

IN THE SUPREME COURT OF PAKISTAN
(Constitutional Jurisdiction)

PRESENT:

Mr. Justice Javed Iqbal
Mr. Justice Khilji Arif Hussain
Mr. Justice Asif Saeed Khan Khosa

Constitution Petition No. 29 of 2011

Al-Jehad Trust and another

... *Petitioners*

versus

Federation of Pakistan and others

... *Respondents*

For the petitioners:

Mr. Habibul Wahab Alkhairi, ASC

For the Federation of
Pakistan:

Maulvi Anwarul Haq, Attorney-General for
Pakistan

For respondents No. 3 & 5:

Mr. Wasim Sajjad, Sr. ASC with Mr. Fawzi
Zafar, Additional Prosecutor-General,
National Accountability Bureau with Syed
Safdar Hussain, AOR

For respondents No. 2, 4 &
6 to 8:

Nemo

Date of hearing:

01.06.2011

JUDGMENT

Asif Saeed Khan Khosa, J.: In his report published in THE NEWS International, Islamabad on March 29, 2011 Mr. Ansar Abbasi, a reputed and respected journalist, had commented that the National Accountability Bureau, repeatedly acknowledged by this Court as the premier anti-corruption institution of the country, is facing a slow and painful death at the hands of those at the helm of affairs of the country and the said comment has, in the backdrop of the circumstances of the present case, been found by us to be not far from the reality. A copy of that newspaper report has been appended by the petitioners with the paper-book of this petition at page No. 80 thereof. The scheme of the National

Accountability Ordinance, 1999 manifests that the Chairman, National Accountability Bureau is the linchpin of that institution and the Prosecutor-General Accountability plays the pivotal role in all the prosecutions conducted by the National Accountability Bureau. It is unfortunate that for the last about three months no person is holding the office of the Chairman, National Accountability Bureau and even the office of the Prosecutor-General Accountability is lying vacant for the last about three quarters of a year and the persons at the helm of affairs have not demonstrated any interest in filling the vacancies in those important offices in the near future. In the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others* (PLD 2010 SC 1109) this Court had declared that in case of a vacancy in the office of the Chairman, National Accountability Bureau nobody can be appointed as an Acting Chairman or can act as the Chairman. We have been informed that from time to time some powers vesting in the Chairman, National Accountability Bureau had been delegated to the Deputy Chairman of the said institution and on account of the current vacancy in the office of the Chairman Mr. Javed Zia Qazi, Deputy Chairman, National Accountability Bureau, respondent No. 5 herein, is running the National Accountability Bureau with those delegated powers of the Chairman. Through this Constitution Petition filed under Article 184(3) of the Constitution the petitioners, i.e. Al-Jehad Trust and its *Raesul Mujahideen* Mr. Habibul Wahab Alkhairi have called in question the present state of affairs of the National Accountability Bureau and with reference to the same they have made the following prayers and have sought the following reliefs from this Court:

- a) The appointment of respondent No. 5 namely Mr. Javed Zia Qazi as Deputy Chairman, National Accountability Bureau on 05.06.2010 may be set aside;
- b) Respondent No. 5 is to retire from the civil service on 30.04.2011 and, thus, he may be restrained from performing the duties of the Deputy Chairman, National Accountability Bureau and also from exercising the delegated powers of the Chairman, National Accountability Bureau;
- c) The respondents may be restrained from passing any order regarding extension in the service of respondent No. 5;
- d) The order passed by the then Chairman, National Accountability Bureau on 15.10.2010 delegating some of his powers to respondent No. 5 may be declared to be illegal and the same may be set aside; and
- e) Any other relief which is deemed necessary by this Court.

*(English translation of the prayers made and the
reliefs prayed for in Urdu language)*

2. We have heard Mr. Habibul Wahab Alkhairi petitioner appearing in person, Mr. Wasim Sajjad, Sr. ASC appearing for respondents No. 3 and 5 and Maulvi Anwarul Haq, Attorney-General for Pakistan at some length and have gone through the relevant record of this case with their assistance. The remaining respondents have failed to enter appearance before us.

