

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

Present:

Mr. Justice Javed Iqbal

Mr. Justice Raja Fayyaz Ahmed

Mr. Justice Asif Saeed Khan Khosa

Constitution Petitions No. 60 and 61 of 2010

1. Shahid Orakzai

... Petitioner in Const. P. No. 60/2010

2. Ch. Nisar Ali Khan

... Petitioner in Const. P. No. 61/2010

versus

1. Pakistan through Secretary Law, Ministry of Law, Islamabad

... Respondent in Const. P. No. 60/2010

2. Federation of Pakistan through Secretary, Ministry of Law, Justice & Parliamentary Affairs, Pakistan Secretariat, Islamabad and two others

... Respondents in Const. P. No. 61/2010

For the petitioner:
(in Const. P. No. 60/2010)

Mr. Shahid Orakzai petitioner in person

For the petitioner:
(in Const. P. No. 61/2010)

Mr. Mohammad Akram Sheikh, Sr. ASC
assisted by Barrister Natalya Kamal, Advocate and Syed
Riaz Hussain, Advocate

For the Federation of Pakistan:

Mr. Abdul Hafeez Pirzada, Sr. ASC and Mian
Gul Hassan Aurangzeb, ASC
assisted by Mr. Hamid Ahmad, Advocate, Ms. Saleha
Hayat, Advocate and Mr. Mustafa Aftab Sherpao,
Advocate

On Court's notice:

Maulvi Anwarul Haq, Attorney-General for
Pakistan

For respondent No. 3:
(in Const. P. No. 61/2010)

Dr. Khalid Ranjha, Sr. ASC

For the National Accountability
Bureau:

Mr. Muhammad Akbar Tarar, Acting Prosecutor-
General, National Accountability Bureau
Mr. Fowzi Zafar, Additional Prosecutor- General,
National Accountability Bureau
Mr. M. S. Khattak, AOR

Dates of hearing:

01.02.2011, 02.02.2011, 08.02.2011, 28.02.2011
& 10.03.2011

JUDGMENT

Asif Saeed Khan Khosa, J.: "Obedience to the Constitution and law is
the inviolable obligation of every citizen wherever he may be and of every other

person for the time being within Pakistan” and this inviolable obligation has been mandated by no less a legal instrument than the Constitution of Pakistan itself through clause (2) of its Article 5. Through the present Constitution Petitions it has been asserted by the petitioners that in the matter of appointment of Mr. Justice (Retired) Syed Deedar Hussain Shah, a former Judge of this Court, as Chairman, National Accountability Bureau both the Constitution as well as the relevant law have been violated.

2. The issue posed by these petitions is one of comparative simplicity. That is to say, the facts of the case are intelligible to the least-instructed layman and, with respect, the only persons utterly at sea are those connected with the law. The basic facts of this case are quite straightforward and uncomplicated and not in dispute but the constitutional and legal position applicable to such facts has been made to appear before this Court as a question of acute difficulty and it has fallen to our lot to state and declare the correct position in that regard. The pangs that a Judge has to go through and endure while adjudicating between fellow human beings are known to many but very few know that the pain is more penetrating when the matter concerns a former colleague in the profession. The case in hand happens to be one of such cases and we have been called upon to adjudicate upon an issue directly concerning appointment of a former Honourable Judge of this Court to a prestigious office in the country and, no matter how acute the pain and agony, judge we must, justly and fairly, as that is what is our vocation and calling.

3. The long and short of the matter is that Mr. Justice (Retired) Syed Deedar Hussain Shah (respondent No. 3 in Constitution Petition No. 61 of 2010, hereinafter referred to as ‘the respondent’) was appointed as Chairman, National Accountability Bureau by the President of Pakistan on 7th October, 2010 and the relevant Notification issued on 8th October, 2010 reads as follows:

“Government of Pakistan
Ministry of Law, Justice and Parliamentary Affairs

Islamabad, the 8th October, 2010.

NOTIFICATION

No.F.8.(17)/2010-A.I The President of Islamic Republic of Pakistan has been pleased to appoint Mr. Justice (Retd) Syed Deedar Hussain Shah as Chairman, National Accountability Bureau in terms of Section 6(b)(i) of the National Accountability Ordinance, 1999, with immediate effect.

(AHMAD ALI TURI)
Deputy Secretary (Admn-II)”

Within a matter of about one week of issuance of that Notification the appointment of the respondent was challenged before this Court through the present Constitution Petitions filed under Article 184(3) of the Constitution out of which Constitution Petition No. 60 of 2010 has been filed by Mr. Shahid Orakzai, a freelance journalist, and Constitution Petition No. 61 of 2010 has been preferred by Ch. Nisar Ali Khan, the Leader of the Opposition in the National Assembly, who is also a statutory consultee in the matter of appointment of Chairman, National Accountability Bureau in terms of section 6(b)(i) of the National Accountability Ordinance, 1999.

4. During the pendency and hearing of these petitions before this Court the above mentioned order dated 7th October, 2010 passed by the President of Pakistan appointing the respondent as Chairman, National Accountability Bureau was “withdrawn/recalled” on 9th February, 2011, the Notification dated 8th October, 2010 was “rescinded/cancelled” and the respondent was again “appointed” as Chairman, National Accountability Bureau by the President of Pakistan “with immediate effect”, i.e. with effect from 9th February, 2011. The relevant composite Notification issued on 9th February, 2011 reads as under:

“Government of Pakistan
Ministry of Law, Justice and Parliamentary Affairs

Islamabad, the 9th February, 2011.

NOTIFICATION

No.F.8.(17)/2010-A.I The President of Islamic Republic of Pakistan has been pleased to withdraw/recall his order dated 07.10.2010, appointing Mr. Justice (R) Syed Deedar Hussain Shah as Chairman, National Accountability Bureau (NAB). Consequently, notification No.F.8(17)/2010-A.I dated 08.10.2010 is hereby rescinded/cancelled.

2. Further, the President of Islamic Republic of Pakistan has also been pleased to appoint Mr. Justice (R) Syed Deedar Hussain Shah as Chairman, National Accountability Bureau (NAB), in terms of Section 6(b)(i) of the National Accountability Ordinance, 1999 with immediate effect.

(AHMAD ALI TURI)
Deputy Secretary (Admn-II)”

As cancellation of the respondent’s earlier appointment as Chairman, National Accountability Bureau and his fresh appointment as such had come about during the pendency and hearing of the present petitions and as the said development had been brought to the notice of this Court by the Federation of Pakistan itself, therefore, we had decided to treat that development as a part of the pending issue and to determine its effect on the same without requiring the petitioners to amend

their petitions *qua* such development. It is by now settled law that a Court seized of a matter can not only take notice of any relevant development taking place during the pendency of the *lis* but it can also mould the relief to be granted keeping in view such development and none of the learned counsel representing different parties to the present petitions has disputed that legal position or has objected to the course adopted by us in that regard.

