. Irfan Qadir negotiated with Mr. Babar Awan and informed me that he (Babar Awan) was ready to contest our case for an amount of Rs.5.00 M as legal fee till the finalization of the case. Mr. Babar Awan appeared before the LHC on behalf of Harris Group. The legal fee was paid to Mr. Babar Awan through Irfan Qadir.

Para 13. Sh. Afzal:

.....During July, 2008 Mr. Malik Qayyum informed me that 'Mr. Babar Awan is a friend of mine, is a Senator and it is necessary to pay him over and above the agreed amount of Rs.5.00M' which had already been paid. Mr. Malik Qayyum further informed that Mr. Babar Awan was sitting with the then _____ of Supreme Court and he (M Q) happened to be there. He quoted Babar Awan telling to the Judge that his case should be decided in our favour. Mr. Malik Qayyum argued that Mr. Babar Awan had a great influence, therefore, more amounts should be paid to him.

I asked Irfan Ali to deliver Rs.3.00M to Mr. Malik Qayyum for onward submission to Mr. Babar Awan. After this Mr. Babar Awan started appearing in Supreme Court regularly. I also asked Mr. Malik Qayyum to deliver Rs.2.00 M to Babar Awan from the amount already held by Mr. Malik Qayyum. He confirmed that the said amount had been paid.

Irfan Ali:

I delivered Rs.3.00 M in July, 2008 to Mr. Malik Qayyum in his office in Islamabad

Sh. Afzal:

Later on Mr. Malik Qayyum told me that he could manage a guaranteed deal with Mr. Babar Awan for Rs.35 M. It was the time when the case was being ordered to be transferred to LHC. I allowed him to deliver Rs.15.00 M to Babar Awan which he confirmed me. I also called Mr. Babar Awan who assured me that apart from his

legal fee of Rs. 5.00 M he would charge Rs.35 M. He assured me that he had discussed the case with the Judges and the case would be quashed within 15 days. Beside fee, I had already paid him Rs. 20 M. Irfan Ali and Malik Qayyum further delivered an amount of Rs.5.00 M in the office of Mr. Babar Awan in Blue Area. Whereas an other amount of Rs. 10.00 M was paid by Mr. Malik Qayyum to Mr. Babar Awan in September, 2008. In this way, besides the legal fee I paid Rs.25 M to Mr. Babar Awan till September 2008.

Irfan Ali:

I delivered Rs.5.00 to Mr. Babar Awan in September, 2009, Mr. Malik Qayyum and Ravid Sami were with me. Amount was delivered in his office in Blue Area.

Para 14. Sh. Afzal:

.....asked Mr. Babar Awan that he should personally meet him in UAE and give him commitment for his satisfaction. I advised Irfan Ali to manage a return ticket of Mr. Babar Awan.

4th Line. Irfan Ali:

.....I arranged return ticket of Mr. Babar Awan from Mahnoor Travels, Near Shimla Pahari, Lahore and made the payment.

Sh. Afzal:

Mr. Babar Awan arrived in UAE, Dubai in Ramzan of 2008. I received him in Grand Hyatt Hotel and arranged a room in Grand Hyatt for one night. I had meeting with him in presence of my son Harris Afzal. My secretary was also there for some time. Mr. Babar Awan assured me that after

payment of full amount of deal, the case will be quashed by the IHC and if appealed by the NAB, the same will be decided in our favour from the SC within 15 days as he pretended that he had settled all the matters with the Judges.

Harris Afzal:

I was present in the meeting. Mr. Babar Awan assured us that he had managed all the affairs and he would comply with the terms of the deal.

Sh. Afzal:

Babar Awan asked me to pay balance amount of Rs.5.00 M. I paid him in UAE Dirhams 250,000. My secretary Khawaja Arshad and my son are witnesses. At this point of time entire amount of deal Rs.25 M was completed. Mr. Babar Awan again asked me to give him some more amounts for shopping. I gave him another 50,000 UAE Dirhams. Harris my son accompanied him to different shopping centres. When they returned Mr. Babar Awan told me that he had spent 65,000 Dirhams. I paid him another 15000 Dirhams. Mr. Malik Qayyum had got commission of Rs.600 M out of payments made to Mr. Babar Awan.

Harris Afzal:

I accompanied Mr. Babar Awan for shopping. When we returned he asked my father to pay another 15000 Dirhams because as per his statement he had spent 65000 Dirhams. My father paid.

Khawara Arshad

> *My boss paid 250,000 Dirhams to Babar Awan in my presence. I was staying with Sh. Afzal in Grand Hyatt.*
>
> ***Para 15, 2nd sub para. Sh. Afzal:***
> *Later on Mr. Babar Awan took charge of my legal team and appeared in the Islamabad High Court and Reference was stayed. Then he became a minister, and he refused to appear on behalf of Harris Group. He started avoiding me and never attended my phone.*"

It was consequently submitted by the learned counsel that notwithstanding the respect that he had for Mr. Irfan Qadir, Advocate as a colleague in the profession, his character and conduct was not such which qualified him for appointment as the Prosecutor General Accountability on account of above-noticed provision which desired a person of an un-impeachable character to be appointed as the Prosecutor General.

12. Molvi Anwar-ul-Haq, the learned Attorney General for Pakistan entered appearance and submitted that he was not representing any of the respondents in this matter but was appearing in this case only on account of the notice issued to him by this Court seeking his assistance in the matter.

13. He added that he had had a meeting with the Prime Minister of Pakistan to seek instructions vis-à-vis the appointment of the Chairman of the NAB after the office had fallen vacant on account of the resignation tendered by the incumbent of the said office and that the Prime Minister had told him that the

appointment of the regular Chairman N.A.B. was in the process and would be made within a matter of days.

14. About the validity and the legality of a Deputy Chairman of the N.A.B. acting as the Chairman when the office of Chairman had fallen vacant, the learned Attorney General submitted that where the said office fell vacant on account of some unforeseeable reasons, then some immediate arrangement was required to be made so that everything which was happening under the said Ordinance did not come to a stand still.

15. When questioned about the legality of the appointment of a person as the Prosecutor General who had already held the said office for a full term of three years and which term stood declared by law to be un-extendable, the reply of the learned Attorney General was that the present case was not one where the term of the incumbent holder of the said office had been extended but was one where the said person had been appointed afresh to the said office.

16. Before proceeding to notice the submissions made by Mr. Irfan Qadir, the learned Prosecutor General, in defence of the assumption of office of Acting Chairman of the N.A.B. by the Deputy Chairman thereof and in defence of his own appointment as the Prosecutor General Accountability, we would like to bring on record that when we took up this matter on the last date of hearing we had noticed that no reply to the application under adjudication had been filed either by the N.A.B. or by anyone else and observed that the N.A.B., the Acting Chairman of the N.A.B. and the learned

Prosecutor General whose appointments were in question, should feel free to file their replies by the next date of hearing. Today, when this matter was taken up for hearing, Mr. Irfan Qadir rose and submitted that he had prepared a concise statement on behalf of himself and on behalf of the Acting Chairman of the N.A.B. which, however, could not be filed in Court because the Advocate-on-Record representing them had, after putting his signatures thereon, cut across the same because on going through the contents thereof, he had refused to own the said concise statement or to file the same in Court. The learned Prosecutor General was reminded that as per the Supreme Court Rules, 1980, no concise statement could be filed in Court except through a duly authorized Advocate-on-Record. He was, however, informed and allowed that notwithstanding the non-submission of their reply, he should feel free to submit orally whatever he wished to state or canvas or argue before this Court. Needless to say that he was then heard at length.