3. Mr. Wasim Sajjad, Sr. ASC appearing for respondents No. 3 and 5 has raised a preliminary objection regarding maintainability of this Constitution Petition and he has argued that there is no question of public of importance involved in this petition and no fundamental right of the petitioners has been shown to have been violated or abridged and, therefore, the prerequisites for filing and entertaining a petition under Article 184(3) of the Constitution do not stand attracted to the petition in hand. He has maintained that the petition in hand, at its best, is based upon wild, unspecific and generalized averments and allegations disclosing neither any personal injury to or particular grievance of the petitioners nor any specific relief has been prayed therein for the benefit of the petitioners themselves. In support of his objection to maintainability of this Constitution Petition he has relied upon an unreported judgment passed by this Court on 26.05.2005 in the case of *Syed Ihsanullah Waqas v. The Federation of Pakistan and others* (CMA No. 11 of 2005 in Constitution Petition No. Nil of 2005 & CMA No. 2227 of 2005 in CMA No. 11 of 2005) and has also made a reference to a book titled Public Interest Litigation authored by Dr. B. L. Wadehra (Second Edition, published by the Universal Law Publishing Co. Pvt. Ltd., India). After attending to the objection raised by Mr. Wasim Sajjad we have, however, remained unable to subscribe to his submissions made in that regard because the principal issue raised in this petition is exercise of some powers and performance of some functions of the Chairman, National Accountability Bureau by the Deputy Chairman, National Accountability Bureau at a time when there is no Chairman holding his office. In the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* and then in the case of *Shahid Orakzai and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another* (PLD 2011 SC 365) Constitution Petitions filed under Article 184(3) of the Constitution were held by this Court to be competent and maintainable *vis-à-vis* the matters of holding the offices of the Chairman, Acting Chairman and Prosecutor-General Accountability in the National Accountability Bureau and in respect of matters pertaining to performing the functions of those offices in different situations. The petition in hand also essentially deals with the same or

similar subject and, thus, for the detailed reasons recorded in the above mentioned precedent cases, we have found this petition also to be competent and maintainable.

4. Adverting to the prayers made and the reliefs sought by the petitioners through this petition we have found that the first three reliefs sought by the petitioners, reproduced above, cannot be granted as the prayers made in those regards are without any merit. As far as the appointment of respondent No. 5 as Deputy Chairman, National Accountability Bureau is concerned we have noticed that according to the requirements of section 7(aa) of the National Accountability Ordinance, 1999 a person is qualified to be appointed as Deputy Chairman, National Accountability Bureau if he is or has been an officer of the Armed Forces of Pakistan equivalent to the rank of a Major General or if he is or has been a Federal Government officer in BPS 21 or equivalent. In the case in hand while serving as a civil servant with the Federal Government respondent No. 5 was promoted to BPS 21 on 30.04.2009 and he was appointed as Deputy Chairman, National Accountability Bureau on 04.05.2010 for a period of three years. The record further shows that the appointment of respondent No. 5 had been made by the President of Pakistan upon an advice of the Prime Minister in consultation with the Chairman, National Accountability Bureau as contemplated by the provisions of section 7(a) of the National Accountability Ordinance, 1999. These facts clearly establish that at the time of his appointment respondent No. 5 was qualified to be appointed as Deputy Chairman, National Accountability Bureau. As regards the effect of respondent No. 5 reaching the age of superannuation on 30.04.2011 we have found that the said respondent had been appointed as Deputy Chairman, National Accountability Bureau for a period of three years and according to section 7(aa) of the National Accountability Ordinance, 1999 he was qualified to be appointed to the said office if he was or had been a Federal Government officer in BPS 21 or equivalent. It is, thus, evident that at the time of his appointment he was qualified to be so appointed in his capacity as a serving Federal Government officer in BPS 21 and after reaching the age of superannuation he remains qualified to continue and complete his term of office of three years because he had been a Federal Government officer in BPS 21 in the past. In this view of the matter we have found that nothing turns on respondent No. 5 reaching the age of superannuation while performing his duties and functions as Deputy Chairman, National Accountability Bureau. Adverting to the petitioners apprehension that the respondents may grant an extension in the

service of respondent No. 5 suffice it to observe that by virtue of the provisions of section 7(a) of the National Accountability Ordinance, 1999 a Deputy Chairman, National Accountability Bureau is to hold that -extendable period of three ye s regarding extension in the service of respondent No. 5 is, thus, misconceived and the law itself takes care of the same. Apart from that any extension in the service of respondent No. 5 in his capacity as a civil servant cannot have any bearing upon

For the reasons recorded above we have found the first three prayers made and reliefs sought by the petitioners through this petition to be devoid of force besides being misconceived.

