

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Tassaduq Hussain Jilani
Mr. Justice Anwar Zaheer Jamali
Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Amir Hani Muslim
Mr. Justice Muhammad Ather Saeed

Constitution Petition No. 73 of 2011

(Against the appoint of Chairman, National Accountability Bureau)

Ch. Nisar Ali Khan

...Petitioner

Versus

Federation of Pakistan, etc.

...Respondents

For the petitioner:

Mr. Mohammad Akram Sheikh,
Sr. ASC
Mr. Arshad Ali Chaudhry, AOR
assisted by Barrister Sherjeel Adnan
Sh. Advocate, Ch. Hasan Murtaza
Mann, Advocate and Syed Faraz
Raza, Advocate

For respondent No. 3:

Sardar Muhammad Latif Khan
Khosa, Sr. ASC
Chaudhry Akhtar Ali, AOR

On Court's notice:

Mr. Irfan Qadir, Attorney-General
for Pakistan
assisted by Barrister Sheryar Riaz,
Advocate

Dates of hearing:

27.05.2013 & 28.05.2013

JUDGMENT

Asif Saeed Khan Khosa, J.: The facts of this case are quite simple and uncomplicated and they may be stated straightaway. In order to fill an existing vacancy in the office of the Chairman,

National Accountability Bureau the President of the Islamic Republic of Pakistan wrote a letter to the then Leader of the Opposition in the National Assembly (the petitioner) on 09.10.2011 proposing the name of Admiral (Retd.) Fasih Bokhari (respondent No. 3) for the said position. The said letter reads as follows:

**"PRESIDENT
Islamic Republic of Pakistan**

Subject:- APPOINTMENT OF CHAIRMAN, NATIONAL ACCOUNTABILITY BUREAU (NAB).

It is proposed to appoint Admiral (Retd) Fasih Bokhari, NI(M), S.Bt, as Chairman NAB. A copy of his CV is enclosed.

2. Leader of the House and the Leader of the Opposition in the National Assembly are requested to consider the aforesaid proposal and convey their views urgently.

(ASIF ALI ZARDARI)
PRESIDENT

Syed Yousaf Raza Gillani,
Prime Minister/
Leader of the House in the National Assembly,
Islamabad.

Ch. Nisar Ali Khan,
MNA/Leader of the Opposition in the National
Assembly,
Islamabad.

President's Sectt's F.No.20(201)/Dir(A-II)/2011, dated: 9th October, 2011"

On 13.10.2011 the petitioner wrote back to the President on the subject and the contents of the petitioner's letter written to the President are reproduced below:

"National Assembly of Pakistan

Leader of the Opposition

Islamabad
13th October, 2011

Dear Mr. President,

Assalam-o-Alaikum,

With reference to your letter dated October 8, 2011, without expressing an opinion on the suitability or otherwise of the proposed nominee mentioned in your letter, I would like to point out the following:-

I have repeatedly suggested (letters dated September 23 and 24 to the Prime Minister and letter dated March 21, 2011 by my Secretary to your Secretary refer) that a panel of possible candidates for Chairman should be drawn up mutually in the first instance which can then be discussed through a participatory consultative process to facilitate development of a consensus amongst the consultees. Such consensus is a necessity in the light of the judgment dated March 10, 2011 of the august Supreme Court of Pakistan in Constitutional Petitions 60 and 61 of 2010 [the Justice (Retd) Deedar Hussain Shah case] wherein it has been held that "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 (n)or purposive nor consensus-oriented."

A panel of possible candidates is also necessary for purposes of consultation with the Chief Justice of Pakistan in respect of the appointment of Chairman NAB, as recommended by the august Supreme Court of Pakistan in Khan Asfandyar Wali and others v. Federation of Pakistan and others, Dr. Mobashir Hassan and others v. Federation of Pakistan and others, Bank of Punjab v. Haris Steel Industries (Pvt.) Ltd. and others and forcefully reiterated in the latest judgment referred to above.