5. Mr. Shahid Orakzai, the petitioner in Constitution Petition No. 60 of 2010, has argued before us in person that appointment of Chairman, National Accountability Bureau is not a discretionary power of the President of Pakistan and in the matter of appointment of the respondent to that office no advice had been tendered to the President by the Prime Minister and, thus, the respondent's appointment was unconstitutional. He has also argued that the impugned action of the President had been taken under section 6 of the National Accountability Ordinance, 1999 which legal provision had been promulgated and amended during a period when some provisions of the Constitution were held in abeyance but the present interpretation and application of the said law should be in accordance with the Constitution which is presently fully in force. With reference to Articles 182 and 207 of the Constitution he has maintained that a retired Judge of the superior judiciary can be available for some other assignment till two or three years of his retirement and not after that whereas the respondent has been appointed as Chairman, National Accountability Bureau at the age of about seventy years which, according to Mr. Orakzai, amounts to 'judicial indiscipline' besides militating against the constitutional mandate regarding separation of the judiciary from the executive. While relying upon the spirit of Article 213 of the Constitution regarding appointment of the Chief Election Commissioner he has further argued that 'consultation' between the Leader of the House and the Leader of the Opposition in the National Assembly contemplated by section 6(b)(i) of the National Accountability Ordinance, 1999 should be understood to be aimed at evolving a 'consensus' between the said two constitutional functionaries and if they fail to arrive at a consensus then they are to draw out lists of their respective recommendees which lists may then be submitted before the other authority involved in the matter which in the case of section 6(b)(i) of the National Accountability Ordinance, 1999 happens to be the President of Pakistan. Mr. Orakzai has lastly submitted that cancellation of the respondent's earlier appointment as Chairman, National Accountability Bureau on 8th October, 2010 and his fresh appointment as such on 9th February, 2011 "with immediate effect"

meant that the respondent's earlier term of office for four years commencing on 8th October, 2010 had been terminated and he had been appointed again for another term of four years commencing on 9th February, 2011 which was not permissible under section 6(b)(i) of the National Accountability Ordinance, 1999 which places an embargo upon extension in a four years' term or reappointment for another term. He has referred in this context to the judgment rendered by this Court in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others* (PLD 2010 SC 1109). He has pointed out that the Notification dated 8th October, 2010 as well as the Notification dated 9th February, 2011 carry the same number and that, according to him, was absurd because the President had recalled his order dated 7th October, 2010 on 9th February, 2011 and his recalling of that order could not have retrospective effect as the earlier order dated 7th October, 2010 and the Notification dated 8th October, 2010 had already been acted upon.

6. Mr. Muhammad Akram Sheikh, Sr. ASC appearing for the petitioner in Constitution Petition No. 61 of 2010 has narrated the history of section 6 of the National Accountability Ordinance, 1999 and has highlighted that the President of Pakistan has constantly remained the appointing authority of Chairman, National Accountability Bureau but the persons to be consulted by him before making such an appointment have been changing from time to time. He has pointed out that in the case of *Khan Asfandiyar Wali and others v. Federation of Pakistan and others* (PLD 2001 SC 607) a recommendation had been made by this Court that Chairman, National Accountability Bureau ought to be appointed by the President in consultation with the Chief Justice of Pakistan and that recommendation had been given effect to through the National Accountability Bureau (Amendment) Ordinance XXXV of 2001 but subsequently through the National Accountability Bureau (Amendment) Ordinance CXXXIII of 2002 the Chief Justice of Pakistan had been excluded from the consultees and he was substituted by the Leader of the House and the Leader of the Opposition in the National Assembly who were to be consulted by the President before making an appointment of Chairman, National Accountability Bureau. However, in the case of *Dr. Mobashir Hassan and others v. Federation of Pakistan and others* (PLD 2010 SC 265) this Court had reiterated its earlier recommendation and suggestion with regard to consultation with the Chief Justice of Pakistan in the matter of such appointment and that recommendation and suggestion had once again been repeated by this Court in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others* (*supra*). He has referred to the cases of *Irshad Ahmad Shaikh v. The State*

(2000 SCMR 814) and *All Pakistan Newspapers Society and others v. Federation of Pakistan and others* (PLD 2004 SC 600) to maintain that even an *obiter dictum* of this Court is worthy of great respect but in the matter of appointment of the respondent as Chairman, National Accountability Bureau no consultation whatsoever was made with the Chief Justice of Pakistan and such omission reflected adversely upon the legality of the appointment so made.

7. It has also been argued by Mr. Sheikh that in terms of section 6(b)(i) of the National Accountability Ordinance, 1999 the President of Pakistan was obliged to personally consult the Leader of the Opposition in the National Assembly (the petitioner in Constitution Petition No. 61 of 2010) before appointing the respondent as Chairman, National Accountability Bureau but admittedly the President had never personally consulted the Leader of the Opposition in the National Assembly in that regard. He has maintained that on account of that omission a mandatory requirement of section 6(b)(i) of the National Accountability Ordinance, 1999 had remained unfulfilled and, thus, the appointment of the respondent was patently illegal. He has referred in this respect to the age old principle of law that when the law requires a thing to be done in a particular manner then that thing must be done in that manner alone or not at all.

8. Mr. Sheikh has further argued that in the case in had the purported consultation with the Leader of the Opposition in the National Assembly in the matter of appointment of the respondent as Chairman, National Accountability Bureau had been made by the Prime Minister of Pakistan in his capacity as the Leader of the House in the National Assembly which consultation was not only against the mandate of section 6(b)(i) of the National Accountability Ordinance, 1999 but the same was also not in consonance with the interpretation of the word ‘consultation’ handed down by the superior courts of the country through various judgments. He has pointed out that in the case of *Al-Jehad Trust and others v. Federation of Pakistan and others* (PLD 1996 SC 324) this Court had held that a ‘consultation’ has to be “effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfairplay” and an identical interpretation of that word had also been advanced in the case of *Al-Jehad Trust and another v. Federation of Pakistan and others* (PLD 1997 SC 84). He has also highlighted that in the case of *Sindh High Court Bar Association v. Federation of Pakistan and 4 others* (PLD 2009 Karachi 408) the High Court of Sindh had held that for a consultation to be meaningful and purposive an “attempt should be

made to reach at some consensus” and that the required consultative process should be in writing. In this context he has also referred to the case of *Sindh High Court Bar Association and another v. Federation of Pakistan and others* (PLD 2009 SC 879) wherein this Court had observed that “by all means the first priority has to be directed to evolving consensus between the consultees by mutual discussion of the merits and demerits of the concerned candidate.” According to Mr. Sheikh the purported consultation made by the Prime Minister of Pakistan with the Leader of the Opposition in the National Assembly *vis-à-vis* the respondent fell far short of being consensus-oriented because in the solitary telephone call made in that connection by the Prime Minister to the Leader of the Opposition in the National Assembly no serious effort had been made to evolve a consensus on the name of the respondent for the office of Chairman, National Accountability Bureau. Mr. Sheikh has also referred in this respect to a letter written by the Leader of the Opposition in the National Assembly to the Prime Minister on 24th September, 2010, a copy whereof has been appended with Constitution Petition No. 61 of 2010 at page No. 18 thereof. He has maintained that the objections of the Leader of the Opposition in the National Assembly against the respondent’s appointment as Chairman, National Accountability Bureau had been brushed aside by the Prime Minister on the basis of an expression of confidence in the respondent’s integrity and impartiality by Mian Muhammad Nawaz Sharif, the head of the political party to which the Leader of the Opposition in the National Assembly belongs, more than a decade ago when the respondent was serving as the Chief Justice of the High Court of Sindh but that expression of confidence by Mian Muhammad Nawaz Sharif was irrelevant to the issue because Mian Muhammad Nawaz Sharif was not a consultee in terms of section 6(b)(i) of the National Accountability Ordinance, 1999, he was not the Leader of the Opposition in the National Assembly at the time of the purported consultation and he did not represent the entire opposition in the National Assembly. Thus, according to Mr. Sheikh, apart from not being consensus-oriented the purported consultation was also not meaningful because the consideration weighing with the Prime Minister for rejecting the objections and concerns of the Leader of the Opposition in the National Assembly *qua* the respondent were extraneous and irrelevant. Mr. Sheikh has also maintained that the purported consultation was not even purposive because the purpose of such consultation, on account of our unfortunate history of victimization of the political opposition through the National Accountability Bureau or its predecessor institutions, was to appoint a Chairman, National Accountability Bureau who

inspired confidence of the apprehensive potential victim, i.e. the political opposition in the country.