17. He admitted that he had been a counsel for the accused persons of the first above-noticed Bank fraud case which is generally known as Haris Steel Mills case and that the said case was presently under investigation with none other than the N.A.B. itself with Ministry of Law as their Administrative Ministry and with him as its Prosecutor General. He added that he was the one who had filed all the cases on behalf of the accused persons of the said fraud case in the Lahore High Court and even in this Court and claimed that he had won all the said cases for them. He further added that he was the one who had engaged some other senior Advocates also to represent the said accused persons in the High

Court and in this Court at that time not because he wanted so to do but because the said accused persons had desired that he should also associate some senior advocates with him who enjoyed influence with the Judges of the High Courts and of the Supreme Court and that it was in deference to the said desire of his said clients that he had engaged Syed Sharifuddin Pirzada, Mr. Waseem Sajjad and Mr. Babar Awan, Advocates to represent the said accused persons in the said cases. He, however, denied the allegation that he had taken any money from his said clients for any collateral purposes or that he had mis-appropriated any part of any money given to him by his said clients for onward payment to the said learned Advocates. He also reacted to the above-noticed accusations levelled by Khawaja Haris Ahmed, Advocate and submitted that he (Khawaja Haris Ahmed, Sr. ASC) had also charged fat fees from the Bank of Punjab and was staying in expensive hotels at its expense while visiting Islamabad to enter appearance in this case.

18. The submissions made by Mr. Irfan Qadir, in defence of the application under adjudication, related mainly to the maintainability of the said application and to the jurisdiction, or to be more precise, the absence of jurisdiction of this Court to deal with the matter in question.

19. His precise submissions were as under: -

> *(i) that C.M. No.1703 of 2010 which is under adjudication, had been filed before this Court in the proceedings commenced by this Court neither under the*

Constitution nor under the N.A.B. Ordinance of 1999, therefore, this Court had no jurisdiction to control, supervise or in any manner interfere with the investigation being conducted by the officers of the N.A.B. under the said N.A.B. Ordinance of 1999;

(ii) that the jurisdiction of this Court is confined to the powers conferred on it either by the Constitution or by the law and since no provision existed in any law allowing this Court to deal with or to supervise the investigations, therefore, this Court had no jurisdiction to deal with the matter in question;

(iii) that the investigation was an executive and not a judicial function;

(iv) that the power of judicial review was available only where some legal provision had been violated and since no statutory provision had been breached in the present case, therefore, this Court lacked jurisdiction to intervene in the matter;

(v) that the entertainment of application in question i.e. C.M.A. No.1703 of 2003 by this Court, was violative of Article 10-A of the Constitution and was likely to cause prejudice to the accused persons of the said case;

(vi) that this was the first case ever in which this Court had controlled the investigation of a case at the instance of the complainant;

(vii) that neither the Government of Punjab nor even the Bank of Punjab had

any locus-standi to file the application in question; and that

(viii) the appointment of holders of public offices could not be challenged in collateral proceedings.

20. With respect to the legality of assumption of office of Acting Chairman by the Deputy Chairman of N.A.B., it was submitted by Mr. Irfan Qadir, the learned Prosecutor General, that the same was valid in view of the provisions of section 19 of the General Clauses Act, 1897 and in defence of his own appointment as the learned Prosecutor General, his only submission was that his was a fresh appointment and not an extension of his earlier tenure and that section 8 of the N.A.B. Ordinance of 1999 created no bar on a fresh appointment of a person as the Prosecutor General who had already exhausted one term of three years in that office. Reliance in this connection had been placed on the Black's Law Dictionary and on the cases of ***MALIK SHAUKAT ALI DOGAR AND 12 OTHERS VS. GHULAM QASIM KHAN KHAKWANI AND OTHERS (PLD 1994 SC 281)*** and ***PIR SABIR SHAH VS. FEDERATION OF PAKISTAN & OTHERS (PLD 1994 S.C. 738).***

21. We shall first take up the objection of the learned Prosecutor General with respect to the maintainability of this Application and to the assumption of jurisdiction by this Court with respect to the matter in question.

22. As has been mentioned above, the matter in question relates to one of the gravest financial scams in the banking history of our country as a result of which the Bank of Punjab stood

cheated of an enormous amount of around eleven billion rupees which amount of money in fact belonged to around one million innocent depositors including depositors of small amounts of money whose life-savings and property had come under serious threat casting thus an obligation on this Court to move in to protect and defend the right of property of such a large section of the population i.e. about ten lakh depositors and customers of the Bank of Punjab which right of property stood guaranteed to them by Article 24 and Article 9 of the Constitution.

23. The background of the case in question has been noticed in some detail in the earlier parts of this order and it appears that it was in view of the said facts and circumstances that the Bank of Punjab had felt compelled to approach this Court under Article 184(3) of the Constitution read with Order XXXIII Rule 6 of the Supreme Court Rules of 1980 through Constitutional Original Petition No.39 of 2009 with the following prayer: -

> *"It is, therefore, prayed that given the callus manner and the enormity of the fraud played by the Respondents, and the resultant threat to the safety of the savings of more than 9,00,000 innocent small-scale depositors of the BoP holding Rs.100,000 or less in their respective Accounts) on account of this fraud, as result of which a sum of upward of Rs. 10 Billion belonging to inter alia these small-scale borrowers and fraudulently withdrawn from the Bank and misappropriated by Respondent No.1-3, is not even secured to the extent of 10% of this amount coupled with the fact that these respondents and their*

associates are hooding and supporting holders of fake CNIC's and identities, against which they are holding more than 120 urban Properties in DHA, Lahore Cantt etc., and another 105 properties, which are predominantly rural (though mostly worthless) in Kasur, Chunian, Muridke etc., and are dealing with or are likely to deal with hundreds of persons/citizens and with Banks etc. on the basis of these fake identities, and even travel abroad on that basis, besides being a security threat to the state, it is evident that this is case which, consistent with the pronouncements of this august Court, is one involving serious violations of and threat of violation of fundamental rights of hundreds and, potentially, thousands of innocent persons and, as such, the issues involved herein may be taken up b y this august Court, directly under this august Court's jurisdiction under article 184(3) of the constitution of the Islamic Republic of Pakistan, 1973, and appropriate dictations be given and orders passed tope secure the fundamental rights of more than "9,00,000 small-scale depositors of BoP.

It is further prayed that during the pendency of this petition the NAB or any other Investigation Agency may very kindly be directed to initiate and carry out full investigation in the case, and, for this purpose, to have full power and authority to associate any and all persons in the investigation, including the respondents herein as well as the Writ Petitioner, and if sufficient incriminating evidence is found or is available against them, to forthwith arrest, detain and interrogate in accordance with law.