One of the 4 major points of dispute between the Government and the Opposition regarding the Holders of Public Office (Accountability) Bill which is pending before the National Assembly Standing Committee for Law and Justice for nearly 2 ½ years relates to the qualification for appointment of the Chairman of the proposed new National Accountability Commission. The Government Bill provides that the Chairman should be a person who is, or has been, a Judge of the Supreme Court or is qualified to be appointed a Judge of the Supreme Court. PML(N)'s view is that the Chairman should be a serving Judge of the Supreme Court. The fact that the Government has proposed the appointment of a person (who is not a judge nor qualified to be a judge) is contradictory to its own position. It appears that the Government has no intention to pass the new accountability law.

Mr. President, if the objective of the entire exercise is to select a nominee with impeccable reputation, integrity and credibility and unquestionable impartiality, there is no reason whatsoever for hesitation on the part of the Government to engage

with the Opposition in a thorough, concrete and meaningful consultation.

In the light of the above, I am of the view that a panel of possible candidates should be drawn up mutually and the nominee finalized after meaningful, purposive and consensus-oriented consultation.

With regards,

Yours sincerely,

(CH. NISAR ALI KHAN)

Mr. Asif Ali Zardari,
President,
Islamic Republic of Pakistan
President's House
Islamabad"

The President responded to the petitioner's letter on 15.10.2011 informing the petitioner about his decision to appoint respondent No. 3 as the Chairman, National Accountability Bureau and the President's letter of that date reads as under:

**"PRESIDENT
Islamic Republic of Pakistan**

F.No.20(201)/Dir(A-II)/2011
October 15, 2011

Dear Ch. Nisar Ali Sahib,

With reference to your letter dated 13th October, 2011 containing some points regarding the appointment of Chairman, National Accountability Bureau, I wish to draw your attention to a self-explanatory section 6(b) of National Accountability Ordinance, 1999, reproduced hereinafter for ready reference:-

"6. There shall be constituted a National Accountability Bureau for the whole of Pakistan.

- b) Chairman, National Accountability Bureau;
- (i) There shall be a Chairman NAB to be appointed by the President in consultation with the Leader of the House and 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 the Supreme Court of Pakistan:

Provided that the present incumbent of the office of Chairman, NAB shall complete the period of four years from the date of his initial appointment.

- (ii) The Chairman NAB may, in writing under his hand, address to the President, resign his office.
- (ba) A person shall not be appointed as Chairman NAB unless he:-
 - (i) is a retired Chief Justice or 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".

2. The existing provisions of law have been strictly followed and adhered to and the proposed nominee falls under sub-clause (ii) of clause (ba) of section 6 of the aforesaid Ordinance. There is no deviation from the existing legislation, in any manner.

3. The sense of various judgments of the superior courts is that the consultation shall be meaningful and for this purpose there is no necessity of sending a panel of nominees. Therefore meaningful consultation can be done even on a single person and for that purpose you are taken on board quite candidly. Sending of a panel for consultation does not have any legal cover as well, there being no legal requirement as such. I have consulted the Leader of the House in the National Assembly on the subject who has concurred to the proposal.

4. In order to implement the judgments of the superior courts referred to in your letter a bill is proposed by the Federal Government and is pending in the Parliament wherein process of consideration of the bill by Members of the Parliament is taking place. Therefore in the existing legal parlance, the name of proposed nominee is in line with the provisions of the National Accountability Ordinance, 1999 which is existing law at the point of time.

5. It is pertinent to mention here that no comments have been given on the profile and integrity of the nominee, which in fact is the material aspect of the consultation.

6. In the light of foregoing lego-factual position, it is expected that the nominee would serve the institution in the best manner. I take this opportunity to thank you for taking part in the consultative process, as mandated by law.

