IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Asif Saeed Khan Khosa
Mr. Justice Iqbal Hameedur Rahman
Mr. Justice Umar Ata Bandial

Criminal Appeal No. 264 of 2006
(Against the judgment dated 13.06.2002 passed by the Lahore High Court, Lahore in Criminal Appeal No. 1912 of 2000)

The State *…Appellant*

versus

Anwar Saif Ullah Khan *…Respondent*

For the appellant/State:	Mr. M. Bashir Kiyani, Deputy Prosecutor-General Accountability
For the respondent:	Khawaja Harris Ahmed, ASC Mr. M. S. Khattak, AOR In person.
Dates of hearing:	08.01.2015, 13.01.2015, 14.01.2015, 20.01.2015 & 21.01.2015

JUDGMENT

Asif Saeed Khan Khosa, J.: In his capacity as a Federal Minister Anwar Saif Ullah Khan respondent forced his will upon a reluctant Chairman of a public sector Corporation and after relaxing the relevant rules he got 145 persons appointed to various jobs against the requirements of the Corporation only to please his political friends in the Parliament. The Lahore High Court, Lahore held that what the respondent did was in accord with the prevalent practice. Such implied acceptance of a culture of political patronage cannot be approved by us. The High Court had concluded that the respondent had no criminal intent in the matter. With respect to the High Court, we do not agree.

2. The facts of the case are that the respondent served as a Minister for Petroleum and Natural Resources in the Federal Cabinet from 28.11.1994 to 05.11.1996. On 10.05.1997 a Reference was filed against the respondent by the Chief Ehtesab Commissioner before the Lahore High Court, Lahore under section 14(1) of the Ehtesab Ordinance, 1996 with an allegation of indulging in corruption and corrupt practices while holding a public office and upon promulgation of Ordinance No. XVIII of 1999 the said Reference stood transferred to the Accountability Court, Lahore, was numbered as Reference No. 4-B of 1999 and was treated as a Reference filed by the National Accountability Bureau under the National Accountability Ordinance, 1999. The precise allegation leveled against the respondent was that in his capacity as the Federal Minister for Petroleum and Natural Resources he had misused his authority by prevailing upon the Chairman, Oil & Gas Development Corporation and getting 145 persons recommended by some parliamentarians appointed to various jobs in the Oil & Gas Development Corporation and for this purpose he had relaxed the relevant rules. On 15.05.2000 the Accountability Court, Lahore framed a charge against the respondent for an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999 to which the respondent pleaded not guilty and claimed a trial. The prosecution produced eight witnesses in support of its case against the respondent whereafter the respondent's statement under section 342, Cr.P.C. was recorded wherein he denied and controverted the allegations leveled against him and professed his innocence. The respondent made his statement on oath under section 340(2), Cr.P.C. before the trial court when he appeared as DW1. Upon conclusion of the trial the learned Judge, Accountability Court, Lahore convicted the respondent for an offence under section 3(1)(d) of the Ehtesab Ordinance, 1996 read with section 35 of the National Accountability Ordinance, 1999 *vide* judgment dated 30.11.2000 and sentenced the respondent to simple imprisonment for one year and a fine of Rs. 50,00,000/- or in default of payment thereof to

undergo simple imprisonment for one year. The benefit under section 382-B, Cr.P.C. was extended to the respondent. The Accountability Court also passed a consequential order under section 15 of the National Accountability Ordinance, 1999 disqualifying the respondent from contesting an election or holding a public office for a specified period. The respondent challenged his conviction and sentence before the Lahore High Court, Lahore through Criminal Appeal No. 1912 of 2000 which was heard and allowed by a learned Division Bench of the said Court *vide* judgment dated 13.06.2002 and the respondent was acquitted of the charge. The State has assailed the respondent's acquittal by the Lahore High Court, Lahore through the present appeal by leave of this Court granted on 10.05.2006.

3. In support of this appeal the learned Deputy Prosecutor-General Accountability appearing for the appellant/State has argued that the *actus reus* of relaxing the relevant rules and approving appointment of 145 persons to different posts in the Oil & Gas Development Corporation had never been denied or disputed by the respondent and the *mens rea* for the exercise was nothing but obliging some parliamentarians which intention was unconstitutional and illegal besides being criminally culpable and, thus, the Lahore High Court, Lahore was not justified in acquitting the respondent of the charge by holding that the prosecution had failed to prove any criminal intent on the part of the respondent. In support of his submissions the learned Deputy Prosecutor-General Accountability has placed reliance upon the cases of *Mushtaq Ahmed Mohal and others v. The Honourable Lahore High Court, Lahore and others* (1997 SCMR 1043) and *Syed Mubashir Raza Jaffri and others v Employees Old-Age Benefits Institutions (EOBI) through President of Board, Board of Trustees and others* (2014 SCMR 949). As against that the learned counsel for the respondent has argued that the view formed by the Lahore High Court, Lahore in the matter was a view which was reasonable and a disagreement with such view does not provide a valid basis for interfering with a judgment of acquittal. In support of this argument the learned