5. The fourth prayer made by the petitioners through the present petition revolving around legality or otherwise of the order passed by the then Chairman, National Accountability Bureau on 15.10.2010 in respect of delegation of some of the powers of the Chairman to respondent No. 5 and the consequential issue regarding continued exercise of such delegated powers by respondent No. 5 despite a vacancy in the office of the Chairman have, however, been found by us to be worth a serious consideration. The record shows that on 15.10.2010 the then Chairman, National Accountability Bureau had delegated some of his powers in favour of respondent No. 5 and even prior to that some of the powers of the Chairman had also been delegated to the Deputy Chairman, National Accountability Bureau on 13.06.2006. As regards the office of Deputy Chairman, National Accountability Bureau section 7(a) of the National Accountability Ordinance, 1999 provides as follows:

7. Deputy Chairman, National Accountability Bureau:

- (a) There shall be a Deputy Chairman NAB appointed by the President in consultation with the Chairman NAB. The Deputy Chairman NAB shall assist the Chairman NAB in the performance of his duties and shall carry out such functions as may be directed by the Chairman

Section 34A of the National Accountability Ordinance, 1999 stipulates as under:

Delegation of Powers: The Chairman NAB may, by an order in writing, delegate any of his powers to and authorize performance of any of his functions by, an officer of the NAB as he may deem fit and proper, subject to

such conditions, if any, as may be specified in the order, for carrying out the

A combined reading of the provisions of the National Accountability Ordinance, 1999 reproduced above shows that the Deputy Chairman, National Accountability Bureau has no independent duties or functions of his own and his only job is to assist the Chairman, National Accountability Bureau in the performance of his duties and to carry out such functions as may be directed by the Chairman. Apart from that the Chairman, National Accountability Bureau may delegate any of his powers to and authorize performance of any of his functions by an officer of the National Accountability Bureau, including the Deputy Chairman, as he may deem fit and proper for carrying out the purposes of the National Accountability Ordinance, 1999. It has been conceded before us that the office of the Chairman, National Accountability Bureau is presently lying vacant for the last many months and, thus, the job of respondent No. 5 to assist the Chairman in the performance of his duties and to carry out such functions as may be directed by the Chairman appears to be non-existent at present if looked at in the context of section 7(a) of the National Accountability Ordinance, 1999. The question mooted before us is as to whether in such a situation respondent No. 5, in his capacity as a duly appointed Deputy Chairman, National Accountability Bureau can continue to exercise the powers of the Chairman, National Accountability Bureau delegated to him earlier on by the Chairman or not and also whether in a situation like this he can continue performing any of the functions as directed by the Chairman or not. With reference to the cases of *Malik Asad Ali v. Federation of Pakistan through Secretary Law, Justice and Parliamentary Affairs, Government of Pakistan Islamabad and 2 others* (1998 SCMR 122) and *Mr. Zulfiqar Ali Bhutto v. The State* (PLD 1978 SC 40) Mr. Wasim Sajjad, Sr. ASC appearing for

the office of the head of some institution or department the other authorities performing their own duties and functions in that institution or department can continue to discharge their duties and perform their functions and, thus, if there is a vacancy in the office of the Chairman, National Accountability Bureau then respondent No. 5 can continue to exercise and perform not only his own duties and functions but also the powers of the Chairman, National Accountability Bureau delegated to him by the Chairman earlier on. We have minutely gone through the above mentioned precedent cases referred to by Mr. Wasim Sajjad and have found that the *ratio decidendi* of those precedent cases is not attracted to the case in hand. The question before us is not as to whether respondent No. 5 can

continue to exercise his own duties and perform his own functions as Deputy Chairman, National Accountability Bureau at a time when the office of the Chairman, National Accountability Bureau is vacant but the issue at hand is as to whether respondent No. 5 can continue to exercise the delegated powers of the Chairman, National Accountability Bureau when the delegator himself is not on the scene any more. The above mentioned precedent cases are silent on this issue and, therefore, they are of little assistance in the matter.

6. Mr. Wasim Sajjad has further argued that a delegation of powers continues even if the delegator office becomes vacant because a constitutional or statutory office continues to exist even if there is no incumbent holding that office for the time being. In the context in hand we have already mentioned above that under section 7(a) of the National Accountability Ordinance, 1999 the job of a Deputy Chairman is only to assist the Chairman in performance of his duties and to carry out such functions as may be directed by the Chairman. It is, therefore, quite obvious that when the office of the Chairman is vacant there is nobody in that office to be assisted by the Deputy Chairman and there is nobody in the office of the Chairman to direct the Deputy Chairman to carry out any particular function upon his direction. The situation that emerges in the facts of the present case is that due to the vacancy in the office of the Chairman respondent No. 5 has no job of his own to perform within the purview of section 7(a) of the National Accountability Ordinance, 1999 and he is presently exercising the delegated powers of the Chairman, National Accountability Bureau at a time when there is no Chairman on the scene. Under the law of contract a delegation comes to an end when the delegator vanishes from the scene and an agent loses his authority to act on behalf of his principal when such principal is removed from the picture. Applicability of these principles relevant to a contractual delegation may, however, be inapt to the case in hand because the delegation of powers involved in the present case is a statutory delegation which, in an appropriate case, can survive a vacancy in the office of the delegator. The real issue in the present case, therefore, is as to whether such a statutory delegation during a vacancy in the office of the delegator can be stretched to a period which is unduly protracted and indefinite and which creates an irresistible impression that those responsible for filling the vacancy in the office of the delegator are not interested in filling that vacancy and are contented with running the affairs of the concerned institution or department through the delegatee himself. This surely is a serious matter and in case such an impression is well-founded then such an exercise may amount to

committing a fraud with or upon the relevant statute. It may advantageously be mentioned here that the qualifications for the office of Chairman, National Accountability Bureau contained in section 6(ba) of the National Accountability Ordinance, 1999 are much higher than those specified in section 7(aa) of that Ordinance for the office of Deputy Chairman, National Accountability Bureau and those provisions are reproduced below for the purposes of a comparison:

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 equivalent

7(aa). A person shall not be appointed as Deputy Chairman NAB unless he-

- (i) is or has been an officer of the Armed Forces of Pakistan equivalent to the rank of a Major General; or
- (ii) is or has been a Federal Government officer in BPS 21 or

It seems to us to be preposterous and outrageous if in the garb of a statutory delegation of some of his powers by a Chairman, National Accountability Bureau in favour of a Deputy Chairman, National Accountability Bureau the Deputy Chairman may be permitted to keep on exercising the powers of the Chairman for a protracted and indefinite period of time while the office of the Chairman remains, or is deliberately kept, vacant for months at an end. Such clothing of the Deputy Chairman, who is otherwise not even qualified to be appointed as Chairman, with a valid authority of the Chairman would, virtually and practically, amount to permitting him to act as the Chairman during such period whereas it has already been clearly held by this Court in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* that there cannot be an Acting Chairman, National Accountability Bureau at a time when the office of the Chairman, National Accountability Bureau is vacant. It is by now a settled proposition of law that what cannot be achieved directly under the law cannot be permitted or allowed to be achieved indirectly.

7. The learned Attorney-General for Pakistan has very candidly conceded before us that the whole scheme of the National Accountability Ordinance, 1999

revolves around the office of the Chairman and, academically speaking, the whole National Accountability Bureau stands paralyzed when the office of the Chairman, National Accountability Bureau is vacant. He has also conceded that despite the appropriate directions issued by this Court in the cases of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* and *Shahid Orakzai and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another (supra)* the offices of the Chairman, National Accountability Bureau and the Prosecutor-General Accountability are lying vacant for a considerable period of time and existence of such vacancies are gravely and prejudicially affecting the normal and smooth functioning and performance of the National Accountability Bureau. He has, therefore, requested that instead of holding that in the absence of those two pivotal officers of the National Accountability Bureau the said Bureau cannot keep on functioning under the law this Court may graciously provide the Federal Government an opportunity to fill those offices on an urgent basis so as to keep the National Accountability Bureau afloat and also to keep the prosecutions before the Accountability Courts in the country proceeding ahead. Keeping in view the drastic implications and the alarming possibilities hinted at by the learned Attorney-General for Pakistan we tend to agree with him that instead of becoming instrumental in closing down the National Accountability Bureau and winding up of the inquiries, investigations and trials being conducted by it at present we may provide one more opportunity to the Federal Government to fill the offices of the Chairman, National Accountability Bureau and the Prosecutor-General Accountability within a reasonable time so that the normal functioning of the National Accountability Bureau and of its operations under the National Accountability Ordinance, 1999 are restored and the Chairman, National Accountability Bureau to be appointed is provided an opportunity to consider the desirability or otherwise of continuance of the delegation of powers of the Chairman in favour of respondent No. 5. In the case of *Al-Jehad Trust and others v. Federation of Pakistan and others* (1999 SCMR 1379) it had been held that this Court can direct that proper administrative and legislative steps may be taken by the government where needed under the Constitution. Under Article 5(2) of the Constitution

and, thus, the authority of this Court to direct taking of proper administrative and legislative steps needed under the Constitution would necessarily include the authority to direct taking of such steps where needed under the law.

8. For what has been discussed above the Federal Government is directed to fill the vacant offices of the Chairman, National Accountability Bureau and the Prosecutor-General Accountability within one month of announcement of this judgment positively failing which respondent No. 5 shall *ipso facto* and without further ado stand denuded of his authority to continue exercising the delegated powers of the Chairman, National Accountability Bureau and performing any other function not conferred upon him by the National Accountability Ordinance, 1999. If in such an eventuality the National Accountability Bureau practically ceases to exist or function under the National Accountability Ordinance, 1999 then the blame for the same shall rest squarely upon the shoulders of the Federal Government. This Constitution Petition is disposed of with the directions issued and the observations made above.

Judge

Judge

Judge

Announced in open Court at Lahore on 21.06.2011.

Judge

Approved for reporting.

M. Yasin