9. Mr. Sheikh has gone on to argue that appointment of Chairman, National Accountability Bureau is not a discretionary power of the President of Pakistan and in making such an appointment the President was, in terms of Article 48(1) of the Constitution, bound to act on the advice of the Prime Minister but in the case of first appointment of the respondent as Chairman, National Accountability Bureau on 8th October, 2010 the Prime Minister had tendered no advice to the President. With reference to some newspaper clippings appended with Constitution Petition No. 61 of 2010 he has pointed out that as a matter of fact the Prime Minister had made a public statement that he had tendered no advice whatsoever to the President for appointment of the respondent as Chairman, National Accountability Bureau. According to Mr. Sheikh, such appointment of the respondent as Chairman, National Accountability Bureau was an act of deliberate defiance of the mandate of Article 48(1) of the Constitution by the President and also an unconstitutional abdication of his constitutional jurisdiction by the Prime Minister in favour of the President and, thus, the impugned appointment of the respondent was not a valid appointment in the eyes of the Constitution. He has maintained that the notion of 'substantial compliance' has never been accepted in the matter of constitutional mandates or requirements. He has also referred in this context to Article 74(1) of the Indian Constitution and to the case of *Govinddassammy v. The President of India* (2001 CTC 423) wherein it had been held that the Indian President could not do anything without the advice of Ministers.

10. With reference to some Articles of the United Nations Convention on Corruption Mr. Sheikh has also argued that establishing independent and impartial anti-corruption bodies in the country is an obligation and commitment of the Government of Pakistan because Pakistan is a signatory to the said Convention and she has also formally ratified it but by appointing the respondent as Chairman, National Accountability Bureau such obligation and commitment have been violated and infringed.

11. As far as the fresh appointment of the respondent on 9th February, 2011 is concerned Mr. Sheikh has contended that undeniably such fresh appointment was made without the President or the Prime Minister consulting the Leader of the

Opposition in the National Assembly at all and, therefore, the mandatory requirement in that regard contained in section 6(b)(i) of the National Accountability Ordinance, 1999 had been flagrantly violated and that violation had vitiated the respondent's fresh appointment. He has further contended that even in the matter of the second appointment of the respondent the Chief Justice of Pakistan had not been consulted rendering such appointment further laconic. He has gone on to submit that only the President and the Prime Minister were involved in the respondent's second appointment and that appointment was vitiated on account of conflict of interest because the President was personally involved in many criminal cases being pursued by the National Accountability Bureau and the Prime Minister had previously been convicted for an offence under the National Accountability Ordinance, 1999 but he had subsequently been acquitted in appeal. With reference to the case of *Alexia Morrison v. Theodore B. Olson* (487 US 654) he has maintained that in cases of potential conflict of interest the judicial branch is most suitable to make an appointment to such an office. In the context of conflict of interest he has further referred to the Oaths of Office prescribed by the Constitution for the President of Pakistan and the Prime Minister and has pointed out that before entering upon their respective offices the President and the Prime Minister had both sworn before Almighty Allah "That I will not allow my personal interest to influence my official conduct or my official decisions". He has also argued that such fresh appointment of the respondent was in fact his second appointment for a fresh term of four years whereas by virtue of the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 the respondent could be appointed only once for a "non-extendable period of four years". He has maintained that through the fresh appointment of the respondent something has been achieved indirectly which could not have been done directly and this amounted to committing fraud upon the relevant statute. He has pointed out that in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* this Court has already held in most categorical terms that the statutory embargo placed by the use of the words "non-extendable period" of some specified years *vis-à-vis* an office in the National Accountability Bureau cannot be circumvented or overcome by making a fresh appointment to the relevant office for a fresh term of that office.

12. As regards the maintainability of his client's Constitution Petition filed before this Court under Article 184(3) of the Constitution Mr. Sheikh has maintained that appointment of Chairman, National Accountability Bureau is

inextricably linked with enforcement of many Fundamental Rights of the people of this country including right to life, right to liberty, due process of law, fair trial and access to justice and this Court being the guardian of those rights is under an obligation to ensure that only such person is appointed to that office who can protect such rights and can prosecute the violators. He has highlighted that under the National Accountability Ordinance, 1999 the Chairman, National Accountability Bureau has vast powers regarding initiating or authorizing inquiries, investigations and trials besides the powers of freezing properties and entering into or approving plea-bargains with suspects being inquired into or accused persons being investigated or tried which powers are essentially judicial or quasi-judicial in nature and, thus, the matter of appointment of Chairman, National Accountability Bureau necessarily involves issues concerning access to justice which the jurisprudence of this country now recognizes as issues of basic human rights. As hundreds of inquiries, investigations and trials are to be dealt with by the Chairman, National Accountability Bureau, therefore, he has also maintained that the matter of appointment of Chairman, National Accountability Bureau is a matter or question of public importance within the purview of Article 184(3) of the Constitution. In this connection Mr. Sheikh has also pointed out that the matter of appointment of Chairman, National Accountability Bureau has repeatedly been found by this Court to be of such public importance that in the case of *Khan Asfandiyar Wali and others v. Federation of Pakistan and others* (*supra*) a recommendation had been made by this Court that Chairman, National Accountability Bureau ought to be appointed by the President in consultation with the Chief Justice of Pakistan and subsequently that recommendation and suggestion had also been repeated and reiterated in the cases of *Dr. Mobashir Hassan and others v. Federation of Pakistan and others* (*supra*) and *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others* (*supra*). He has gone on to submit in this regard that the office of an independent investigator or prosecutor is of such great public importance that despite the absence of any express provision regarding an Independent Counsel in the Constitution of the United States of America the power to appoint an Independent Counsel for the purposes of investigation and prosecution of high State functionaries was upheld as constitutionally valid in the case of *Alexia Morrison v. Theodore B. Olson* (*supra*).

13. In the end Mr. Sheikh has impassionedly submitted that as the guardian of the people's Fundamental Rights this Court is under a constitutional obligation to

ensure that affirmative or negative investigatorial and prosecutorial jurisdiction and discretionary role of the concerned institutions of the State do not fall in the hands of those the validity of whose appointment or impartiality of their conduct is clouded with doubts of serious nature.

14. As against that Mr. Abdul Hafeez Pirzada, Sr. ASC appearing for the Federation of Pakistan has argued that the Constitution Petitions in hand are not maintainable as the requisite requirements of Article 184(3) of the Constitution are not fulfilled by them. He has submitted that although the issue raised in these petitions involves a question of public importance yet that issue is not of enforcement of Fundamental Rights or access to justice. According to him, it is a case of appointment to a public office which is an executive office and not a judicial office and, therefore, such appointment is not relevant to access to justice. He has referred in this respect to the cases of *Jamat-e-Islami through Amir and others v. Federation of Pakistan and others* (PLD 2009 SC 549) and *All Pakistan Newspapers Society and others v. Federation of Pakistan and others* (PLD 2004 SC 600).