With regards,

Yours sincerely,

(Asif Ali Zardari)

Ch. Nisar Ali Khan,
MNA/Leader of the Opposition in the National Assembly,
Islamabad"

On the following day, i.e. 16.10.2011 respondent No. 3's appointment as the Chairman, National Accountability Bureau was notified. Within six days of issuance of that notification the petitioner filed the present Constitution Petition before this Court challenging the appointment of respondent No. 3 as the Chairman, National Accountability Bureau.

2. We have heard the learned counsel for the petitioner, the learned counsel for respondent No. 3 and the learned Attorney-General for Pakistan at some length. In support of this petition Mr. Muhammad Akram Sheikh, Sr. ASC appearing for the petitioner has argued that by virtue of the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 the President is to appoint the Chairman, National Accountability Bureau in consultation with the Leader of the House and the Leader of the Opposition in the National Assembly and in the case of appointment of respondent No. 3 no proper consultation had taken place between the President and the petitioner and, thus, the mandatory legal requirement in that respect had not been complied with. For elaboration of this contention the learned counsel for the petitioner has placed a heavy reliance upon the judgment handed down by this Court in the case of Shahid Orakazi and another v. Pakistan through Secretary Law, Ministry of Law,

Islamabad and another (PLD 2011 SC 365) wherein the word "consultation" had been interpreted, its connotations had been elaborated and proper requirements for the same had been laid down. He has also referred to the case of Alexia Morrison v. Theodore B. Olson (487 US 654) in this regard. He has gone on to submit that the response of the petitioner to the President's letter dated 09.10.2011 had never been considered by the President with any degree of seriousness and the President had proceeded to appoint respondent No. 3 as the Chairman, National Accountability Bureau without even properly satisfying himself as to whether the petitioner was agreeable to such appointment or not. Mr. Sheikh has maintained that the President had acted in the matter with undue haste which had clouded the *bona fide* of the exercise. He has further contended that, as suggested and recommended by this Court in the case of Shahid Orakazi (supra), in case of a disagreement in the matter of appointment of a nominee the matter had to be referred to the Hon'ble Chief Justice of Pakistan in his capacity as a neutral arbiter but that course was not resorted to in the present case. He has gone on to submit that a suggestion or recommendation made by this Court needs to be extended due respect and deference and even if it is treated as an *obiter dictum* still it has a binding force. In this respect he has referred to a few passages (at pages 605 to 609) from the book titled Fundamental Law of Pakistan written by Mr. A. K. Brohi. He has also relied in this regard upon some observations made by this Court in the case of All Pakistan Newspapers Society and others v. Federation of Pakistan and others (PLD 2004 SC 600). On the issue of "consultation" Mr. Sheikh has also read out and referred to different passages from the judgments delivered by this Court in the cases of Capt. (Retd.) Abdul Qayyum, Executive Engineer v. Muhammad Iqbal Khokhar and 4 others (PLD 1992 SC 184), Khan Asfandyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 SC 607), Bank of Punjab and another v. Haris Steel Industries (Pvt.) Ltd. and others

(PLD 2010 SC 1109), Dr. Mobashir Hassan and others v. Federation of Pakistan and others (PLD 2010 SC 265) and also from some judgments from the Indian jurisdiction. With these submissions the learned counsel for the petitioner has prayed that the appointment of respondent No. 3 as the Chairman, National Accountability Bureau may be set aside on account of lack of proper consultation as contemplated by the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999.