> *It is further prayed that the immoveable property belonging to the respondents Nos.1-5 and their associates may very kindly be ordered to be attached and possession delivered to BoP and the vehicles recovered from them may very graciously be allowed to be sold and sale proceeds utilized towards partial adjustments of the outstanding amounts.*
>
> *Any other interim order which is deemed fit and proper by this hon'ble court under the facts and circumstances of the case and to secure the rights of the small scale depositors of BoP may also be passed in the interest of justice, equity and fairplay."*

24. As has been mentioned above, besides other petitions filed in this Court under various other provisions of the Constitution and the law, Constitution Petition No.39 of 2009 had been filed under clause (3) of Article 184 of the Constitution which clause (3) reads as under: -

> *"3. Without prejudice to the provisions of Article 199, the Supreme Court shall, if it considers that a question of public importance with reference to the enforcement of any of the Fundamental Rights conferred by Chapter I of Part II is involved, have the power to make an order of the nature mentioned in the said Article."*

25. A perusal of the above quoted provision would demonstrate that this Court was possessed of powers to make any order of the nature mentioned in Article-199 of the Constitution, if, in the opinion of this Court, a question of public importance relating to the enforcement of any of the Fundamental Rights was

involved in the matter. As has been mentioned in the preceding parts of this order, what was at stake was not only a colossal amount of money/property belonging to at least one million depositors i.e. a large section of the public but what was reportedly at stake was also the very existence of the Bank of Punjab which could have sunk on account of the mega fraud in question and with which would have drowned not only the said one million depositors but even others dealing with the said Bank. And what had been sought from this Court was the protection and defence of the said public property. It was thus not only the right of this Court but in fact its onerous obligation to intervene to defend the said assault on the said fundamental right to life and to property of the said public.

26. In questioning the jurisdiction of this Court, Mr. Irfan Qadir, the learned Prosecutor General for the NAB submitted, as has been noticed above, that this Court had no jurisdiction to control investigation of a criminal case and the reason offered by him in support of the said submission was that such a control over the Investigation of a criminal case by this Court could be "***PREJUDICIAL TO THE ACCUSED***." The only judgment cited by him to buttress his said plea was the case of ***MALIK SHAUKAT ALI DOGAR AND 12 OTHERS VS. GHULAM QASIM KHAN KHAKWANI AND OTHERS (PLD 1994 S.C. 281)***.

27. It was rather interesting to find that it was the Prosecutor General who had risen in defence of the accused persons complaining of prejudice to them through the alleged

interference by this Court with the investigation of the crime in question while the accused persons of the said case were expressing gratification, satisfaction and their faith in the said intervention. It is on record, as noticed above, that one of the principal accused persons of this case, namely, Hamesh Khan who was the President of the Bank of Punjab at the relevant time and who was an American citizen, had volunteered to return to Pakistan on account of the orders passed by this Court and before so doing, he had expressed his complete confidence in this Court while still being in a foreign land i.e. in U.S.A.. Similar was the situation with other main accused persons e.g. Sheikh Afzal, his son Haris Afzal and others.

28. Be that as it may, a perusal of the said cited judgment which emanated from a learned Bench of this Court comprising two Honourable Members, would reveal that the only reason which had weighed with the said learned Bench in reaching the above conclusion was the judgment delivered by the Privy Council in ***KHAWAJA NAZIR'S*** case reported as ***AIR 1945 P.C. 18***. Suffice it to say that what was in issue in the said ***KHAWAJA NAZIR'S*** case was an intervention by the Lahore High Court in the purported exercise of its powers under section 561-A of the Cr.P.C. which provision of law authorized the High Court "***TO MAKE SUCH ORDERS AS MAY BE NECESSARY TO GIVE EFFECT TO ANY ORDER UNDER THIS CODE; OR TO PREVENT ABUSE OF PROCESS OF ANY COURT OR OTHERWISE TO SECURE ENDS OF JUSTICE***." Needless to add that unlike the situation obtaining in the year 1945 and earlier, this Court and the High Court now stand vested with extraordinary

powers available under Article 199 of the Constitution which are not limited to the bounds of the above-noticed sub-constitutional provision of section 561-A Cr.P.C.. Nor was the said case of ***KHAWAJA NAZIR AHMED*** one where the jurisdiction of a High Court had been invoked or exercised in defence of an aggression against the fundamental rights of the public at large. Therefore, the dictum laid down in ***KHAWAJA NAZIR'S*** case was not applicable to the present situation and seeking its application to the facts and circumstances of the present case was misplaced. While we are on the subject, we would like to refer to a judgment of this Court delivered in the case of ***ADVOCATE GENERAL SINDH VS. FARMAN HUSSAIN AND OTHERS (PLD 1995 SC 1)*** which judgment was then cited with approval in a recent judgment of this Court, namely, ***ZAHID IMRAN AND OTHERS VS. THE STATE AND OTHERS (PLD 2006 SC 109)***. The principle which had been highlighted in the said judgments was that the approach of a Court of law while dealing with criminal matters had to be dynamic keeping in view the facts and circumstances of each case and also the surrounding situation obtaining in the country. The relevant passage reads as under: -

> *"This Court in more than one case has held that the approach of the Court while considering criminal matters should be dynamic and it should take into consideration the surrounding situation obtaining in the country....."*

In view of the facts and circumstances of the present case summarized above, it would have been felonious and un-conscionable on the part of this Court if it had refused to intervene

to defend the fundamental rights of such a large section of the public and leaving it only to the concerned officials of the NAB who had done nothing at all in the matter for almost ***TWO YEARS***; who had remained only the silent spectators of this entire drama and had only witnessed the escape of the accused persons to foreign lands. It is to check and cater for such kind of gross negligence, non-feasance and mal-feasance that the framers of the Constitution had obligated the High Court under Article 199 and this Court under Article 184(3) of the Constitution to intervene in the matter exercising their power to review administrative and executive actions. This is then what the Constitution had expected of this Court through its Article 184(3) and this is exactly what this Court had done.

29. It may be mentioned here that in order to ensure peace in a society, the laws are required to keep pace with the changing times and as has been noticed above with reference to the case of ***ADVOCATE GENERAL, SINDH (supra)***, even the approach of the courts has to be dynamic keeping in view the ever-changing ground realities. It was for this very reason that even in the matter of investigations, a role was carved for the courts by addition of sub-section (6) in section 22-A of the Cr.P.C. through the Amending Ordinance No.CXXXI of 2002 of which provisions, the learned Prosecutor General appears to be ignorant. A reference may also be made to a judgment delivered by a 17 Member Bench of this Court in ***MUBASHIR HASAN'S case*** ***(PLD 2010 SC 265)*** especially to the discussion on the question of investigation as contained in

para 102 thereof which is reproduced hereunder for ready reference: -

> *"102. Apart from above two cases, there is yet another case from UK jurisdiction i.e. High Court of Justice, Queen's Bench Division, in Re: The Queen on the Application of Corner House Research and Campaign Against Arms Trade v. The Director of The Serious Fraud Office and BAE Systems PLC [(2008) EWHC 714]. The brief summary of the facts is as under:*
>
> > *The BAE Systems was under a contract with Saudi Arabia for the purchase of Al-Yamamah aircrafts. In relation to this contract, several allegations of bribery had been made against the BAE. The Serious Fraud Office (SFO) had been appointed to investigate into the matter. In the course of this investigation the BAE was asked to disclose the details of payments to agents and the consultants with respect to the contract of the aircrafts.*
>
> *In response to this, the solicitors for BAE wrote back to SFO saying that the investigations should be halted; as the continuing investigations would seriously affect the diplomatic relations between the U.K and Saudi Arabia and also that the safety of the British Citizens would be affected. Further, also that the investigations would prevent UK from clinching the largest export contract of Al-Yamamah aircrafts. This however, did not stop the investigations from continuing.*
>
> *In July 2006, the SFO was about to access the Swiss Bank accounts of BAE. This caused a stir and made the Prince Bandar of Arabia to convey to the then Prime Minister of UK, that if the SFO*

did not stop looking at the Swiss Bank accounts of BAE, and also cease other investigation, then the contract for the aircrafts would be called off and both intelligence and diplomatic relations between the two countries would be seriously ceased.