15. Mr. Pirzada has further argued that two Constitution Petitions (*Rashid A. Akhund v. President of Pakistan* (Constitution Petition No. 2936 of 2010) and *Muhammad Siddique Mirza v. Federal Government of Pakistan* (Constitution Petition No. 2931 of 2010)) challenging the same appointment of the respondent are presently pending before the High Court of Sindh and in view of pendency of those petitions before the High Court of Sindh this Court may await the decision of those petitions so as to be benefitted by the views of the High Court on the subject. He has maintained that after the recent amendment of Article 186A of the Constitution through the 18th Amendment of the Constitution it is no longer possible for this Court to lift those petitions from the High Court and to hear and decide the same itself.

16. Mr. Pirzada has also argued that the objections raised by the Leader of the Opposition in the National Assembly against the respondent's appointment as Chairman, National Accountability Bureau are based upon presumptive fears and a prayer based upon a presumptive fear cannot be entertained by this Court. Entertaining such a prayer, according to him, would only call for an "academic exercise in respect of unborn issues" and in support of this argument he has referred to the cases of *Qazi Hussain Ahmad, Ameer Jamaat-e-Islami Pakistan*

and others v. General Pervez Musharraf, Chief Executive and others (PLD 2002 SC 853) and *Muhammad Rafiq Tarrar v. Justice Mukhtar Ahmad Junejo, Acting Chief Election Commissioner and 6 others* (PLD 1998 Lahore 461). According to Mr. Pirzada, the objections of the Leader of the Opposition in the National Assembly to the respondent's appointment as Chairman, National Accountability Bureau are baseless and for such objections some past conduct of the respondent has been relied upon whereas the question regarding the respondent's impartiality cannot be determined without appreciating severance of his ties with the past on account of his remaining a Judge and Chief Justice of the High Court of Sindh and then a Judge of this Court. He has referred in this context to the case of *Islamic Republic of Pakistan v. Abdul Wali Khan, M.N.A.* (PLD 1976 SC 57).

17. As regards the issue of 'consultation' provided for by the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 Mr. Pirzada has maintained that the 'consultation' contemplated by section 6(b)(i) is a consultation between two political leaders and such political consultation is different from constitutional consultation. He has gone on to submit that in his letters to the Prime Minister the Leader of the Opposition in the National Assembly had never raised the point that the necessary consultation had to be done by the President and not by the Prime Minister and, thus, the Leader of the Opposition in the National Assembly is now estopped from raising such an objection.

18. Mr. Pirzada has emphasized that in the 'consultation' contemplated by the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 no primacy is available to the Leader of the Opposition in the National Assembly who is merely a consultee and a consultee's opinion cannot be accepted as binding and if that were to be so accepted then, according to him, the power of appointment of Chairman, National Accountability Bureau would practically vest in the Leader of the Opposition in the National Assembly which was never the intention of the relevant law. He has submitted that before the respondent's appointment as Chairman, National Accountability Bureau the Prime Minister had indeed consulted the Leader of the Opposition in the National Assembly and such consultation was sufficient for the purposes of section 6(b)(i) of the National Accountability Ordinance, 1999.

19. It has forcefully been argued by Mr. Pirzada that the Chief Justice of Pakistan was not a statutory consultee at the time of appointment of the respondent as Chairman, National Accountability Bureau and, therefore, nothing turns on failure of the President or the Prime Minister to consult him before the respondent's appointment. He has submitted that on the basis of a recommendation made by this Court in the case of *Khan Asfandiyar Wali and others v. Federation of Pakistan and others* (*supra*) the relevant law had been amended and the Chief Justice of Pakistan was made a consultee in the matter but subsequently the law was amended again and the provision regarding the Chief Justice of Pakistan being a consultee in the matter was deleted and that amendment in the relevant law has never been challenged by anybody so far. He has further submitted that the above mentioned recommendation made by this Court was merely an *obiter dictum* which was, at best, entitled only to respect and not enforceability.

20. Mr. Pirzada has not disputed that the power of appointment of Chairman, National Accountability Bureau is not a discretionary power of the President of Pakistan and by virtue of the provisions of Article 48(1) of the Constitution the President is obliged and bound to act on the advice of the Prime Minister in the matter of such appointment. He has also not denied that in the earlier appointment of the respondent as Chairman, National Accountability Bureau on 8th October, 2010 the President had not acted on any advice of the Prime Minister in that regard but he has hastened to add that on that occasion there was a substantial compliance of the spirit of Article 48(1) of the Constitution as well as of section 6(b)(i) of the National Accountability Ordinance, 1999 and the Rules of Business of the Federal Government. He has maintained in this context that for the purposes of coexistence and survival of section 6(b)(i) of the National Accountability Ordinance, 1999 with Article 48(1) of the Constitution section 6(b)(i) of the National Accountability Ordinance, 1999 is to read down so as to adjust with the mandate of Article 48(1) of the Constitution.

21. It has lastly been submitted by Mr. Pirzada that fresh appointment of the respondent as Chairman, National Accountability Bureau on 9th February, 2011 had been made by the President of Pakistan on the advice of the Prime Minister and, therefore, the constitutional lacuna, if any, in his earlier appointment as such on 8th October, 2010 stood properly removed and rectified. He has further maintained that the fresh appointment of the respondent as Chairman, National

Accountability Bureau on 9th February, 2011 is to be considered as in continuity of his earlier appointment as such on 8th October, 2010 and such fresh appointment cannot be considered as an appointment for a different and new term of office.

22. Dr. Khalid Ranjha, Sr. ASC appearing for Mr. Justice (Retired) Syed Deedar Hussain Shah has submitted that these Constitution Petitions are in the nature of *quo warranto* and *certiorari* and have been filed under Order XXV rule 6 of the Supreme Court Rules, 1980 whereas two Constitution Petitions (Constitution Petition No. 2931 of 2010 and Constitution Petition No. 2936 of 2010) filed by some other persons regarding the same issue are already pending before the High Court of Sindh and, therefore, this Court should await the decision and views of the High Court on the matter before proceeding further with these petitions.

23. Quite contrary to the stand taken by Mr. Abdul Hafeez Pirzada, Sr. ASC appearing for the Federation of Pakistan, Dr. Ranjha has maintained that the necessary advice under Article 48(1) of the Constitution had in fact been tendered by the Prime Minister to the President before the respondent's first appointment as Chairman, National Accountability Bureau on 8th October, 2010 and by virtue of the provisions of Article 48(4) of the Constitution the question whether any, and if so what, advice was tendered to the President by the Prime Minister cannot be inquired into by this Court. He has also submitted that a judgment of facts by a constitutional functionary is not to be gone into by a court of law and in this regard he has referred to the cases of *Aftab Ahmad Khan Sherpao v. Sardar Farooq Ahmad Khan Leghari and others* (PLD 1997 Peshawar 93) and *Mian Manzoor Ahmad Wattoo v. Federation of Pakistan and 3 others* (PLD 1997 Lahore 38). He has further maintained in this context that under Articles 46 and 91 of the Constitution the Prime Minister and the Federal Ministers are required to inform, aid and advise the President and that function had duly been performed by the Prime Minister before the respondent's first appointment as Chairman, National Accountability Bureau on 8th October, 2010.