3. Sardar Muhammad Latif Khan Khosa, Sr. ASC appearing for respondent No. 3 has read out the "Formulations/Points for Determination" contained in Civil Miscellaneous Application No. 3231 of 2013 filed by him and has submitted that there is no dispute in this case that respondent No. 3 is qualified to be appointed as the Chairman, National Accountability Bureau under section 6(b)(i) read with section 6(ba)(ii) of the National Accountability Ordinance, 1999. He has also referred to the *Curriculum Vitae* of respondent No. 3 which had been sent by the President to the petitioner along with his letter dated 09.10.2011 manifesting that the said respondent had a meritorious record of serving the nation in different capacities, he had a good academic background and he was a person amply fit to be appointed to the said office. He has argued that the petitioner had been duly consulted by the President *vis-à-vis* the proposed appointment of respondent No. 3 and in his letter dated 13.10.2011 the petitioner had said nothing adverse to the respondent's fitness or suitability for the proposed appointment and, therefore, on 15.10.2011 the President was quite justified in deciding to appoint respondent No. 3 as the Chairman, National Accountability Bureau because it was by then apparent to the President that the petitioner had no objection to the appointment of respondent No. 3. Mr. Khosa has pointed out that the office of the Chairman, National Accountability Bureau was lying vacant for some time and there was a pressing urgency to fill that vacancy and, thus, the President

could not wait for an indefinite period and allow more time to pass while attending to the suggestions made by the petitioner in his letter dated 13.10.2011, particularly when the petitioner had said nothing adverse to the proposed appointment of respondent No. 3 and the suggestions made by the petitioner traveled beyond the pale of the provisions of the National Accountability Ordinance, 1999. As regards the interpretation of the word "consultation" rendered by this Court through various judgments he has maintained that the courts have no jurisdiction to add to or subtract from the words used by the legislature in a legal instrument and, thus, through the medium of interpretation this Court could not enlarge the functions of the President beyond what was required of him by the statute itself. In this respect he has referred to the judgments passed by this Court in the cases of Asif Ali Zardari and another v. The State (PLD 2001 SC 568), Syed Zafar Ali Shah and others v. General Pervez Musharraf, Chief Executive of Pakistan and others (PLD 2000 SC 869), Khan Asfandiyar Wali and others v. Federation of Pakistan through Cabinet Division, Islamabad and others (PLD 2001 SC 607) and Air Marshal (Retd.) Muhammad Asghar Khan v. General (Retd.) Mirza Aslam Baig, Former Chief of Army Staff and others (PLD 2013 SC 1) maintaining that in the past this Court had on occasions traveled beyond the words used in a statute and had added to the prescribed legal requirements which exercise fell beyond the jurisdiction of this Court. While referring to the judgments delivered by this Court in the cases of Bank of Punjab and another v. Haris Steel Industries (Pvt.) Ltd. and others (PLD 2010 SC 1109), Shahid Orakazi and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another (PLD 2011 SC 365) and Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879) he has submitted that the said judgments may either be revisited by this Court *qua* interpretation of the word "consultation" or the same may be treated as delivered

per incuriam. Mr. Khosa has produced before us photocopies of some press reports tending to show that the petitioner's own political party and its head had offered no objection or resistance to the appointment of respondent No. 3 as the Chairman, National Accountability Bureau and, thus, it has been maintained by him that the petitioner could not raise any such objection against the said appointment on his own. It has lastly been submitted by him that respondent No. 3 has been serving as the Chairman, National Accountability Bureau for the last about one year and three quarters and he is about to complete one half of his fixed term of office of four years and, therefore, at this late stage his appointment may not be disturbed by this Court.

4. Mr. Irfan Qadir, the learned Attorney-General for Pakistan appearing on Court's notice, has argued that many judgments rendered by this Court after 03.11.2007 need to be revisited by the Court and in this context he has made a specific reference to the judgment delivered in the case of Sindh High Court Bar Association through its Secretary and another v. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and others (PLD 2009 SC 879). He has also referred to the history of accountability laws in Pakistan and has maintained that the Hon'ble Chief Justice of Pakistan cannot be declared or treated as a consultee or an arbiter in the matter of appointment of the Chairman, National Accountability Bureau as long as the National Accountability Ordinance, 1999 does not expressly stipulate or recognize his role as such. In the end the learned Attorney-General has submitted that in the past appointments of many Chairmen and other officers of the National Accountability Bureau have been interfered with by this Court which has given rise to some misgivings amongst various national institutions and, therefore, this time the Court may exercise restraint in the matter and allow respondent No. 3 to complete his term of office as he has already completed about one half of it.