counsel for the respondent has relied upon the judgment passed by this Court in the case of *Ghulam Sikandar and another v. Mamaraz Khan and others* (PLD 1985 SC 11) wherein different principles for interference in a judgment of acquittal had been laid down in detail. He has also argued that the case in hand was a case of an alleged commission of a criminal offence and, thus, the evidence led by the prosecution had to be assessed on the basis of the *actus reus* and the *mens rea* which did not coincide in this case so as to make the offending action of the respondent a criminal offence. In this regard he has submitted that after receiving requests from some parliamentarians the respondent had referred the matter of appointments to the Chairman, Oil & Gas Development Corporation, the respondent had relaxed the relevant rules and had approved the making of appointments when he was advised that he had the requisite jurisdiction to relax the rules and the actual appointments were made by the Chairman, Oil & Gas Development Corporation and not by the respondent. He has also argued that before relaxing the rules and granting approval for making of the appointments the respondent had been informed that there was already in existence a prevailing practice whereby the Federal Minister for Petroleum and Natural Resources could grant the requisite approval for appointments after relaxation of the rules as a special case. It has been maintained by the learned counsel for the respondent that following a prevalent practice negated the element of *mens rea* on the part of the respondent which was crucially important for transforming the respondent's *actus reus* into a criminal offence. The learned counsel for the respondent has gone on to argue that Ijaz Ahmed Khan (PW1) had stated before the trial court that the required appointments were to be made after fulfillment of certain conditions, Mobeen Ehsan (PW3) had deposed about his own authority to recruit and had never stated that the respondent had pressurized him in that regard, Akhtar Hussain (PW4) had stated before the trial court that the recruitments in question were made in accordance with the Rules of the Oil & Gas Development Corporation, Abdul Mateen Ahmed (PW5) had also stated the same thing as was stated by

Akhtar Hussain (PW4) and R. A. Hashmi (PW6) had clearly deposed before the trial court that the respondent had not applied any pressure upon anybody in the matter of appointment of the relevant persons nor any dictation was given in that regard by the respondent to the Oil & Gas Development Corporation. It has, thus, been maintained by the learned counsel for the respondent that there was no criminal intent in the matter on the part of the respondent and, therefore, the Lahore High Court, Lahore was quite justified in acquitting him. The learned counsel for the respondent has read out the relevant portions of the impugned judgment passed by the Lahore High Court, Lahore and has submitted that the grounds weighing with the High Court for acquitting the respondent were sound and, therefore, the respondent's acquittal does not warrant any interference by this Court. The learned counsel for the respondent has also drawn our attention towards Exhibit-DW1/2 which contained the government's policy in respect of Oil & Gas Development Corporation and laid down the requirement of appointments and recruitment through a Selection Board but according to the same policy the Federal Minister concerned could approve a departure from the requirement of advertisement. It has been maintained by the learned counsel for the respondent that the respondent had granted such approval qualifying that such departure would be made in cases of urgency and for ensuring merit. He has also referred to the document brought on the record as Exhibit-DW1/17 showing that the Chairman, Oil & Gas Development Corporation did not usually accept dictation of the Federal Minister. With these submissions the learned counsel for the respondent has maintained that the High Court could have reasonably come to the conclusion it had reached and that the High Court was amply justified in concluding that the requisite *mens rea* for turning the respondent's action into a criminal offence was lacking in this case. In support of his submissions the learned counsel for the respondent has placed reliance upon the cases of *Maj. (Retd.) Tariq Javed Afridi* v. *The State* (PLD 2002 Lahore 233), *The State and others* v. *M. Idrees Ghauri and others*

(2008 SCMR 1118), *M. Siddique-ul-Farooque v. The State* (PLD 2002 Karachi 24), *Wahid Bakhsh Baloch v. The State* (2014 SCMR 985), *Mansur-ul-Haque v. Government of Pakistan* (PLD 2008 SC 166) and *Pir Mazharul Haq and others v. The State through Chief Ehtesab Commissioner, Islamabad* (PLD 2005 SC 63). While exercising his right of rebuttal the learned Deputy Prosecutor-General Accountability has submitted that the Oil & Gas Development Corporation Rules define a "temporary" employment and the appointment of 145 persons in this case was not temporary appointment because the letters of appointment had mentioned probation which is meant for regular posts only.

4. After hearing the learned counsel for the parties and going through the record of the case and the precedent cases with their assistance we have found that the use of authority by the respondent in the matter of appointment of 145 persons on different posts in the Oil & Gas Development Corporation is not disputed and that the main issue is as to whether such use of authority by the respondent amounted to misuse of authority or not within the purview of section 9(a)(vi) of the National Accountability Ordinance, 1999 which provides as follows:

> **9. Corruption and Corrupt Practices:**
> (a) A holder of a public office, or any other person, is said to commit or to have committed the offence of corruption and corrupt practices:-
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> (vi) if he misuses his authority so as to gain any benefit or favour for himself or any other person, or renders or attempts to render or willfully fails to exercise his authority to prevent the grant or rendition of any undue benefit or favour which he could have prevented by exercising his authority.