This made the government to rethink its policy, and it was agreed among the Prime Minister and other ministers that 'if the investigation into this continued then the relations between the two countries would be affected and a severe blow would also be dealt on UK's foreign policy objectives in the Middle East. Further, there would be a threat to the internal security of the country.

In light of the above developments on 14 December 2006 the Director of SFO terminated all investigation proceedings as it was felt that the continued investigation posed a serious threat to the country's National and International security and would also affect the lives of their citizens. It was in this light that an NGO called Corner House Research, applied for a judicial review of the decision to terminate the investigation process.

The Court, apart from other findings, made the following observations:--

The principle of separation of powers cannot be applied in the cases of executive's decisions affecting foreign policy. The courts can take notice of those cases where the threat involved is not simply against the country's commercial, diplomatic and security interest but also against its legal system.

It is the responsibility of the court to provide protection. Threats to the administration of public justice within a country are the concern primarily of the courts, not the executive.

The rule of law requires that the Director should act in a manner consistent, the well recognized standards, which the courts impose by way of judicial review. At the heart of the obligations of the courts and of the judges lies the duty to protect the rule of law.

The Rule of law is nothing if it fails to constrain overweening power.

The courts fulfill their obligation to protect the rule of law by ensuring that a decision maker on whom statutory powers are conferred exercises those powers independently and without surrendering them to a third party.

The executive, Director and the attorney should not make any decision in submission to the threats. The courts cannot exercise jurisdiction on the foreign state, however, the legal relationships of the different branches of the government and the separation of power depends upon internal constitutional arrangements. They are of no concern to foreign states.

A resolute refusal to any foreign threat is the only way to protect national interest. While exercising statutory power an independent prosecutor is not entitled to surrender to the threat of a third party or the foreign state.

The discontinuation of the investigation has in fact caused actual damage to the national security, the integrity of criminal justice system and the rule of law.

The Director has acted on erroneous interpretation of Art 5 of OECD and both the Director and the government have failed to recognize that the rule of law required the decision to discontinue to be reached as an exercise of independent judgment, in pursuance of power conferred by statute. To preserve the integrity and independence of that judgment demanded resistance to the pressure exerted by means of a specific threat. That threat was intended to prevent the Director from pursuing the course of investigation. It achieved its purpose.

On the basis of above findings, the Court ultimately came to the following conclusion:-

"The Court has a responsibility to secure the rule of law. The Director was required to satisfy the court that all that could reasonably be done had been done to resist the threat. He has failed to do so. He submitted too readily because he, like the executive, concentrated on the effects which were feared should the threat be carried out and not on how the threat might be resisted. No one whether within this "country or outside is entitled to interfere with the course of our justice. It is the failure of govt. and the defendant to bear the essential principle in mind that justifies the intervention of this court. We shall hear further arguments as to the nature of such intervention. But we intervene in fulfillment of our responsibility to protect the independence of the Director and of our criminal justice system from threat. On 11 Dec. 2006, Prime Minister said that this was the clearest case for intervention in the public interest he had seen. We agree."

30. The learned Prosecutor General had also pressed into service the provisions of the newly added Article 10-A in the

Constitution to plead that the interference in question by this Court was violative of the said Fundamental Right of a fair trial guaranteed to an accused person and thus causing harm and injury to their interests. The said provisions of Article 10-A inserted in the Constitution by the Constitution (Eighteenth Amendment) Act, 2010, read as under:-

> *"10-A. For determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial in due process."*

The submission, to say the least, is based upon the learned counsel's misconception about the purpose, the concept and the true meanings of '***INVESTIGATION***'. Section 4(1)(*l*) of the Code of Criminal Procedure, 1898 defines the said word in the following terms:-

> *"(l) '**INVESTIGATION**' includes all the proceedings under this Code for the **COLLECTION OF EVIDENCE** conducted by a police officer or by any other person....."*

Investigation, therefore, means nothing more than collection of evidence. Needless to say that it is evidence and evidence alone which could lead a court of law to a just and fair conclusion about the guilt or innocence of an accused person. It is, therefore, only an honest investigation which could guarantee a fair trial and conceiving a fair trial in the absence of an impartial and a just investigation would be a mere illusion and a mirage. It is, hence,

only a fair investigation which could assure a fair trial and thus any act which ensures a clean investigation which is above board, is an act in aid of securing the said guaranteed right and not in derogation thereof. However, before we part with this aspect of the matter, we may add that if the learned counsel had cared to go through various orders passed by this Court in the main Constitution Original Petition No.39 of 2009, he would have discovered that the said orders were restricted only to ensuring that the investigating agency did what it was required by law to do; did it honestly, fairly and efficiently; did not sleep over the matter as it had done for almost ***TWO YEARS*** and that not a word had been said by this Court about what evidence to collect and what evidence not to collect or about the worth or veracity of the collected evidence.

31. Having thus examined all aspects of the matter emanating from the submissions of the learned Prosecutor General noticed at serial number (i) to (vii) in para 19 supra, we say that while we do acknowledge his concern for the welfare and the interests of the accused persons of the case in hand, we find and hold that in the given facts and circumstances of this case, the petitioner's approach to this Court and this Court's response thereto was perfectly constitutional and legal. The said contentions of the learned Prosecutor General are, therefore, repelled.

32. The next submission of the learned Prosecutor General noticed at Sl.No. (viii) of para 19 above, was that the appointments of the holders of public offices could not be challenged in collateral

proceedings. The precise submission was that since the grievance in the main Constitution Petition No.39 of 2009 related to the alleged looting of public money lying in trust with the Bank of Punjab, therefore, the question of the validity of assumption of the office of the Acting Chairman of NAB by a Deputy Chairman thereof and the issue of the legality of the appointment of the learned Prosecutor General of the said organization, could not be entertained by this Court nor decided in the said proceedings. Reliance had been placed by the learned Prosecutor General on ***PIR SABIR SHAH'S case*** ***(PLD 1994 SC 738)*** wherein it had been observed at page 769 that the appointment of a holder of a public office could not be challenged in collateral proceedings.