5. After hearing the learned counsel for the parties and the learned Attorney-General for Pakistan at some length and after going through the precedent cases cited and the material produced by them we have observed that the jurisdiction of this Court to entertain the present petition filed under Article 184(3) of the Constitution has not been contested by any of the parties and have found that the pivotal issue involved in the present case is as to whether proper consultation had taken place between the President and the petitioner in his capacity as the Leader of the Opposition in the National Assembly before appointment of respondent No. 3 as the Chairman, National Accountability Bureau or not. Section 6 of the National Accountability Ordinance, 1999 is attracted and applicable to this issue and the relevant parts of the same provide as follows:

"6. National Accountability Bureau:

(a)

(b) Chairman, National Accountability Bureau:

(i) 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:

Provided that the present incumbent of the office of Chairman NAB shall complete the period of four years from the date of his initial appointment.

... .."

The word "consultation" appearing in section 6(b)(i) reproduced above has already been interpreted by this Court in many a judgment and the last of such judgments was that delivered in the case of Shahid Orakazi and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another (PLD 2011 SC 365). In paragraphs No. 36 and 37 of that judgment this Court had observed and concluded as follows:

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 Asfandyar 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."

(underlining and bold letters have been supplied for emphasis)

It, thus, stands settled that a constitutionally or statutorily required "consultation" has to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play and in order to establish that a consultation was meaningful and purposive it should manifestly be shown that a serious, sincere and genuine effort was made towards evolving a consensus. It also stands equally settled that the first priority in any consultation has to be directed towards evolving a consensus

between the consultees by mutual discussion of the merits and demerits of the concerned candidate and that consultation practically amounts to an effort made towards meeting of minds. In this backdrop we find that although the process of consultation did take place in the present case between the President and the petitioner in his capacity as the Leader of the Opposition in the National Assembly yet the question is as to whether in the process of such consultation any serious, sincere and genuine effort was made to reach a consensus or not. In this context we note that on 09.10.2011 the President had proposed to the petitioner the name of respondent No. 3 for the relevant appointment and on 13.10.2011 the petitioner had momentarily withheld his opinion regarding suitability or otherwise of respondent No. 3 for the proposed appointment and had instead made a few suggestions regarding the process through which consultation between him and the President ought to take place. At the end of his letter dated 13.10.2011 the petitioner had written to the President as follows:

"In the light of the above, I am of the view that a panel of possible candidates should be drawn up mutually and the nominee finalized after meaningful, purposive and consensus-oriented consultation".

It was, thus, quite clear that through that letter to the President the petitioner, while making a few suggestions regarding the process to be adopted, had reserved his right to give his views about suitability or otherwise of any nominee. The letter sent by the President to the petitioner on 15.11.2011 quite clearly shows that while rejecting the petitioner's suggestions regarding the process to be adopted for consultation he had decided to appoint respondent No. 3 as the Chairman, National Accountability Bureau without actually soliciting the petitioner's opinion about respondent No. 3 after rejection of the suggestions made by the petitioner regarding the process to be adopted. In our considered view once the President had decided to ignore, disregard or reject the suggestions regarding the process made by the petitioner the

President ought to have written to the petitioner that the suggestions made by him regarding the process were not acceptable to him and that the petitioner should give his opinion regarding suitability or otherwise of respondent No. 3 in black and white. Unfortunately the President did not deem it important or necessary to do that and he decided to proceed with appointment of respondent No. 3 as the Chairman, National Accountability Bureau. It is but obvious that no serious, sincere and genuine effort was made by him towards evolving a consensus over the particular nominee and no mutual discussion regarding the merits or demerits of the nominee was deemed by the President to be a necessary part of the consultative process. In this view of the matter the process of consultation undertaken in the present case cannot be termed or accepted as meaningful, purposive or consensus-oriented.