Section 14(d) of the National Accountability Ordinance, 1999 is relevant to a charge under section 9(a)(vi) of the said Ordinance and the same reads as under:

> **14. Presumption against accused accepting illegal gratification:**
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> (d) In any trial of an offence under clauses (vi) and (vii) of section 9, the burden of proof that he used his authority, or issued any directive, or authorised the issuance of any policy or statutory rule or order (SRO), or made any grant or allowed any concession, in the public interest, fairly, justly and for the advancement of the purpose of the enactment under which the authority was used, directive or policy or rule or order was issued or grant was made or concession was allowed shall lie on the accused, and in the absence of such proof the accused shall be guilty of the offence, and his conviction shall not be invalid by the reason that it is based solely on such presumption;
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> Provided that the prosecution shall first make out a reasonable case against the accused charged under clause (vi) or clause (vii) of sub-section (a) of section 9.

Another issue germane to the above mentioned main issue is as to whether any misuse of authority by the respondent in the matter could be said to have been committed with criminal intent so as to make his action culpable or not.

5. The provisions of sections 9(a)(vi) and 14(d) of the National Accountability Ordinance, 1999 have been discussed and analyzed by this Court in some previous cases in the context of allegations regarding misuse of authority and it may be useful to refer to those cases first before discussing the merits of the present case. In the case of *Pir Mazharul Haq and others v. The State through Chief Ehtesab Commissioner, Islamabad* (PLD 2005 SC 63) a Provincial Minister according approval regarding regularization of a plot was acquitted by this Court and it was observed as follows:

> "28. In criminal cases the general rule is that the accused must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution. All that may be necessary for the accused is to offer some explanations of the prosecution evidence and if this appears to be reasonable even though not beyond doubt and to be consistent with the innocence of accused, he should be given the benefit of it. The proof of the case against accused must depend for its support not upon the absence or want of any explanation on the part of the accused but upon the positive and affirmative evidence of the guilt that is led by the prosecution to substantiate accusation. There is no cavil with the proposition and judicial consensus seems to be that "if on the facts proved no hypothesis consistent with the innocence of the accused can be suggested, the conviction must be upheld. If however, such facts can be reconciled with any reasonable hypothesis compatible with the innocence of the accused the case will have to be treated as one of no evidence and the conviction and the sentence will in that case have to be quashed." -------

29. We are not persuaded to agree with learned Deputy Prosecutor General NAB that conviction could have been awarded in view of the provision as contained in section 14 of NAB Ordinance, 1999 for the simple reason that "the section cannot be used to undermine the well established rule of law that save in very exceptional class of cases, the burden to prove the guilt of the accused is on the prosecution and never shifts. The section does not affect the onus of providing the guilt of an accused which always rests on the prosecution and it does not cast any burden on an accused person to prove that no crime was committed, by proving facts specially within his knowledge, nor does it warrant the conclusion that if anything is unexplained, which the Court thinks the accused could explain, he ought therefore to be found guilty." -------

30. It hardly needs any elaboration that "the ordinary rule that applies to criminal trials, viz., that the onus lies on the prosecution to prove the guilt of the accused, is not in any way modified by the rule of evidence contained in this section which cannot be used to make up for the inability of the prosecution to produce evidence of circumstances necessary to prove the guilt of the accused. It is only in cases where the facts proved by the evidence give rise to a reasonable inference of guilt unless the same is rebutted, that such inference can be negative by proof of some fact which, in its nature, can only be within the special knowledge of the accused. If the prosecution fails to prove the essential ingredients of the offence, no duty is cast on the accused to prove his innocence." -------

31. It would be a misconception of law that every accused who faced trial in the Accountability Court or against whom a reference has been sent the "presumption as envisaged in section 14 of the NAB Ordinance, 1999" would start running against him. Where the prosecution has failed to discharge the onus of "proof" by adducing cogent, concrete and forthright evidence the presumption of guilt would not arise against him and thus the question of conviction would have not arisen. The said proposition has been clarified by this Court in case titled Khan Asfandyar Wali v. Federation of Pakistan (PLD 2001 SC 607), operative portion whereof is reproduced herein above for ready reference:--

> "Be that as it may, the prosecution has to establish the preliminary facts whereafter the onus shifts and the defence is called upon to disprove the presumption. This is also the consistent stand taken by Mr. Abid Hassan Minto as well as the learned Attorney-General who adopted his arguments. This interpretation appears to be reasonable in the context of the background of the NAB Ordinance and the rationale of promulgating the same notwithstanding the phraseology used therein. We are also of the view that the above provisions do not constitute a bill of attainer, which actually means that by legislative action an accused is held guilty and punishable. For safer dispensation of justice and in the interest of good governance, efficiency in the administrative and organizational set-up, we deem it necessary to issue the following directions for effective operation of section 14 (d).

> (1) The prosecution shall first make out a reasonable case against the accused charged under section 9(a)(vi) and (vii) of the NAB.
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> (2) In case the prosecution succeeds in making out a reasonable case to the satisfaction of the Accountability Court, the prosecution would be deemed to have discharged the prima facie burden of proof and then the burden of proof shall shift to the accused to rebut the presumption of guilt." ----

32. In no circumstances the defence should be expected to prove the accusation. In a similar wake of event while discussing the question of presumption it was held in Rehmat v. State PLD 1977 SC 515 as follows: --

> "Needless to emphasise that in spite of section 106 of the Evidence Act in a criminal case the onus rests on the prosecution to prove the guilt of the accused beyond reasonable doubt and this section cannot be construed to mean that the onus at any stage shifts on to the accused to prove his innocence or make up for the liability and failure of the prosecution to produce evidence to establish the guilt of the accused. Nor does it relieve the prosecution of the burden to bring the guilt home to the accused. It is only after the prosecution has on the evidence adduced by it, succeeded in raising reasonable inference of the guilt of the accused, unless the same is rebutted, that this section wherever applicable, comes into play and the accused may negative the inference by proof of some facts within his special knowledge. If, however, the prosecution fails to prove the essential ingredients of the offence, no duty is cast on the accused to prove his innocence."