33. This was a case where Pir Sabir Shah, a deposed Chief Minister of the then NWFP (now Khyber Pakhtoonkhwa) had challenged the Proclamation of Emergency issued by the then President of Pakistan under Article 234 of the Constitution whereby the said Chief Minister and all the Provincial Ministers had been ousted from their respective offices; the Governor had been directed to assume all functions of the Government of that Province and the powers of the Provincial Assembly had been ordered to be exercisable by or under the authority of the Parliament. The reliefs claimed by the said deposed Chief Minister, through a petition filed in this Court under Article 17 read with Article 184(3) of the Constitution, were as under:-

> *a) Declaration that the Proclamation issued under Article 234 was null and void and of no legal effect;*

*b) Declaration that any action taken either by or **ON THE REPORT** or **ADVICE** of respondent No.4 (the Governor) was contrary to law and of no legal effect and restraining him from taking any actions under colour of law in purported exercise of the functions of the Governor of the Frontier Province;*

c) Restraining the Federal Government and/or the President from interfering with or meddling in the affairs of the Government of the Frontier Province;

d) Declaration that the Government headed by the petitioner was the duly constituted Government of the Frontier Province and was authorised to exercise all powers and discharge all responsibilities accordingly;

e) Restraining the respondents or any of them acting either directly or indirectly from interfering with the functioning of the Government of the Frontier Province;

f) Such other relief as may be deemed appropriate by this Hon'ble Court;

g) Costs of the case.

Just a bare look at the facts of this case would have revealed to the learned Prosecutor General that said was a case where what had, in fact, been challenged was a report or an advice submitted by the Governor to the President on which an emergency had been imposed and one of the grounds urged during the course of arguments, to canvass illegality of the said report/advice was that the Governor who had submitted the said report was not a constitutionally appointed Governor. No frontal attack, at all, had ever been made to the Governor's appointment as such and a perusal of the above-quoted prayer clause of the petition would also

show that not even a prayer had been made about the alleged illegal appointment of the said Governor. As against this, in the present case, however, it was not any act or action of the Acting Chairman or of the learned Prosecutor General which had been impugned and it was not to seek invalidation of any such action that the illegality of the appointment of these public office holders had been incidentally pleaded as a ground for the purpose. But what had been done in the present case was a direct challenge thrown to the said appointments through an independent application.

34. In this view of the matter, the reliance placed by the learned Prosecutor General on ***PIR SABIR SHAH'S*** case was totally misplaced.

35. Having thus dealt with all the above-noticed submissions, we now proceed to examine the merits of the case.

36. We will first take up the matter of the assumption of office of the Acting Chairman of the NAB by a Deputy Chairman of the said Bureau.

37. The National Accountability Bureau being Ordinance No. XVIII of 1999 was promulgated on 16th November, 1999, *inter-alia*, "***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 KICK-BACKS, COMMISSIONS AND FOR***

MATTERS CONNECTED AND ANCILLARY OR INCIDENTAL THERETO." And for "***RECOVERY OF OUTSTANDING AMOUNTS FROM THOSE PERSONS WHO HAVE COMMITTED DEFAULT IN RE-PAYMENT OF AMOUNTS TO BANKS, FINANCIAL INSTITUTIONS, GOVERNMENT AGENCIES AND OTHER AGENCIES***." The persons liable to be ***PROCEEDED AGAINST, ARRESTED*** and ***PROSECUTED*** under the said Ordinance, as per section 9 thereof read with section 5(m), included persons of the level and status of the ***SITTING PRIME MINISTER***, the sitting Chairman of the Senate, the sitting Speaker of the National Assembly, Federal Ministers, Attorney General, the sitting Chief Ministers, the sitting Speakers of the Provincial Assemblies, Provincial Ministers, Members of the Parliament and Members of the Provincial Assemblies. And the person empowered to initiate and take such-like steps against such-like accused persons and others, including ordering their arrest, their prosecution and even confiscation of their properties, was the Chairman of the said Bureau. The provisions of section 6(b) of the said Ordinance then talked of the appointment and the terms and conditions of the office or the said Chairman, as originally enacted, was in the following terms:-

> *"6(b) Chairman National Accountability Bureau:*
>
> *(i) There shall be a Chairman NAB to be appointed by the President for such period as the Chief Executive of Pakistan may determine and consider proper and necessary.*
>
> *(ii) The Chairman NAB shall be appointed on such terms and conditions and shall*

have the status and privileges as may be determined by the Chief Executive.

(iii) The Chairman NAB may resign his office by writing under his hand addressed to the Chief Executive."

The matter of accountability under the said Ordinance and the status of the persons charged with the responsibilities envisaged by the said Ordinance, came to be examined by this Court in ***KHAN ASFAND YAR WALI'S case (PLD 2001 S.C. 607)***. This Court was appalled to find that no qualifications stood prescribed for persons who could be appointed as officers with the above kind of high obligations nor did such like officers, who stood commanded to proceed even against the sitting Prime Minister, have any security of service or of any terms and conditions of their service. It was, therefore, found imperative by this Court that the office of the Chairman should be made secure and strong and be manned by persons of high qualities to be able to cope with the high degree of responsibilities cast on it. It had consequently been observed through para 288 of the above-mentioned judgment that the Chairman of the NAB should be appointed by the President in consultation with the Chief Justice of Pakistan; that the tenure of his office be secured; that he should also be protected against removal from office and should not be removable from the said office except on grounds on which a Judge of the Supreme Court could be removed and that the salary and allowances etc. to which such a Chairman was entitled should also be fixed and determined and should not be allowed to be varied during the term of his office.

38. It was in view of these recommendations and observations made by this Court through the above-mentioned judgment delivered in April, 2001 that amendments were made in the above-mentioned Ordinance through an Amending Ordinance No.XXXV of 2001 which was promulgated on August, 10, 2001 and the substituted provisions of section 6(b) above-quoted then read as under: -

> "***(b) Chairman National Accountability Bureau:***
>
> *(i) There shall be a Chairman NAB to be appointed by the President in consultation with the Chief Justice of Pakistan for a period of three years on such terms and conditions as may be determined by the President and shall not be removed except on the grounds of removal of Judge of Supreme Court of Pakistan.*"

39. It may, however, be mentioned that in the month of November, 2002, amongst others, a new sub-section (ba) was added to the above-mentioned section 6 through the Amending Ordinance No. CXXXIII of 2002 whereby the qualifications for a person to be appointed as the Chairman NAB were also prescribed which were as under: -

> "***6(ba)*** *A person shall not be appointed as Chairman NAB unless he-*
>
> *(i) is a retired Chief Justice or a Judge of the Supreme Court or a Chief Justice of a High Court; or*
>
> *(ii) is a retired officer of the Armed Forces of Pakistan equivalent to*

the rank of a Lieutenant General; or

(iii) is a retired Federal Government Officer in BPS 22 or equivalent."

But in the same breath, an amendment was also made in sub-section (b) of the said section 6 whereby consultation with the Chief Justice of Pakistan in the matter of the said appointment was omitted. It may well have been just a coincidence but historically speaking the elimination of the Chief Justice of Pakistan from the said scene coincided with the General Elections in the country in the year 2002 after which elections serious allegations became public regarding the misuse of this NAB Ordinance for political purposes.