24. Dr. Ranjha has also argued that the process of appointment of the respondent as Chairman, National Accountability Bureau had been initiated after the express orders of this Court passed in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others* (*supra*) and in the judgment delivered in

that case this Court had directed that an appointment to the office of Chairman, National Accountability Bureau was to be made in terms of section 6(b)(i) of the National Accountability Ordinance, 1999 and no direction had been made in that judgment for an appointment to be made in terms of the requirements of Article 48(1) of the Constitution. It has been maintained by Dr. Ranjha that the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 had been fully complied with while appointing the respondent as Chairman, National Accountability Bureau for the first time on 8th October, 2010. He has further submitted that in the matter of that appointment the Prime Minister had to walk on a tight rope creating a balance between the above mentioned judgment of this Court, the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 and the mandate of Article 48(1) of the Constitution.

25. While dilating upon the meanings of the word ‘consultation’ used in section 6(b)(i) of the National Accountability Ordinance, 1999 Dr. Ranjha has referred to Black’s Law Dictionary and has maintained that consultation does not mean persuasion or approval of the consultee.

26. Dr. Ranjha has summed up his arguments with a plea that the respondent is a very dignified and honourable man and he is not to be held at fault for others’ lack of correct understanding or application of the Constitution or the law, if any.

27. Maulvi Anwarul Haq, the learned Attorney-General for Pakistan, appearing on the Court’s notice has admitted that the matter of appointment of Chairman, National Accountability Bureau does not fall within the discretionary powers of the President and for such appointment the President has to act upon an advice tendered to him by the Prime Minister in terms of Article 48(1) of the Constitution. He has, however, maintained that the earlier appointment of the respondent as Chairman, National Accountability Bureau on 8th October, 2010 was in consonance with the spirit of Article 48(1) of the Constitution, section 6(b)(i) of the National Accountability Ordinance, 1999 and the Rules of Business of the Federal Government because in the matter of that appointment the Prime Minister was actively involved, he had consulted the Leader of the Opposition in the National Assembly and had then ‘seen’ the summary forwarded to the President for the respondent’s appointment although no formal advice was tendered by him to President in that regard. The learned Attorney-General has gone on to submit that the earlier appointment of the respondent as Chairman,

National Accountability Bureau on 8th October, 2010 had subsequently been cancelled and he had again been appointed to that office on 9th February, 2011 after removal of the constitutional defect in his earlier appointment. He has, thus, maintained that the present appointment of the respondent as Chairman, National Accountability Bureau is without any constitutional or legal blemish and, therefore, the petitions in hand should be dismissed. Like Mr. Abdul Hafeez Pirzada, Sr. ASC appearing for the Federation of Pakistan, the learned Attorney-General has also maintained that the Chief Justice of Pakistan is not a constitutionally or statutorily recognized consultee in the matter of appointment of Chairman, National Accountability Bureau and, thus, absence of consultation with him in the matter cannot vitiate an appointment made to that office

28. After hearing Mr. Shahid Orakzai petitioner in person and the learned counsel for the other parties as well as the learned counsel for the Federation of Pakistan and the learned Attorney-General for Pakistan at great length on many dates of hearing and after going through the relevant record of this case with their able assistance we have observed that the respondent namely Mr. Justice (Retired) Syed Deedar Hussain Shah was appointed Chairman, National Accountability Bureau not once but twice. Initially he was appointed to that office by the President of Pakistan on 7th October, 2010 in terms of section 6(b)(i) of the National Accountability Ordinance, 1999 (which section specifies a term of four years for that office) and a Notification in that regard was issued on 8th October, 2010. After such appointment the respondent had actually been discharging the duties and performing the functions of that office till 9th February, 2011 when through another Notification of that date the President withdrew/recalled his earlier order dated 7th October, 2010 whereby the respondent had been appointed Chairman, National Accountability Bureau and consequently the earlier Notification dated 8th October, 2010 was rescinded/cancelled. On the same date, i.e. 9th February, 2011 the President, through the same Notification of that date, again appointed the respondent as Chairman, National Accountability Bureau in terms of section 6(b)(i) of the National Accountability Ordinance, 1999, i.e. for a term of four years in office “with immediate effect”. We have already observed above that as cancellation of the respondent’s earlier appointment and his fresh appointment as Chairman, National Accountability Bureau had come about during the pendency and hearing of the present petitions and as the said development had been brought to the notice of this Court by the Federation of Pakistan itself, therefore, we had decided to treat that development as a part of the pending issue

and had decided to determine its effect on the same without requiring the petitioners to amend their petitions in respect of such development. There is no gainsaying the fact that the law is by now quite settled that a Court seized of a matter can not only take notice of any relevant development taking place during the pendency of the *lis* but it can also mould the relief to be granted keeping in view such development and none of the learned counsel representing different parties to the present petitions has disputed that legal position or has objected to the course adopted by us in that regard. Most of the arguments addressed before this Court in connection with the present petitions had been addressed in respect of the first appointment of the respondent on 8th October, 2010 but all such arguments had been reduced to those of academic interest only because during the pendency of these petitions the respondent's first appointment had been revoked on 9th February, 2011. We have, therefore, decided to, as far as possible, avoid making any comment on the arguments addressed before the Court in respect of the respondent's first appointment and have further decided to determine the fate of the present petitions mainly on the basis of the arguments addressed before the Court in respect of the second appointment of the respondent which had come about and had commenced on 9th February, 2011.

29. In the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others* (*supra*) this Court had made some detailed comments in respect of the reasons behind promulgation of the National Accountability Ordinance, 1999, the qualifications for holding the office of Chairman, National Accountability Bureau, the consultees in the matter of his appointment and the important duties to be discharged and the prestigious functions to be performed by him. It had been observed by this Court in that case as follows:

“37. The National Accountability Bureau Ordinance 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 of 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 SC 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. XXXVI 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 subsection (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 subsection (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."

30. In the above mentioned case assumption of the office of Acting Chairman, National Accountability Bureau by a Deputy Chairman at a time when the office of Chairman was vacant had been declared to be illegal and it was *inter alia* directed by this Court 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."

It was in that backdrop that the respondent herein namely Mr. Justice (Retired) Syed Deedar Hussain Shah had firstly been appointed Chairman, National Accountability Bureau on 8th October, 2010 and then upon withdrawal/recall of

the order of his appointment dated 07.10.2010 and rescission/cancellation of the Notification dated 8th October, 2010 through the Notification dated 9th February, 2011 he was appointed to that office again with effect from the last mentioned date. It is true that the subsequent appointment of the respondent on 9th February, 2011 had been made by the President of Pakistan upon an advice tendered to him in that regard by the Prime Minister in terms of Article 48(1) of the Constitution but at the same time it is equally true that the said appointment had not been made in terms of section 6(b)(i) of the National Accountability Ordinance, 1999, as directed by this Court. Section 6(b)(i) of the National Accountability Ordinance, 1999, as it stood on 9th February, 2011 and as it stands today, reads as follows:

“There shall be a Chairman NAB to be appointed by the President in consultation with the Leader of the House and the Leader of the Opposition in the National Assembly for a non-extendable period of four 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. -----”