33. In the light of what has been discussed herein above we are of the view that prosecution has failed to establish the guilt beyond shadow of doubt. The appeals preferred on behalf of appellants are hereby accepted and the judgment passed by learned High Court of Sindh Karachi in Ehtesab Reference No. 8 of 1997 is set aside."

(underlining has been supplied for emphasis)

6. The case of *Mansur-ul-Haque v. Government of Pakistan* (PLD 2008 SC 166) was a case of a Chief of the Naval Staff allegedly misusing his authority in the matter of purchase of some naval ships. While acquitting the accused person this Court held as under:

> "9. It is clear from the above referred portion of the judgment of the High Court that the prosecution has not been able to bring on record any cogent evidence to establish the charge and learned DPGA frankly conceded the factual position in the light of which the trial Court held that the allegation regarding exorbitant price and financial loss to the PNSC or financial gain by the accused, was not proved. Learned counsel

for the petitioner has not been able to convince us from the evidence on the record that essential elements of mens rea and intention to commit an offence under section 9(a)(vi) of NAB Ordinance were traceable in the transaction or the accused acted for their personal gain at the cost of causing financial loss to the organization (PNSC) or the ships in question were not of viable technology and were not that of international standard and specification. The mere procedural irregularities in the transaction, would not be sufficient to constitute an offence under section 9(a)(vi) of the ibid Ordinance. This is essential to draw distinction between procedural irregularities and violation of substantial provisions of law to determine the question of criminal liability in the transaction. The procedural irregularities may bring an act done in the official capacity within the ambit of misconduct which is distinguishable from criminal misconduct or an act which may constitute an offence and thus unless it is established through the evidence that an act or series of acts done in the transaction constituted an offence, the criminal charge would be groundless. We may point out that notwithstanding the special provision contained in the NAB Ordinance regarding shifting of the burden of proof, the fundamental principle of the law of criminal administration of justice that basic onus is always on the prosecution to establish the commission of an offence is not changed and in the present case, we find that the respondents having negotiated with the seller company abroad in the official capacity entered into the contract of purchase of ships and in the process certain procedural irregularities constituting an act of misconduct in the contemplation of law applicable to their service were probably committed but the same may not constitute a criminal offence under section 9(a)(vi) of NAB Ordinance punishable under section 10 of the said Ordinance or under any other law without proof of the existence of element of dishonest intention of personal gain. The prosecution in the present case has not been able to bring on record any evidence to substantiate the allegation of dishonest intention to cause financial loss to the organization for personal gain to bring the case within the purview of National Accountability Bureau Ordinance, 1999. This is settled law that unless prosecution discharges the initial burden of proving the charge no presumption of guilt can be raised and in the present case, the prosecution except pointing out certain irregularities committed by the respondents in the transaction of purchase of ships for the use of PNSC, has not been able to bring on record any evidence oral or documentary to show that either the price for which the ships were purchased, was exorbitant or the respondents while acting for their personal gain have caused financial loss or any other damage to the organization. In the light of the facts of prosecution case and the circumstances leading to the completion of transaction it is evident on record that the view of the evidence taken by the High Court was unexceptional.

The National Accountability Bureau Ordinance, 1999, no doubt is a special law and prosecution having the advantage of the provision of section 14(a) of the Ordinance may not under heavy burden to discharge the onus of proving the charge as the Court may on discharge of initial burden of proving prima facie case by the prosecution raise a presumption of guilt but in the light of concept of criminal administration of justice, the prosecution is not absolved of its duty to prove the charge beyond reasonable doubt under NAB Ordinance as the burden of proof is only shifted on the person facing charge if the prosecution succeeds in making out a reasonable case by discharging the

> initial burden of proving the charge. The provision of section 14(d) of the said Ordinance envisages that burden of proof is only shifted to the accused to rebut the allegations if the prosecution succeeds in establishing the preliminary facts to raise the presumption of guilt."
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> *(underlining has been supplied for emphasis)*

7. In the case of *The State and others v. M. Idrees Ghauri and others* (2008 SCMR 1118) a public servant accused of misusing his authority in the matter of allotment of plots had been acquitted by this Court. It had been observed by this Court as follows:

> "11. The leading facts of the case are that appellant while discharging the functions of Managing Director of Cholistan Development Authority (C.D.A.) also exercised the powers of Collector under the Colonization of Government Lands (Punjab) Act, 1912 without formal conferment of such powers in consequence to which he was put to face the criminal prosecution for the charge of corruption and corrupt practices. The defence plea of the appellant was that in view of the past practice, he being under the bona fide impression that M.D. C.D.A., was competent to exercise the power of Collector exercised such powers, which were also subsequently conferred on him, therefore, he committed no offence. In the light thereof, the real question for determination would be whether the appellant assumed the powers of Collector with mala fide intention and for some ulterior motive or he did exercise the power of Collector in good faith without any consideration of illegal gain or undue benefit. There is no cavil to the proposition that an illegal order in a particular set of fact, may have the penal consequence but the question required to be adhered in the present case, was as to whether the act of grant of propriety rights of the land without the power of Collector, by itself would constitute an offence of corruption and corrupt practices within the meanings of section 9(a)(vi) of the Ordinance without proof of essential ingredient of illegal gain and undue favour to constitute such an offence and the answer would certainly be in the negative. The concept of criminal administration of justice is based on the assumption that criminal act is injurious not just to an individual but society as a whole and violation of the criminal law which is built upon constitutional principles of the substantial as well as procedural law, has the consequence of punishment, therefore, the prosecution in the light of constitutional principle is under heavy duty to establish the violation of criminal law to award the punishment. The striding of law to bring an action within its compass is in conflict to the concept of fair treatment, therefore it is primary duty of the Court to ascertain whether the alleged offence was outcome of an act in violation of some law which can be termed as actus reus of the crime (guilty act) and if this essential element of crime is missing, the breach may not subject to the sanction of criminal law, therefore, a person who is blamed to have committed an offence if is not accountable in criminal law for his action, he cannot be subject to the prosecution. The mens rea (guilty mind) is another essential component of crime without proof of which a person cannot be held guilty of an offence and similarly without the proof of concurrence to commit the crime, the offence is not complete. In addition to the above basic components of a crime, the harm caused in consequence to an act is also considered an essential element of a crime because the

act if is harmless it may not constitute a crime. The above components of an offence of corruption and corrupt practices are not traceable in the series of transaction in the present case.

12. The charge against the appellant was that he by misuse of his authority, committed an offence of corruption and corrupt practices within the meanings of section 9(a)(vi) punishable under section 10(a) of the Ordinance. The misuse of authority in general, means wrong and improper exercise of authority for the purpose not intended by law, therefore, in order to prove the charge of misuse of authority, at least two basic ingredients i.e. mens rea and actus reus of the crime have to be necessarily established and in case anyone of these two elements is found missing, the offence is not made out. Mens rea in context to the misuse of authority means to act in disregard of the law with the conscious knowledge that act was being done without authority of law and except in the case of strict liability, the element of mens rea is necessary constituent of crime. The offence of corruption and corrupt practices within the meanings of section 9(a)(vi) of the Ordinance, is not an offence of strict liability, therefore, the use of authority without the object of illegal gain or pecuniary benefit or undue favour to any other person with some ulterior motive, may not be a deliberate act to constitute an offence. The mens rea for an offence under section 9(a)(vi) of the Ordinance, is found in two elements i.e. conscious misuse of authority and illegal gain or undue benefit and in absence of anyone of these basic components of crime, the misuse of authority is not culpable, therefore, the prosecution must establish mens rea and actus reus of the crime to establish the charge, as without proof of these elements of crime, mere misuse of authority, has no penal consequence. The offence of corruption and corrupt practices has not been as such defined in the Ordinance but in general terms, the corruption is an act which is done with intent to give some advantage inconsistent with law and wrongful or unlawful use of official position to procure some benefit or personal gain, whereas the expression corrupt practices is series of depraved/debased/morally degenerate acts, therefore, as contemplated in section 14(d) of the Ordinance, unless the prosecution successfully discharges the initial burden of proving the allegation in a reasonable manner, the accused cannot be called to disprove the charge by raising a presumption of guilt. In the present case, the NAB authorities on the basis of order passed by the appellant by virtue of which land was allotted to the affectees of Lal Sohanra Park, launched prosecution against the appellant for the charge of committing an offence under section 9(a)(vi) of the Ordinance whereas the appellant in his defence plea asserted that he having found that the rights of allottees were acknowledgeable in law, exercised the powers of Collector in a good faith with bona fide intention and perusal of record would show that no direct or circumstantial evidence was brought on record to suggest that appellant exercised the power of Collector for the consideration of an illegal gain or an undue benefit for himself or for any other person and consequently, the case would not fulfil the test of section 9(a)(vi) of NAB Ordinance to justify the criminal prosecution.

13. The allegation without specific evidence that appellant in connivance with his co-accused acted for a dishonest or unlawful purpose or the land in question was allotted to the persons who were not entitled for such allotment under the law, would seriously reflect upon the truthfulness of the allegation and learned DPG has not been able to satisfy us that in such a case, mere use of authority contrary to law, is a wrong of the nature, which would necessarily entail the penal consequence under NAB

> Ordinance. The prosecution also has not been able to bring on record any evidence direct or circumstantial in proof of the fact that the appellant in collusion with his co-accused or in connivance with the allottees of the land by indulging in corruption and corrupt practices, extended undue favour to them for some personal gain or pecuniary advantage, therefore, the mere jurisdictional defect in the allotment without any motive, illegal gain or undue benefit, would not constitute an offence of corruption and corrupt practices within the meanings of section 9(a)(vi) read with section 10(a) of the NAB Ordinance, 1999. ------
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> 15. The presumption of guilt under section 14(d) of the NAB Ordinance, in respect of an offence can only be raised after prosecution has established preliminary facts and succeeded in making out prima facie a reasonable case to charge an accused for an offence under section 9(a)(vi) of the Ordinance. Therefore, notwithstanding the provision of section 14(d) of NAB Ordinance, this is settled law that unless the prosecution to the satisfaction of Court succeeds in discharging the initial burden of proving the allegation, no presumption of guilt can be raised to shift burden of disproving the allegation to the accused."
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> *(underlining has been supplied for emphasis)*