40. Be that as it may, what is still strikingly noticeable is that irrespective of the fact whether the said Chairman was appointable with or without the consultation of the Chief Justice of Pakistan, the fact remains that the qualifications prescribed for the said office are a definite indicator of the high status of the said office which is obviously in consonance with the high obligations cast on the incumbent i.e. a Chairman being a person who had held the office of the Chief Justice of Pakistan or of the Judge of the Supreme Court or of the Chief Justice of a High Court or was a retired officer of the Armed Forces of Pakistan of the rank of a Lieutenant General or who was a retired Federal Government Officer in BPS-22.

41. The reason for looking for a person of such an eminence and prestige for appointment as the Chairman of NAB is not far to

find. A bare perusal of the provisions of sections 5(m), 7, 8, 12, 16(a), 18, 19, 20, 21, 22, 24, 25, 26 and 28 of the said NAB Ordinance would show the importance and the momentousness of the office of the Chairman under the said Ordinance. He is the person to be consulted by the President of Pakistan for the appointment of a Deputy Chairman of the NAB and for the appointment of the Prosecutor General Accountability; he appoints all other officers of the NAB; he is the one to decide whether to make or not to make a Reference with respect to corruption or corrupt practices and no Court could take cognizance of any such offence unless such a Reference was made by him or by an officer authorized by him; he is the one who could order initiation of proceedings under this Ordinance or order an inquiry or investigation in the matter; he is one who directs and authorizes arrests of accused persons under the said Ordinance; he is the one who has the power to freeze properties which are the subject matter of an offence under the said Ordinance and who could, in certain cases, even order sale of the said property and he has the authority to call for any record or information with respect to any matter covered by the NAB Ordinance. All Banks and Financial Institutions stand commanded to report all unusual financial transactions to him. It is he who stands authorized to communicate with foreign Governments for their assistance; he is the authority to accept plea-bargains and he is the one who has the power to tender pardon to any person accused of an offence under the said Ordinance. Needless to add that such like orders could be passed

by him against any holder of any Public Office including a sitting Prime Minister of the country.

42. As against this, a Deputy Chairman of the NAB is appointed, as has been mentioned above, in consultation with the Chairman. He is so appointed only to assist the Chairman and stands ordained to carry out only such functions as may be directed by the Chairman. Reference may be made to the provisions of section 7(a) of the NAB Ordinance. According to section 7(aa) the qualifications prescribed for appointment as the said Deputy Chairman are: -

> *"(a) is or has been an officer of the Armed Forces of Pakistan equivalent of the rank of a Major General; or*
>
> *(b) is or has been a Federal Government officer in BPS-21 or equivalent."*

As against the security of tenure guaranteed to the Chairman who is removable from office only on the grounds prescribed by the Constitution for the removal of a Judge of the Supreme Court of Pakistan, the ground for removal of a Deputy Chairman from office is misconduct as defined by the Government Servants (Efficiency & Disciplines) Rules of 1973.

43. This is then the difference between the status of the Chairman and the level of a Deputy Chairman whose functioning and exercise of powers are at the mercy of the Chairman. And it is for this reason that the provisions of section 6(c) of the NAB Ordinance did not consider a Deputy Chairman good enough to

perform the functions of the office of the Chairman except in situations of dire emergency. The said provisions of section 6(c) of the said Ordinance are reproduced hereunder for ready reference: -

> *"**(c) Acting Chairman National Accountability Bureau:***
>
> *As and when the Chairman NAB is ABSENT OR UNABLE TO PERFORM THE FUNCTIONS OF HIS OFFICE due to any reason whatsoever, the Deputy Chairman will act as the Chairman NAB, and in*
>
> *case the Deputy Chairman is absent or unable to perform the functions of the office, ANY OTHER PERSON DULY AUTHORIZED BY THE CHAIRMAN NAB, to act as Chairman NAB."*
>
> *(emphasis and under-lining has been supplied)*

44. As has been noticed above, Khawaja Haris Ahmed, the learned Sr. ASC representing the petitioner Bank had drawn our attention to the provisions of Article 180, Article 196 and Article 217 of the Constitution as also to the provisions of some other statutes which envisage appointment of an acting incumbent of the office not only when the actual incumbent was temporarily absent or was unable to perform his functions but also where such an office had become vacant. And to add that a similar situation is envisaged by clauses (1) and (2) of Article 49 of the Constitution where a specific provision has been made with respect to the office of the President of Pakistan and where the Chairman of the Senate or the Speaker of the National Assembly act as the President or perform the functions of the said office not only when the President is temporarily absent or is unable to perform the functions of his

office but also when the said office had fallen vacant. It had been highlighted by the learned counsel that it was because of the high degree of difference in the level of the persons occupying the office of the Chairman and that of the Deputy Chairman and also because a Deputy Chairman would not be possessed of qualifications prescribed for the Chairman that the law-giver had specifically and intentionally permitted the Deputy Chairman to act as the Chairman only when the Chairman was absent or was unable to perform the functions of his office and not when the said office had become vacant. The learned counsel had also drawn our attention to the words "***ANY OFFICER OF THE NAB DULY AUTHORIZED BY THE CHAIRMAN***" occurring in the above-quoted provisions of section 6(c) and had submitted that the said provisions of section 6(c) pre-supposed the existence of the Chairman and did not cater for a situation where a permanent vacancy had occurred in the said office.

45. The reply of Mr. Irfan Qadir, the learned Prosecutor General Accountability to the above-noticed state of law was only his reliance on ***PIR SABIR SHAH'S*** case supra and his submission was that the appointment of the holder of a public office could not be challenged in collateral proceedings. This submission has been examined by us in some detail in the preceding part of this judgment and has been rejected. His further reliance was on the provisions of section 19 of the General Clauses Act which read as under: -

> "***19. Official chiefs and subordinates.*** *(1) In any Central Act or Regulation made after the commencement of this Act, it shall be sufficient, for the purpose of expressing that a law relative to the chief or superior or an office shall apply to the deputies or subordinates* ***LAWFULLY PERFORMING THE DUTIES OF THAT OFFICE IN THE PLACE OF THEIR SUPERIOR****, to prescribe the duty of the superior.*
>
> *(2) This section applies also to all Central Acts made after the third day of January, 1868, and to all Regulations made on or after the fourteenth day of January, 1887.*"
>
> *(emphasis and under-lining has been supplied)*

These provisions of the said section 19 do not offer any help to the proposition being canvassed by the learned counsel as they authorize a subordinate to perform the functions reserved for a superior only if such functions were being '***LAWFULLY***' performed by a subordinate and would not come in aid of a subordinate who assumes performance of his superior's functions in violation of law. Needless to say that the said provisions of section 19 have no relevance to the question in issue.

46. The only submission made in the matter in question by the learned Attorney General, who appeared to assist us on our call, was that the provisions of the said section 6(c) be read with the provisions of section 6(b)(ii) which provisions read as under: -

> "***6(b)***
> *(ii) The Chairman NAB may, in writing under his hand, addressed to the President, resign his office.*"

What the learned Attorney General perhaps wished us to consider was a situation where the Chairman resigned his office or where the office became '***VACANT***' for some other un-foreseeable cause.