6. The argument of the learned counsel for respondent No. 3 that in his letter dated 13.10.2011 the petitioner had not offered any adverse comment regarding suitability of respondent No. 3 for the relevant office and, therefore, there was hardly any occasion for the President to seek the petitioner's opinion in that regard again has been found by us to be an argument which ignores many facts staring in the face. It is a fact that in his letter dated 13.10.2011 the petitioner had reserved his comments about suitability or otherwise of any nominee shortlisted after the process of consultation suggested by him and this is so evident from the combined reading of the first and the last paragraphs of that letter. Asking for a panel of possible candidates itself was indicative of the fact that the petitioner entertained reservations against the nomination of respondent No. 3. It is also a fact that after the appointment of respondent No. 3 as the Chairman, National Accountability Bureau the petitioner had lost no time and had challenged his appointment through the present petition which was filed within six days of the appointment. It is also a hard fact

that during the entire period of pendency of this petition the petitioner has been pursuing the matter diligently. It also cannot be ignored as a fact that despite the appointment of respondent No. 3 having been made about a year and three quarters ago the petitioner has still vehemently and forcefully argued the matter before this Court through his learned counsel. The argument of the learned counsel for respondent No. 3 regarding an implied concurrence or acquiescence on the part of the petitioner has, thus, been found by us to be unacceptable. It appears that the momentary withholding of his opinion by the petitioner about suitability or otherwise of respondent No. 3 was taken advantage of by the President without appreciating that a proper consultative process could have thrown up many other good options as well and such an exercise could have served the National Accountability Bureau as well as the society better.

7. The learned counsel for respondent No. 3 has asserted that in view of the peculiar background regarding vacancy of the office of the Chairman, National Accountability Bureau there was a pressing urgency involved in the matter and that is why after disagreeing with the suggestions regarding the process made by the petitioner the President had proceeded to appoint respondent No. 3 as the Chairman, National Accountability Bureau by assuming that the petitioner held no views adverse to suitability of the said respondent for the relevant office as he had expressed none in his letter to the President dated 13.10.2011. However, in the factual background of the case this assertion of the learned counsel for respondent No. 3 has failed to impress us. The background is that on 01.09.2010 it was declared by this Court in the case of Bank of Punjab and another v. Haris Steel Industries (Pvt.) Ltd. and others (PLD 2010 SC 1109) that discharge of functions of the Chairman, National Accountability Bureau by the then Acting Chairman was illegal and a direction was issued by this Court that a regular appointment to the vacant office of the

Chairman, National Accountability Bureau be made within the next thirty days. As a result of that judgment of this Court Mr. Justice (Retired) Syed Deedar Hussain Shah, a former Judge of this Court, was appointed by the President as the Chairman, National Accountability Bureau. The appointment of Mr. Justice (Retired) Syed Deedar Hussain Shah was challenged before this Court through two Constitution Petitions which were allowed by this Court on 10.03.2011 through the judgment reported as Shahid Orakazi and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another (PLD 2011 SC 365) and through that judgment the appointment of Mr. Justice (Retired) Syed Deedar Hussain Shah was set aside and a direction was issued that a fresh appointment to the vacant office of the Chairman, National Accountability Bureau be made "without any delay". Instead of complying with that direction of the Court and appointing any Chairman of the National Accountability Bureau within the directed period the said Bureau was allowed by the President/Federal Government to keep running under the charge of a Deputy Chairman and such running of the Bureau was challenged before this Court. On 21.06.2011 the said challenge was allowed and through the judgment reported as Al-Jehad Trust and another v. Federation of Pakistan and others (PLD 2011 SC 811) it was declared that a Deputy Chairman, National Accountability Bureau could not perform the functions of the Chairman of that Bureau at a time when the office of the Chairman was lying vacant. It had specifically been observed and directed by this Court in that judgment as follows:

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

blame for the same shall rest squarely upon the shoulders of the Federal Government. This Constitution Petition is disposed of with the directions issued and the observations made above."