8. In the case of *Wahid Bakhsh Baloch v. The State* (2014 SCMR 985) it was alleged that the accused person, in his capacity as Deputy Commissioner, had asked a Sub-Engineer in the Municipal Committee to make an incorrect (reduced) assessment of the value of some State land and had then got the same allotted in favour of the co-accused. The Accountability Court had convicted the accused person for misuse of authority and his appeal had been dismissed by the High Court but he was acquitted by this Court. It was held by this Court as follows:

> "12. In M. Anwar Saifullah Khan v. State (PLD 2002 Lahore 458), the Court while adverting to the initial burden on prosecution to prove the charge of misuse of authority or powers held at page 477 as under:--
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> > "20. Misuse of authority means the use of authority or power in a manner contrary to law or reflects an unreasonable departure from known precedents or custom. Every misuse of authority is not culpable. To establish the charge of misuse of authority, the prosecution has to establish the two essential ingredients of the alleged crime i.e. "mens rea" and "actus reus". If either of these is missing no offence is made out. Mens rea or guilty mind, in context of misuse of authority, would require that the accused had the knowledge that he had no authority to act in the manner he acted or that it was against law or practice in vogue but despite

> that he issued the instruction or passed the order. In the instant case the documentary evidence led by the prosecution and its own witnesses admit that the appellant was told that he had the authority to relax the rules and the competent authority P.W.3 could make the appointments thereafter. The guilty intent or mens rea is missing. Even the actus reus is doubtful because he had not made the appointments. He merely approved the proposal and sent the matter to the competent authority. At worst he could be accused of mistake of civil law. i.e. ignorance of rules. But a mistake of civil law negates mens rea."
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> 13. Admittedly the only evidence to prove mens rea is the statement of Khair Muhammad P.W.4 who was at that time serving as Sub-Engineer in the Municipal Committee and alleged that when he received the letter to assess the property in question, he initially valued it as Rs. 150 per sqft. but it was at the asking of the appellant that he reduced it to Rs. 30 per sqft. However, in his cross-examination he admitted that he never gave it in writing that the property valued Rs. 150 per sqft. When questioned regarding the formula followed by him to determine the value, he explained that the property in question was assessed after assessing the value of the adjacent properties but admitted that the adjoining properties were never assessed as none was sold. The appellant while appearing as his own witness in terms of section 340, Cr.P.C. had candidly denied the charge and maintained that he merely forwarded the letter received from the Senior Member Board of Revenue to Sub-Engineer concerned and the latter's report received regarding assessment was sent to the former and that he had nothing to do with either the allotment or giving possession of the property to Iqbal son of Momin. Surprisingly no question was asked by the prosecution to him that the property in question was assessed at the rate of Rs. 150 at his asking; that he derived any pecuniary benefit from the said transaction or that the property was owned by the revenue department and not the Municipal Committee. There is no corroboration of the statement of P.W.4 regarding the value of the property nor is there any other documentary evidence either.
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> 14. In the afore-referred circumstances, we are of the view that the prosecution had failed to discharge the initial burden to prove beyond reasonable doubt to sustain conviction. Consequently, the impugned judgments cannot be sustained. The appeal is allowed and the impugned judgment of the High Court and that of the trial Court to his extent are set aside. The appellant is acquitted of the charge."
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> *(underlining has been supplied for emphasis)*

9. Similar interpretations of sections 9(a)(vi) and 14(d) of the National Accountability Ordinance, 1999 had been advanced by different High Courts in the cases of *Aftab Ahmed Khan Sherpao, Ex-Chief Minister of N.-W.F.P. v. The State* (PLD 2001 Peshawar 80), *Maj. (Retd.) Tariq Javed Afridi v. The State* (PLD 2002 Lahore 233) and *Muhammad Hayat and 2 others v. The State* (PLD 2002 Peshawar 118).

10. With reference to the precedent cases mentioned above the law appears to be settled by now that in a case involving a charge under section 9(a)(vi) of the National Accountability Ordinance, 1999 the prosecution has to make out a reasonable case against the accused person first and then the burden of proof shifts to the accused person to rebut the presumption of guilt in terms of section 14(d) of the said Ordinance. It is also apparent from the same precedent cases that a mere procedural irregularity in the exercise of jurisdiction may not amount to misuse of authority so as to constitute an offence under section 9(a)(vi) of the National Accountability Ordinance, 1999 and that a charge of misuse of authority under that law may be attracted where there is a wrong and improper exercise of authority for a purpose not intended by the law, where a person in authority acts in disregard of the law with the conscious knowledge that his act is without the authority of law, where there is a conscious misuse of authority for an illegal gain or an undue benefit and where the act is done with intent to obtain or give some advantage inconsistent with the law. The said precedent cases also show that misuse of authority means the use of authority or power in a manner contrary to law or reflecting an unreasonable departure from known precedents or custom and also that *mens rea* or guilty mind, in the context of misuse of authority, would require that the accused person had the knowledge that he had no authority to act in the manner he acted or that it was against the law or practice in vogue but despite that he issued the relevant instruction or passed the offending order.