It is not disputed that before appointment of the respondent as Chairman, National Accountability Bureau on 9th February, 2011 neither the President of Pakistan nor the Prime Minister had consulted the Leader of the Opposition in the National Assembly in any manner whatsoever and, thus, a mandatory requirement in that regard had remained unfulfilled. The learned counsel for the Federation of Pakistan has vehemently argued that the appointment of the respondent as Chairman, National Accountability Bureau on 9th February, 2011 was in fact in continuation of or in supersession of his appointment as such made on 8th October, 2010 and before the appointment made on 8th October, 2010 the Leader of the Opposition in the National Assembly had indeed been consulted. We have, however, remained unable to subscribe to this argument of the learned counsel for the Federation of Pakistan for the simple reason that the respondent's appointment made on 9th February, 2011 was made “with immediate effect”, i.e. with effect from 9th February, 2011 and not with effect from 8th October, 2010 and at the time of such appointment it was never made clear either in the order passed by the President or in the Notification issued in that regard that the respondent's fresh appointment on 9th February, 2011 was in continuation of or in supersession of his earlier appointment made on 8th October, 2010. In this view of the matter the respondent's appointment as Chairman, National Accountability Bureau on 9th February, 2011 was, for all intents and purposes, a fresh appointment which required fresh mandatory consultation with the Leader of the Opposition in the National Assembly which, admittedly, was never resorted to. It is also not denied that before appointing the respondent for the second time, as in the case of his

first appointment, no consultation had been made by the President or the Prime Minister with the Chief Justice of Pakistan as repeatedly recommended and suggested by this Court in the cases mentioned above.

31. Mr. Shahid Orakzai petitioner has pointed out before us, and we have been intrigued to notice, that the Notification dated 8th October, 2010 as well as the Notification dated 9th February, 2011 carry the same number (No.F.8.(17)/2010-A.I) and that surely was an absurdity because the President had recalled his order dated 7th October, 2010 on 9th February, 2011 and his recalling of that order could not have retrospective effect as the earlier order dated 7th October, 2010 and the Notification dated 8th October, 2010 had already been acted upon and during the period between 8th October, 2010 and 9th February, 2011, i.e. for a period of more than four months the respondent had actively been discharging the duties and performing the functions of the relevant office. We are quite sanguine that assigning the same number to two different Notifications issued on two different dates, which dates were months apart from each other, could not establish disappearance or evaporation of the respondent's first appointment or the period spent by him in the office in that connection. We are of the considered opinion that adoption of such a stratagem or methodology could neither establish continuity in the term of office of the respondent nor could it superimpose the second appointment of the respondent upon his first appointment so as to portray the respondent's second appointment as practically his first appointment or a continuation of his first appointment. It is noteworthy that the Notification dated 9th February, 2011 withdrawing/recalling the President's order of the respondent's first appointment, rescinding/canceling the Notification dated 8th October, 2010 and appointing him to the same office for the second time was not even a Corrigendum Notification seeking to rectify any mistake committed at the time of the respondent's first appointment because in that case the subsequent Notification would have specified so but it certainly did not say so at all and instead the subsequent Notification categorically and unambiguously recalled and cancelled the respondent's first appointment. In view of these irrefutable factors we have entertained no manner of doubt that the respondent's two appointments were, for all intents and purposes as well as for all legal consequences, two distinct and separate appointments.

32. It is of critical importance to mention here that according to section 6(b)(i) of the National Accountability Ordinance, 1999 a Chairman, National

Accountability Bureau can be appointed by the President for a “non-extendable period of four years” and, likewise, by virtue of the provisions of section 8(a)(iii) of the same Ordinance a Prosecutor-General Accountability can hold that office for a “non-extendable period of three years”. While interpreting the term “non-extendable period” this Court had observed and concluded in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* as follows:

“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 provisions 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:

“(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 "NON-EXTENDABLE" was

added before the word "PERIOD" in clause (iii) of subsection (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 Senior Advocate Supreme Court 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 terms:

"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 v. President of Pakistan and others (PLD 1993 SC 473) and on the case of Haji Muhammad Boota and others v. Member (Revenue), Board of Revenue, Punjab and others (PLD 2003 SC 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 SC 1445) and to Imtiaz Ahmed Lali's case (PLD 2007 SC 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 case of *Madden v. Nelson* (1889 AC 626) and it was Lord Halsbury 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 Muhammad 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 all 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, Advocate Supreme Court 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."

The said judgment shows, and shows quite unmistakably, that the words "non-extendable period" used by the relevant law with reference to appointment to an office in the National Accountability Bureau practically mean an appointment of a person for one term of office only and no fresh appointment of the same person can be made to that office whether he completes the original term of office or not. This is so because whether the original term of office is completed by him or not the person concerned would serve in that office for more than the fixed and "non-extendable" period if he is appointed again to that office even after one day of his original appointment. We are conscious of the fact that in the above mentioned precedent case Mr. Irfan Qadir had completed his full term of office before he

was appointed afresh for another full term of the relevant office and in the case before us the respondent namely Mr. Justice (Retired) Syed Deedar Hussain Shah had been appointed afresh before completion of his first term of office but we feel convinced that it would be very dangerous to hold that a fresh appointment made before completion of the term of an earlier appointment would not be hit by the negative command of the provision regarding “non-extendable period”. In our considered opinion permitting such a fresh appointment after premature discontinuation of an earlier appointment some time before expiry of the term of the earlier appointment is capable of grave misuse and abuse and would surely have the effect of extending the period of appointment beyond the maximum and “non-extendable” period provided by the law for the office. If such fresh appointment after premature discontinuation of the earlier appointment is made permissible then before the expiry of the first term the appointment would be terminated on the basis of some cooked up pretext, ruse or subterfuge and a favourite incumbent would be appointed afresh for another term of office and that surely would destroy the very spirit and the very object of the law in declaring that an appointment can be made for a “non-extendable period”. We have already observed above that upon his first appointment as Chairman, National Accountability Bureau the respondent had discharged his duties and had performed his functions from 8th October, 2010 to 9th February, 2011, i.e. for a period of more than four months and upon recalling/withdrawing of the order of his earlier appointment on 9th February, 2011 he was appointed again as Chairman, National Accountability Bureau “with immediate effect”, i.e. with effect from 9th February, 2011 “in terms of Section 6(b)(i) of the National Accountability Ordinance, 1999” which terms meant that even his fresh appointment was for a period of four years commencing on 9th February, 2011. We have been informed that after revocation of his first appointment the respondent had never relinquished the charge of his office and upon his second appointment he had never assumed the charge again and he had simply continued to hold that office as if nothing had happened and no break had taken place at all! Such a device adopted in the matter had, thus, unmistakably extended the total period of his appointment as Chairman, National Accountability Bureau beyond the maximum period of four years provided by the law and we are constrained to observe that through adoption of such a maneuver violence, if not fraud, had been committed upon the relevant statute. When confronted with this legal impossibility Mr. Abdul Hafeez Pirzada, Sr. ASC appearing for the Federation of Pakistan had very casually maintained that this Court could order reduction of the

respondent's second term of office of four years by deducting from it the period for which he had already served as Chairman, National Accountability Bureau on the basis of his first appointment. With deference to his seniority in the profession and charming mannerism in the Court we could only smile at the said suggestion made by Mr. Pirzada as the period for which a Chairman, National Accountability Bureau is to hold that office has been fixed by the law itself and no Court or authority has the power or jurisdiction to curtail that period as long as he holds that office and also because such power of reduction of his fixed term of office would impinge upon and detract from independence of that high office which independence must jealously be guarded.