47. What then transpires from various provisions relating to the Chairman NAB and its Deputy Chairman noticed above, is that:-

> *a) on account of the extra-ordinary, the delicate and the demanding duties cast on the Chairman, the law expects him to be a person of equally extraordinary qualities, a towering and an exalted person i.e. a person of the caliber and the level of the Chief Justice of Pakistan;*
>
> *b) for the same reason, even the mode of his selection and appointment has been made very competitive i.e. to be chosen by the President in consultation with the Leader of the House and the Leader of the Opposition in the National Assembly; and*
>
> *c) because of the same rationale, he has been made irremovable from office except on the grounds on which a Judge of this Court could be removed.*

And when we look at the qualifications prescribed by law for a person to become a Deputy Chairman; the mode of his appointment i.e. to be appointed by the President in consultation only with the Chairman (section 7(a) of the NAB Ordinance); the duties of his office i.e. to assist the Chairman and to carry out only such functions as may be directed by the Chairman (section 7(a) ibid) and his removability only on grounds of misconduct as

prescribed for the removal of an ordinary civil servant, the office of the Deputy Chairman and the holder thereof appears inconsequential as compared to the Chairman NAB..

48. Reverting once again to the qualifications enjoined for the holders of the said two offices and also keeping in view the qualifications possessed by the respondent Deputy Chairman, the least that can be said is that if a person was disqualified in law to hold the office of the Chairman NAB in terms of section 6(ba) of the Ordinance of 1999 then how could he be allowed to hold the said office in terms of section 6(c) of the said Ordinance. Such an interpretation given to the provisions of the said section 6(c) would amount to defeating the law and playing a fraud on it, to which illegality, this Court cannot become a party. Such a view finds strength from various above-noticed constitutional and legal provisions which allow assumption of an office on acting charge basis not only where the incumbent was temporarily absent but also where such an office had become vacant. Despite knowledge of such-like provisions, the draftsman and the law-giver intentionally declined permission to a Deputy Chairman of NAB to assume the office of the Acting Chairman when this office had become vacant and allowed him to assume the said obligations only in situations of dire emergency when the Chairman was temporarily absent or was un-able to perform the functions of his office. Needless to say that inherent in the inability is the ability of someone to do something and there could be no concept of inability where the ability was completely lacking as in the present case of non-

existence of the Chairman on account of his having quit the said office.

49. It is, therefore, held that the provisions of section 6(c) ibid permit a Deputy Chairman to act as the Chairman NAB only when the Chairman is available but is temporarily absent or is temporarily un-able to perform functions of his office e.g. on account of illness etc. and that the said provisions did not allow a Deputy Chairman to act as the Chairman when the said office was vacant as in the present case.

50. We would also like to notice here the above-mentioned submission of the learned Attorney General with reference to the provisions of section 6(b)(ii) of the said Ordinance i.e. what happens where the Chairman resigns.

51. The simple answer to this question is that every public functionary is required to act diligently in the discharge of his obligations without wasting any time. It had come to our notice while dealing with another case relating to the National Reconciliation Ordinance of 2007 and we take judicial notice of the said fact that it was in the month of February, 2010 i.e. about six months ago that the Chairman NAB had indicated, in writing, his intention to quit the office. Ordinarily, the competent authority would have been expected to start looking for a substitute which was perhaps not done. And then it was in the early part of the month of June i.e. more than ***TWO MONTHS*** ago that he actually resigned. Where is then the justification for not filling up the vacancy for such a long period of time? It will be futile to blame the

stars for the said fault. The defect or culpability does not lie with the law. Even in the case of a vacancy in the office of the President, a mention of which has been made in the earlier parts of this order, inspite of the fact that the said vacancy has to be filled through a fairly cumbersome process i.e. through an election for which the electoral college comprises two Houses of the Parliament and the four Provincial Assemblies, the Constitution permits only ***THIRTY DAYS*** for the purpose. Here is a case of a much simpler exercise where the appointment has to be made by the President in consultation only with the Leader of the House and the Leader of the Opposition in the National Assembly and more than ***TWO MONTHS*** have gone by and there is still no sign of the appointment being made as required by the law.

52. It is a principle too well established by now that no one could be heard or allowed to reap the benefits of his own omissions, mis-feasance or non-feasance. And more importantly, the provisions envisaging appointments of acting incumbents are a mere stopgap arrangement meant to cater for emergencies and such-like provisions can never be allowed to be used to circumvent the law relating to the making of a regular appointment to such an office or to be used as a substitute for a regular appointment or to be abused to put an un-qualified person to hold a post which the law does not permit him to hold. Reference may be made to ***AL-JEHAD TRUST CASE (PLD 1996 SC 324)***.

53. Having thus looked at all aspects of this matter, we find that a Deputy Chairman could assume acting charge of the office of

the Chairman only when a Chairman existed but was absent or was for some reason unable to perform functions of his office and not when the office had become permanently vacant.

54. This brings us to the question of the appointment of Mr. Irfan Qadir, Advocate as the learned Prosecutor General Accountability under the NAB Ordinance of 1999.

55. A perusal of the provisions of section 8 of the said Ordinance of 1999 would reveal also the importance of the said office as it is only a person qualified to be appointed as a Judge of the Supreme Court of Pakistan who could be appointed as the Prosecutor General Accountability under the said Ordinance. And on account of the significance of the said office, its holder was also made irremovable from office except on the grounds prescribed by the Constitution for the removal of a Judge of the Supreme Court of Pakistan. This according to the learned counsel for the petitioner shows the impeccable character required of a person who could legally hold the said office. According to the said learned counsel, Mr. Irfan Qadir, Advocate, fell a lot short of the said commanded requirements of character on account of his alleged involvement in the present case of Haris Steel Mills which was under process with the NAB authorities and more so when he had been representing the accused persons of the said case.

56. Be that as it may, we do not consider it appropriate or even necessary to go into the said aspect of the matter for the time being and would rather confine ourselves to the alleged illegality of the appointment of Mr. Irfan Qadir as the said Prosecutor General.

57. It is a position admitted even by Mr. Irfan Qadir that he had once earlier been appointed as the Prosecutor General Accountability under section 8 of the said Ordinance of 1999 and that he had held the said office for a full term of three years i.e. from December, 2003 to December, 2006. The case of the petitioner Bank is that there was a legal bar on his re-appointment to the same office while the case of Mr. Irfan Qadir is that the bar was only on the extension of the tenure and not on a fresh appointment of a person who had earlier held the office for a non-extendable term of three years. The relevant provision of section 8 of the NAB Ordinance read as under: -

> *"8(a)(iii) The Prosecutor General Accountability shall hold office for a* ***NON-EXTENDABLE PERIOD*** *of three years."*
>
> *(emphasis and under-lining has been supplied)*

58. The provisions of section 8(a) as they existed in the NAB Ordinance of 1999 as originally enacted, read as under: -

> *"The Chairman NAB may appoint any person to act as the Prosecutor General Accountability, notwithstanding any other appointment or office the latter may concurrently hold, upon such terms and conditions as may be determined by the Chairman."*

It was on August 10, 2001 that through the Amending Ordinance No.XXXV of 2001, amongst others, the original provisions of section 8(a) were substituted as under: -

> "**8*(a)***

> *(i) The President of Pakistan, in consultation with the Chief Justice of Pakistan and 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 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."*

It would be noticed that even through this amendment carried out in the year 2001, no specific provision was made either permitting or prohibiting the extension in the tenure of the Prosecutor General's term of office. It was, however, on November 23, 2002 that through the Amending Ordinance No.CXXXVIII of 2002, the word of "***NON-EXTENDABLE***" was added before the word "***PERIOD***" in clause (iii) of sub-section (a) of section 8 of the said Ordinance of 1999.