11. Reverting to the merits of the present case we find that some very clear and unmistakable clues to a resolution of both the issues mentioned in paragraph No. 4 above lie in just three pages of the otherwise voluminous record of this case and those three pages are pages No. 396, 397 and 398 of Part-1 of Criminal Miscellaneous Application No. 415 of 2006 filed in the present appeal. The said pages comprise of the Summary regarding making of the offending 145 appointments and contain the evidence and

material brought on the record of the trial court as Exhibit-PW6/1, Exhibit-PW6/8, Mark-B, Mark-C, Exhibit-PW6/9, Exhibit-PA, Exhibit-PD, Exhibit-PA/1, Exhibit-PB, Exhibit-PB/1, Exhibit-PB/2, Exhibit-PB/3 and Exhibit-PA/2. The said three pages of the record are reproduced below for facility of reference:

"**OFFICE OF THE MINISTER FOR PETROLEUM AND NATURAL RESOURCES**

Islamabad, Sept. 15, 1996.

1. As Minister is kindly aware that we have been under tremendous pressure from the Parliamentarians to cater for their essential requirements of recruitment in the OGDC. Since Budget Session we have been withstanding this pressure and telling them that their requests for recruitment will be acceded to as soon as the position is eased. We have since prepared a list of applicants based on the recommendations of the Parliamentarians. Minister has already been pleased to go through the list and has since approved it.

2. Before the Chairman OGDC is requested to issue appointment letters, Minister may like to see.

(signatures)
16/9/96
(R. A. Hashmi)
Principal Staff Officer

The Minister

PSO

(signatures)
23/9/96

Chairman OGDC

3. Principal Staff Officer to the Federal Minister for Petroleum & Natural Resources has conveyed the approval of the Minister for appointment of 145 applicants in OGDC against various posts.

4. In this respect, it is submitted that appointments in OGDC are made against the advertised post after necessary test and interview. However, in the recent past, a number of appointments have been made on the directives of the Prime Minister's Secretariat without advertising the post, as a special case. In the instant case if the directives of the Honourable Minister are carried out, approval will be required for relaxation of existing policy and the rules. In such case, the applicants will be appointed on the basis of qualifications and experience and will be given the same designation as offered to the Prime Minister's Secretariat under Phase-I, Phase-II, Phase-III of appointment and the special cases.

5. Approval may kindly be solicited from the Minister for Petroleum & Natural Resources for appointment of 145 in relaxation to the rules, as a special case.

6. Submitted please.

(signatures)
30/9
(AIJAZ MUHAMMAD KHAN)
Chief Personnel Officer

MANAGER (PERSONNEL)

7. In view of para 4/N, Para 5/N may kindly be considered.

(signatures)
30 Spt 1996
AM (P)

CHAIRMAN

8. With reference to para-1 of the note of Principal Staff Officer, the factual position has been briefly explained in para-4. It may be added that existing work force in the OGDC is considerably in excess of its requirements and a severe burden on its budget. However the proposal at Para-5 is submitted for consideration and approval.

(signatures)
16.10.96
(M. MUBEEN AHSAN)
Chairman OGDC

Minister for Petroleum & Natural Resources

Approved

(signatures)
16/10/96

Chairman OGDC

(signatures)
16/10

AM (Personnel)

(signatures)
16 Oct 1996
AM (P)

CPO (R)"

12. The note put up by his Principal Staff Officer before the respondent on 15.09.1996 clearly showed that:

(i) the initiative for making the relevant appointments had been taken by the office of the

respondent and not the office of the Chairman, Oil & Gas Development Corporation;

(ii) there was a tremendous pressure of the parliamentarians upon the respondent for making the appointments;

(iii) the pressure from the parliamentarians was to cater for "their" essential requirements of recruitment in the Oil & Gas Development Corporation;

(iv) the respondent had been resisting the pressure for some time in the past;

(v) a list of applicants had been prepared by the respondent's office which list was based upon recommendations of the parliamentarians;

(vi) the respondent had gone through the prepared list and had already approved it;

(vii) the Chairman, Oil & Gas Development Corporation was to be "requested" to issue the letters of appointment; and

(viii) no selection process or consideration of qualifications or merit was involved before approval of the list by the respondent and issuance of the letters of appointment.

It is, thus, obvious that the requirement *vis-à-vis* appointments was that of the parliamentarians and not of the Oil & Gas Development Corporation, the respondent had been resisting the pressure in that regard for some time in the past because the Oil & Gas Development Corporation did not need any such appointment and a list of candidates had already been approved by the respondent before it was to be sent to the Chairman, Oil & Gas Development Corporation for issuing the letters of appointment. It is, therefore, quite evident that in the matter of such appointments the respondent was motivated to please the parliamentarians rather than looking after the interests of the Oil & Gas Development Corporation, the initiative for the appointments had come from the respondent and not from the Chairman, Oil & Gas

Development Corporation and also that in order to release the pressure upon him from the parliamentarians the respondent had decided to force his will upon the Competent Authority, i.e. Chairman, Oil & Gas Development Corporation in the matter of such appointments.