The direction issued by this Court regarding filling the vacancy in the office of the Chairman, National Accountability Bureau "within one month of announcement of this judgment positively" was not complied with and instead Civil Miscellaneous Application No. 2815 of 2011 had been filed before this Court seeking extension of the time fixed by this Court for the purpose but that miscellaneous application was dismissed by this Court on 25.07.2011. Later on Civil Review Petition No. 151 of 2011 was filed before this Court by the Federal Government seeking review of dismissal of Civil Miscellaneous Application No. 2815 of 2011 but that review petition was also dismissed by this Court on 04.10.2011. It is, therefore, quite obvious that despite a clear and unambiguous direction of this Court regarding appointment of a Chairman, National Accountability Bureau within one month of 21.06.2011 the Federal Government had not done the needful and it had instead been trying to prolong the matter by seeking extension of time for doing the needful. Throughout this period the operation of the above mentioned direction had never been suspended by this Court. It is after dismissal of the review petition filed by the Federal Government on 04.10.2011 that the President had initiated the process of appointment of the Chairman, National Accountability Bureau on 09.10.2011 and after receipt of the petitioner's letter dated 13.10.2011 the President had decided to appoint respondent No. 3 to the said office on 15.10.2011 which decision was followed by a notification of appointment dated 16.10.2011. This factual background clearly shows that the Federal Government had failed to comply with the time line directed by this Court and had slept over the matter for about three and half months whereafter the process of appointment of the Chairman, National Accountability Bureau was initiated on 09.10.2011 and the same was completed on 16.10.2011. The haste shown by the President after writing his letter dated 09.10.2011 to the petitioner is not understandable as

the Federal Government had already slept over the matter for about three and a half month and if the petitioner had reserved his comments about suitability or otherwise of respondent No. 3 for the relevant office and had made some suggestions regarding the process then if the President had disagreed with the process suggested by the petitioner then he ought to have written to the petitioner that his suggestions were not acceptable and that he should now offer his opinion about suitability or otherwise of respondent No. 3 for the relevant office. The factual background mentioned above is sufficient to expose the hollowness of the stand taken by the learned counsel for respondent No. 3 regarding the urgency involved in the matter. Apart from that if the President had already slept over the matter for about three and a half months then consuming a few more days for making the consultative process meaningful, purposive and consensus-oriented would not have hurt anybody. A conclusion is, therefore, irresistible and unavoidable that the President had failed to make any serious, sincere and genuine effort to evolve a consensus with the petitioner over the matter of appointment of respondent No. 3 as the Chairman, National Accountability Bureau. In the circumstances of the case detailed above we have entertained no manner of doubt that proper consultation as required by the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 and as interpreted by this Court in various judgments, particularly in the case of Shahid Orakazi and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another (PLD 2011 SC 365), had not taken place in the present case before appointment of respondent No. 3 as the Chairman, National Accountability Bureau.

8. A lot of emphasis has been laid by Mr. Muhammad Akram Sheikh, Sr. ASC appearing for the petitioner upon the Hon'ble Chief Justice of Pakistan being a consultee in the matter of appointment of the Chairman, National Accountability Bureau and

suggestions and recommendation having been made by this Court in that regard in various judgments including the judgment delivered in the case of Shahid Orakazi and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another (PLD 2011 SC 365). As against that the learned counsel for respondent No. 3 as well as the learned Attorney-General for Pakistan have argued with vehemence that the Hon'ble Chief Justice of Pakistan does not figure in the provisions of section 6(b)(i) of the National Accountability Ordinance, 1999 as a consultee and that this Court had no jurisdiction to add a consultee to the process of appointment of a Chairman, National Accountability Bureau where the relevant law did not make him so. We have found all such submissions to be missing the point. It goes without saying that a suggestion or a recommendation made by this Court in a judgment, though entitled to due respect, deference and consideration, does not travel beyond a suggestion or a recommendation and it does not by itself assume the status of law. By its nature and form a suggestion or a recommendation is simply what it is, nothing more and nothing less. In this view of the matter this aspect of the case may not detain us any further.