59. It would thus be noticed that making the three years' term of the office of Prosecutor General "***NON-EXTENDABLE***" was a

specific and intentional insertion in the relevant provisions and meanings and effect was accordingly required to be given to the said deliberate and designed inclusion of the said word "***NON-EXTENDABLE***" in the said provisions.

60. It had been submitted by Khawaja Haris Ahmed, the learned Sr. ASC that the addition of the word "***NON-EXTENDABLE***" in the said provision was designed to emphasize the clear intention of the law giver that a person who had once held the said office for a term of three years would not be eligible to hold that office any further either by way of stretching of the said period through extension of tenure or by manipulating the same through a fresh appointment. He had added that prefixing of word i.e. "***EXTENDABLE***" with a negative word i.e. "***NON***", was always indicative of the intensity of the command and the insistence on the mandatory nature of the compulsion. In this connection the learned counsel drew our attention to the ***PRINCIPLES OF STATUTORY INTERPRETATION*** by Guru Prasanna Singh, Tenth Edition, 2006 (Extensively Revised & Enlarged), where the author deals with the use of negative words in the following term:-

> *"Another mode of showing a clear intention that the provision enacted is mandatory, is by clothing the command in a negative form. As stated by CRAWFORD: "Prohibitive or negative words can rarely, if ever, be directory. And this is so even though the statute provides no penalty for disobedience". As observed by SUBBARAO, J.: "Negative words are clearly prohibitory and are*

> *ordinarily used as legislative device to make a statute imperative."*

61. The learned counsel had further argued that it was an age-old principle too well established by now that what the law did not allow to be achieved directly could never be permitted to be achieved indirectly. Reliance in this connection had been placed on the judgment delivered by this Court in the case of ***MIAN MUHAMMAD NAWAZ SHARIF VS. PRESIDENT OF PAKISTAN AND OTHERS*** ***(PLD 1993 S.C. 473)*** and on the case of ***HAJI MUHAMMAD BOOTA AND OTHERS VS. MEMBER (REVENUE), BOARD OF REVENUE, PUNJAB AND OTHERS*** ***(PLD 2003 S.C. 979)***.

62. The word "***EXTEND***", according to the Oxford English Dictionary means: -

> *"to stretch out, to stretch forcibly, to lengthen, to prolong"*

and the word "***EXTENDABLE***" means: -

> *"capable of being extended or stretched and capable of being enlarged in length or duration"*

"***NON***" is a Latin word which, again according to the Oxford English Dictionary, crept into the English language around the 14th century which is prefixed to nouns to indicate:-

> *"a negation or prohibition"*

63. The word "***NON-EXTENDABLE***" would thus mean, in the present context, a duration of time which was incapable of being enlarged or extended or lengthened or prolonged or stretched. And as has been mentioned above prefixing the word "***EXTENDABLE***"

with a negative command only indicates the emphatic prohibition vis-a-vis the enlargement of the duration of the period in question. The intention of the law-giver by inserting the said word through an amendment in the relevant provision is obvious i.e. that since the Prosecutor General could be called upon to prosecute the holders of the highest of public offices in the country including the sitting Prime Minister, therefore, he should be a person who should be placed above all kinds of temptations and greed and should not at any time be looking for any favour from any quarter which could become a hindrance in his way of fearlessly discharging his said obligations. Needless to say that the competent authority in the matter of appointment of the Prosecutor General is the President which President is obliged by the provisions of Article 48 of the Constitution to act in the matter only on the advice of the Prime Minister which Prime Minister, as has been noticed above, fell within the purview of the NAB Ordinance and thus liable to be prosecuted by the Prosecutor General. This is also a principle too well established that where the intention of the legislature was clear and the object for which a law had been enacted was patent and evident then the Courts were not allowed to interpret such a law in a manner which could impede or defeat the object for which such a law had been enacted. Reference may be made to ***MEHRAM ALI'S case (PLD 1998 S.C. 1445)*** and to ***IMTIAZ AHMED LALI'S case (PLD 2007 S.C. 369)***. If the interpretation canvassed by Mr. Irfan Qadir, ASC was to be accepted then the same would not only defeat the clear object of the provision in question but would also lead to a blatant absurdity. It would be preposterous and irrational to

declare that once an incumbent of the office of the Prosecutor General had completed his term of three years then no one had the competence to extend or enlarge the said term even by one day but the same competent authority could instead, grant him three years by appointing him afresh to the same office. In the recorded judicial history such a situation attracted judicial notice in the year 1889 in the case of ***MADDEN VS. NELSON*** ***(1889 A.C. 626)*** and it was Lord Helsbury who declared for the first time that what was not permitted by law to be achieved directly could not be allowed to be achieved indirectly. And the said principle has been repeatedly acknowledged and followed by the Courts ever since then and the Courts in Pakistan are no exception in the said connection. The cases of ***MIAN MUHAMMAD NAWAZ SHARIF AND HAJI MOHAMMAD BOOTA*** (Supra) are evidence to the said effect.

64. Having thus examined all aspects of this legal proposition, we find that in view of the meanings of the words "***NON-EXTENDABLE***"; in view of an emphatic pre-fixation of a negative before the word "***EXTENDABLE***"; in view of the fact that the said word "***NON-EXTENDABLE***" was a considered and a specific insertion in the provision in question through an amendment; in view of the fact that no interpretation was permissible which could have effect of defeating the clear intention and object of legislature and finally in view of the fact that what could not be achieved directly could not be allowed to be accomplished indirectly, the fresh appointment of Mr. Irfan Qadir, ASC as the Prosecutor General Accountability could not be sustained on account of

section 8(a)(iii) of the NAB Ordinance because he had already held the said office for a "***NON-EXTENDABLE***" term of three years.

65. Consequently, it is held that the appointment in question of Mr. Irfan Qadir as the Prosecutor General Accountability was not legally tenable.

66. Having so found, it is resultantly declared and directed as under:-

> *a) that the assumption of the office of Acting Chairman NAB by Javed Qazi, Deputy Chairman is illegal and it is, therefore, directed that a regular appointment to the vacant office of Chairman NAB be made in terms of section 6 of the NAB Ordinance, 1999. The competent authority is allowed thirty days' time for the purpose; and*
>
> *b) that the appointment of Mr. Irfan Qadir, ASC as the Prosecutor General Accountability is un-lawful and of no legal effect and he shall cease to hold the said office forthwith.*

67. This matter is disposed of in the above terms.

Chief Justice

Judge

Judge

ISLAMABAD
Announced in open Court
On 1st September, 2010
By Mr. Justice Ghulam Rabbani
APPROVED FOR REPORTING.
Zulfiqar