33. Mr. Shahid Orakzai's reliance upon Articles 182 and 207 of the Constitution for maintaining that a retired Judge of the superior judiciary can be available for some other assignment till two or three years of his retirement and not after that and, thus, the respondent's appointment as Chairman, National Accountability Bureau at the age of about seventy years amounts to 'judicial indiscipline' besides militating against the constitutional mandate regarding separation of the judiciary from the executive has been found by us to be inapt, though motivated with the best of intentions. The Constitution itself and many other laws expressly provide for various offices which a retired Judge of the superior judiciary can hold without any restriction regarding age and the National Accountability Ordinance, 1999 is one of such laws. Apart from that Article 4(2)(b) of the Constitution stipulates that "no person shall be prevented from or be hindered in doing that which is not prohibited by law". Other than raising some issues of propriety in this context Mr. Orakzai has not been able to refer to any law which prevented the respondent's appointment as Chairman, National Accountability Bureau at the age of three scores and ten and, therefore, this contention of his may not detain us any further.

34. Adverting to the question of maintainability of the present petitions raised by Mr. Abdul Hafeez Pirzada, Sr. ASC appearing for the Federation of Pakistan and Dr. Khalid Ranjha, Sr. ASC representing Mr. Justice (Retired) Syed Deedar Hussain Shah we may straightaway observe that the petitions in hand have been filed under Article 184(3) of the Constitution and it has been conceded before us by all concerned that these petitions certainly involve a question of public importance. After all, a Chairman, National Accountability Bureau is to deal with hundreds of inquiries, investigations, arrests and trials and thousands of people

are affected by his decisions taken in those respects and those persons may include the serving Prime Minister, Chairman of the Senate, Speaker of the National Assembly, Federal Ministers, Attorney-General, Chief Ministers, Speakers of the Provincial Assemblies, Provincial Ministers, Members of the Parliament and Members of the Provincial Assemblies and, therefore, an appointment to that office is surely a matter of public importance. Mr. Muhammad Akram Sheikh, Sr. ASC has argued that many Fundamental Rights of the people of this country including right to life, right to liberty, due process of law, fair trial and access to justice are directly affected or influenced by a person's appointment to the office of Chairman, National Accountability Bureau and we have found that the said argument of his finds sufficient support from the following observations made by this Court in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* which observations have already been reproduced in the earlier part of this judgment but are being reproduced here again due to the necessity of context:

“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.”

The case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* had stemmed from a Constitution Petition filed before this Court under Article 184(3) of the Constitution against assumption of the office of Acting Chairman, National Accountability Bureau by a Deputy Chairman, National Accountability Bureau at a time when the office of Chairman was lying vacant. That Constitution Petition was not only entertained by this Court but after full-dressed hearing the same was allowed and assumption of the office of Acting

Chairman by the Deputy Chairman was declared to be illegal. It goes without saying that if a Constitution Petition filed under Article 184(3) of the Constitution is maintainable before this Court against assumption of office of an Acting Chairman, National Accountability Bureau then no serious argument can be advanced against maintainability of such a petition against appointment of a Chairman, National Accountability Bureau.

35. Mr. Abdul Hafeez Pirzada, Sr. ASC appearing for the Federation of Pakistan and Dr. Khalid Ranjha, Sr. ASC representing Mr. Justice (Retired) Syed Deedar Hussain Shah have also maintained that two Constitution Petitions (*Rashid A. Akhund v. President of Pakistan* (Constitution Petition No. 2936 of 2010) and *Muhammad Siddique Mirza v. Federal Government of Pakistan* (Constitution Petition No. 2931 of 2010)) challenging the self-same appointment of the respondent are presently pending before the High Court of Sindh and in view of pendency of those petitions before the High Court of Sindh this Court may await the decision of those petitions so as to be benefitted by the views of the High Court on the subject. Upon our request Mr. Pirzada has procured and produced before us a copy of the order dated 22.02.2011 passed in those petitions by a learned Division Bench of the High Court of Sindh which shows that the High Court of Sindh has decided to await the decision of this Court in the present petitions. In view of that order passed by the High Court of Sindh the above mentioned submission made by the learned counsel has lost its efficacy, if not its relevance as well. Apart from that, this aspect of the matter pertains only to an issue of propriety and not of jurisdiction as the provisions of Article 184(3) of the Constitution place no such restriction upon this Court in the matter of exercise of its jurisdiction under that provision of the Constitution. As already observed above, even the matter of propriety is no longer in issue in this context as the High Court of Sindh has itself decided to await the decision of these petitions by this Court before proceeding further *vis-à-vis* the relevant Constitution Petitions pending before it.

36. The scope and interpretation of the word ‘consultation’ used in section 6(b)(i) of the National Accountability Ordinance, 1999 have been intensely debated before us and, therefore, we must clarify the position in that regard. Section 6(b)(i) of the National Accountability Ordinance, 1999 provides for appointment of Chairman, National Accountability Bureau “by the President in consultation with the Leader of the House and the Leader of the Opposition in the

National Assembly”. Before passage of the 18th Amendment of the Constitution the word ‘consultation’ had repeatedly been used in the Constitution particularly in the context of appointment of Chief Justices and Judges of the superior judiciary and in the case of *Al-Jehad Trust and others v. Federation of Pakistan and others* (PLD 1996 SC 324) this Court had held that a ‘consultation’ has to be “effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfairplay” and an identical interpretation of that word had also been advanced in the case of *Al-Jehad Trust and another v. Federation of Pakistan and others* (PLD 1997 SC 84). Subsequently in the case of *Sindh High Court Bar Association v. Federation of Pakistan and 4 others* (PLD 2009 Karachi 408) the High Court of Sindh had held that for a consultation to be meaningful and purposive an “attempt should be made to reach at some consensus” and that the required consultative process should be in writing. The last occasion on which this Court had interpreted the word ‘consultation’ was in the case of *Sindh High Court Bar Association and another v. Federation of Pakistan and others* (PLD 2009 SC 879) wherein this Court had observed that “by all means the first priority has to be directed to evolving consensus between the consultees by mutual discussion of the merits and demerits of the concerned candidate.” In India it was held in the case of *Justice K. P. Mohapatra v. Sri Ram Chandra Nayak and others* (AIR 2002 SC 3578) that ‘consultation’ means “meeting of minds”. The context in the case of the National Accountability Ordinance, 1999 and the National Accountability Bureau created and established thereunder has, however, been found by us to be somewhat different from the above mentioned constitutional context. In the past not too distant complaints of persecution of the political opposition in the country by the government of the day through utilization of the National Accountability Bureau or its predecessor institutions had unfortunately been too many and willingness of the heads of such institutions to slavishly carry out and execute the vendetta of the government of the day against its opponents had also been shamefully rampant. It was in that background that at a time when there was no Parliament in existence this Court had recommended in the case of *Khan Asfandiyar Wali and others v. Federation of Pakistan and others* (PLD 2001 SC 607) that in the matter of appointment of Chairman, National Accountability Bureau consultation ought to be made by the President with the Chief Justice of Pakistan and that recommendation had been given effect to through the National Accountability Bureau (Amendment) Ordinance XXXV of 2001 but subsequently through the National Accountability Bureau (Amendment) Ordinance CXXXIII of 2002 the Chief Justice of Pakistan

had been excluded from the consultees and he was substituted by the Leader of the House and the Leader of the Opposition in the National Assembly who were to be consulted by the President before making an appointment of Chairman, National Accountability Bureau. That deletion had come about because by that time the Parliament had once again come into existence and consultation with the Leader of the Opposition in the National Assembly was expected to go a long way in allaying fears and apprehensions of the political opposition regarding its possible persecution and victimization by the government of the day through the National Accountability Bureau and its Chairman. The spirit of the amended provisions, thus, was that the Leader of the Opposition in the National Assembly would be taken on board, his opinion would be given due weight and consideration and he would have an effective say in the matter of appointment of Chairman, National Accountability Bureau so that the political opposition in the country may not have an occasion to cry foul in the matter.