9. Production of photocopies of some press reports by the learned counsel for respondent No. 3 tending to show that the political party to which the petitioner belongs and the head of that political party had offered no objection or resistance to the appointment of respondent No. 3 as the Chairman, National Accountability Bureau has been found by us to be irrelevant because a Leader of the Opposition in the National Assembly does not merely represent his own political party in the National Assembly but he represents the entire Opposition in the National Assembly which may include members belonging to many political parties and also independent members. Apart from that for the purposes of section 6(b)(i) of the National Accountability Ordinance, 1999 it is only the opinion of the Leader of the

Opposition in the National Assembly which is relevant for the President and not the opinion of any political party to which the Leader of the Opposition may belong or of its head. It may also be observed in this context that respondent No. 3 has not filed any concise statement before this Court and the photocopies of the press reports produced before us during the arguments have neither been properly filed nor proved.

10. The learned Attorney-General for Pakistan has requested, and the learned counsel for respondent No. 3 has also joined him in submitting, that this Court may show restraint and may not interfere in the matter of appointment of respondent No. 3 as the Chairman, National Accountability Bureau at a stage when he has already served in that office for about a year and three quarters and also because in the past this Court has been interfering with such appointments which interference, according to them, has created misgivings amongst different national institutions. After due consideration of the matter we have not been able to persuade ourselves to accede to such a request or accept such a submission. This Court is obliged and bound to decide every case upon its own merits and merely because some appointments to the same or related offices had been illegally made in the past and this Court had interfered with the same ought not to be of any consideration in a similar matter brought to the Court subsequently. As a matter of fact consistency is a cherished judicial virtue and no court should be expected to make exceptions other than those warranted by the law. Apart from that any length of service unlawfully utilized is not long enough to deter this Court from pronouncing upon the legality of the same when the matter is properly brought before it for adjudication. Respondent No. 3 had been appointed to head the premier anti-corruption agency of the country and the importance of the office of the Chairman, National Accountability Bureau had been commented upon by this Court in the case of Bank of Punjab and another v. Haris Steel Industries (Pvt.) Ltd. and others (PLD

2010 SC 1109) and also in the case of Shahid Orakazi and another v. Pakistan through Secretary Law, Ministry of Law, Islamabad and another (PLD 2011 SC 365) and it had been observed in that regard in the latter case as under:

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.”

It may be true that respondent No. 3 has already served as the Chairman, National Accountability Bureau for about a year and three quarters by now out of a term of four years but at the same time it is equally true that the remaining term of office is about two years and a quarter which is a considerably long period of time. A person cannot be allowed to continue holding such an important office if his appointment to that office has been found by this Court to have been brought about in a manner which is not lawful. It is true that the constitutional jurisdiction of this Court is discretionary in nature but we cannot countenance exercise of discretion of this Court in favour of continuance in office of such an unlawfully appointed person for more than a couple of years.

11. The submissions made by the learned counsel for respondent No. 3 and the learned Attorney-General for Pakistan suggesting revisiting of some judgments already passed by this Court regarding proper interpretation of the word “consultation” have not been found by us to be worth any serious consideration as we find such judgments to be considered judgments serving the intents and purposes of the relevant constitutional and legal provisions well.

12. The above are the detailed reasons for the short order announced by us on 28.05. 2013 which reads as follows:

“For the reasons to be recorded later in the detailed judgment, we hold and declare that consultation in the appointment of Chairman NAB was not made in accordance with Section 6 of the National Accountability Bureau Ordinance, 1999 and the law declared by this Court. Consequently, this Constitution Petition is allowed, the impugned appointment of respondent No. 3 is declared to be without lawful authority and is set aside with immediate effect. The Federal Government is directed

to make fresh appointment without further loss of time.”

Judge

Judge

Judge

Judge

Judge

Islamabad

30.05.2013

Approved for reporting.