37. As time progressed another dimension stood added to the issue when, apart from apprehended persecution of the political opposition, the National Accountability Bureau, which happens to be a premier and high-profile anti-corruption institution of the country, started being perceived as an institution which was possibly being misused for covering up corruption at high places and such cover up was perceived to be controlled and managed through appointment of its handpicked Chairman. It was in that backdrop that in the case of *Dr. Mobashir Hassan and others v. Federation of Pakistan and others* (PLD 2010 SC 265) this Court reiterated its earlier recommendation and suggestion with regard to consultation with the Chief Justice of Pakistan in the matter of appointment of Chairman, National Accountability Bureau. That recommendation and suggestion was once again repeated by this Court in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)*. It must be appreciated that consultation with the Leader of the Opposition in the National Assembly and consultation with the Chief Justice of Pakistan are, in the developing scenario, essentially meant for separate noble and laudable purposes which are both directed towards achieving the very objects for which the National Accountability Bureau was established, i.e. elimination of corruption by persons holding public offices and achievement of such objects through a process which is just, fair, impartial and evenhanded. The purpose of consulting the Leader of the Opposition in the National Assembly essentially is to pacify the apprehensions of the political opposition in the country regarding its possible victimization and

persecution and that purpose cannot be served if the opinion of the Leader of the Opposition in the National Assembly in respect of a proposed appointment is brushed aside or bulldozed which would surely be incentive-incompatible. The spirit of such consultation appears to be that it should aim at developing a consensus and it should manifestly be shown that a serious, sincere and genuine effort is made towards evolving a consensus because otherwise the consultation would neither be meaningful or purposive nor consensus-oriented. Similarly, corruption being an unfortunate bane of our society in the current phase of our history and even the high public offices being not immune from serious allegations in that regard, leaving the matter of appointment of the head of the most important anti-corruption institution in the country in the hands only of those very persons who could possibly, in future or present, be a subject of inquiries, investigations or trials for corruption would, apart from giving rise to the issue of conflict of interest, defeat the very object of the relevant law and would, thus, also prejudicially affect, directly or indirectly, the Fundamental Rights of the citizens at large. This is where the Chief Justice of Pakistan comes in as a consultee in his capacity as a guardian and defender of the constitutional and legal rights of the people at large. The Chief Justice of Pakistan can also play a salutary role in the matter of such appointment particularly when there is a serious difference of opinion between the other consultees over a proposed appointment of Chairman, National Accountability Bureau. The role of the Chief Justice of Pakistan as a neutral arbiter in disagreements, differences or disputes over matters of national importance already stands recognized by the Constitution itself through Articles 152 and 159(4) thereof. Under Article 152 of the Constitution if there is a disagreement between the Federation and a Province over the terms of acquisition by the Federation of any land belonging to the Province then the terms of that acquisition are to be determined by an arbitrator appointed by the Chief Justice of Pakistan. Likewise, under Article 159(4) of the Constitution if any question arises whether any condition imposed by the Federal Government on any Provincial Government in respect of entrustment of functions with respect to broadcasting and telecasting is lawfully imposed or whether any refusal by the Federal Government to entrust such functions is unreasonable then that question is to be determined by an arbitrator appointed by the Chief Justice of Pakistan. It may advantageously be mentioned here that Mr. Shahid Orakzai petitioner has drawn our attention to the provisions of Article 213 of the Constitution regarding appointment of the Chief Election Commissioner and with reference to the first proviso to clause (2B) of that Article he has pointed out that if the required

‘consultation’ between the Prime Minister and the Leader of the Opposition in the National Assembly in that respect does not result in a ‘consensus’ then the matter is to be referred to a neutral and bipartisan body. We feel that the spirit of that provision of the Constitution can also be pressed into service in the matter of appointment of Chairman, National Accountability Bureau in case of a lack of consensus between the statutory consultees. We, therefore, reiterate the importance of consulting the Chief Justice of Pakistan in the matter of appointment of Chairman, National Accountability Bureau and expect that the recommendations and suggestions repeatedly made by this Court in that regard through different judgments handed down by it from time to time shall be given effect to in all future appointments to that office. We entertain no manner of doubt that anybody interested in making an honest and good appointment to that office would not feel shy of consulting the Chief Justice of Pakistan in that connection.

38. On the basis of the discussion made above we have arrived at an irresistible and inescapable conclusion that the appointment of Mr. Justice (Retired) Syed Deedar Hussain Shah as Chairman, National Accountability Bureau by the President of Pakistan on 9th February, 2011 is *ultra vires* the letter as well as the spirit of section 6(b)(i) of the National Accountability Ordinance, 1999 and through such illegal appointment the Fundamental Rights of the people of this country including their right to life, right to liberty, due process of law, fair trial and access to justice are adversely affected. Both these Constitution Petitions are, therefore, accepted and the appointment of Mr. Justice (Retired) Syed Deedar Hussain Shah as Chairman, National Accountability Bureau is declared as illegal and *ultra vires*. He shall cease to hold the said office forthwith. It is directed that a fresh appointment to the vacant office of Chairman, National Accountability Bureau be made without any delay.

39. The above are the reasons for the short order passed by us on 10.03.2011 which read as follows:

“For the reasons to be recorded separately, these petitions are accepted and the appointment of Mr. Justice (R) Syed Deedar Hussain Shah as Chairman, National Accountability Bureau (NAB) is hereby declared as illegal and *ultra vires* and he shall cease to hold that office forthwith.”

40. Before parting with this judgment we are constrained to observe that the matter of appointment of Mr. Justice (Retired) Syed Deedar Hussain Shah as Chairman, National Accountability Bureau has been handled by the Ministry of Law, Justice and Parliamentary Affairs, Government of Pakistan in a manner

depicting shallow and perfunctory understanding of the Constitution and the relevant law and in the process the former Honourable Judge of this Court has suffered for no fault of his own. It is because of his two appointments to that office, both botched and messed up by that Ministry’s wrong legal advice to the relevant quarters, that he now stands disqualified to be appointed to that office again on account of the provision regarding “non-extendable period” contained in section 6(b)(i) of the National Accountability Ordinance, 1999, as interpreted through the judgments of this Court handed down in the case of *The Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others (supra)* and in the present case. We also note with some concern that the office of the Prosecutor-General Accountability in the National Accountability Bureau is lying vacant for the last about half a year with no serious effort having been made to fill that important office. It is also directed that a regular appointment to the said office be made without further loss of time.

Judge

Judge

Judge

Islamabad
10.03.2011
Approved for reporting.

M. Yasin*/