13. The note forwarded by the Chief Personnel Officer, Oil & Gas Development Corporation to the Chairman, Oil & Gas Development Corporation on 30.09.1996 had highlighted that the appointments in the Oil & Gas Development Corporation had to be made against advertised posts after necessary tests and interviews and that the "directives" of the respondent in the matter of appointments could only be given effect to after relaxation of the rules as a special case. This clearly showed that merit and open competition had to be sacrificed and bulldozed if the wishes of the respondent were to be accommodated.

14. The note of the Chairman, Oil & Gas Development Corporation submitted before the respondent on 16.10.1996 said it all when it was pointed out by the Chairman to the respondent in black and white that "It may be added that existing work force in the OGDC is considerably in excess of its requirements and a severe burden on its budget." This had again established beyond any doubt that the requirement of making the appointments in issue was not that of the Oil & Gas Development Corporation but the requirement was that of the respondent and that too not for advancing the interests of the Oil & Gas Development Corporation but to please some parliamentarians who had been pestering the respondent in that regard for some time in the past.

15. As if this were not enough, the record shows that the Chairman, Oil & Gas Development Corporation had put up his above mentioned note before the respondent on 16.10.1996 clearly and unmincingly informing the respondent that the Oil & Gas Development Corporation did not need any new employee but on the same date, i.e. 16.10.1996 the respondent relaxed the rules,

the relevant file traveled back to the Chairman and on that very date letters of appointment were issued in favour of all the 145 candidates who had already been approved by the respondent. That still was not enough because the record confirms that the letters of appointment were sent on the same date, i.e. 16.10.1996 not on the addresses of the appointed candidates but were sent to the Principal Staff Officer of the respondent himself who was to deliver those letters of appointment to the respective parliamentarians who had recommended the relevant candidates! Another startling factor evident from the record is that for facilitating the appointment of the pre-approved candidates the respondent had approved relaxation of some rules without anybody ever identifying the relevant rules being relaxed and such relaxation of rules had been approved by the respondent as a special case without ever recording what was the basis or need for treating the matter as a special case.

16. The shocking state of affairs detailed above has left us in no doubt whatsoever that the case in hand was not a case of a mere irregularity in appointments but was a case of the respondent willfully bulldozing the regular procedure, forcing his will upon another vested with jurisdiction, approving/making appointments against the interests and requirements of the relevant institution and appeasing his political friends at the cost of overburdening the workforce and the budget of the institution he was meant to serve and protect. We have, thus, been surprised to find that the Lahore High Court, Lahore had concluded that there was no criminal intent on the part of the respondent and that the travesty of fairness and trashing of due process on the part of the respondent was merely an irregularity which did not constitute any criminal offence. We have examined all the considerations weighing with the High Court for reaching that conclusion and have found those considerations to be hardly commending themselves for approval. The High Court had observed that the respondent had not issued any direction for the relevant appointments; the respondent had the power to relax the relevant rules and precedents were available

in that regard; the proposal regarding the relevant appointments had been endorsed by the Chairman, Oil & Gas Development Corporation who was the Competent Authority in the matter of the relevant appointments; the appointments approved by the respondent were merely temporary appointments and the Regulations of the Oil & Gas Development Corporation did not apply to such temporary appointments; the said Regulations even otherwise failed to receive final approval and, thus, any violation of such Regulations could not be considered against the respondent; no prosecution witness had alleged any violation of any Regulation or Rule by the respondent; out of the 145 appointments approved by the respondent only three of the appointees had joined the service till the respondent was a Minister; all the appointees were still in service and they had not been thrown out of the jobs and, therefore, the respondent could not be penalized for approving their appointments; the respondent had issued guidelines *qua* merits on all Pakistan basis and, thus, he could not be said to have acted in any manner which was discriminatory; the respondent had been given to understand that he could relax the relevant rules before approving the relevant appointments; prior to the present appointments hundreds of other appointments had already been made by the Chairman, Oil & Gas Development Corporation upon the directives of the Prime Minister's Secretariat but no Reference had been filed against the Chairman *vis-à-vis* such appointments; and no loss had been suffered by the Oil & Gas Development Corporation on the basis of the appointments approved by the respondent. We note that in the above mentioned context the High Court had failed to appreciate that if the respondent had the power to relax the rules then he had relaxed them in his personal interest to please his political friends and not in the interest of the relevant institution. If the respondent had not issued any direction of his own *qua* the appointments in question then there is nothing available on the record to explain why he had forced his will upon the manifestly reluctant Chairman, Oil & Gas Development Corporation in the matter of such appointments. If the respondent had required the selection on merits and on all

Pakistan basis then there was no explanation available for handing over a pre-approved list of candidates to the Chairman, Oil & Gas Development Corporation for making the appointments which was nothing but discriminatory. If the appointments made were to be temporary in nature then the letters of appointment would not have mentioned a period of probation which is relevant to a permanent appointment. If the relevant appointments were made on a temporary basis then the argument that the appointed persons were still in service and had not been thrown out of service despite passage of a decade had lost its relevance. There might have been some instances in the past where rules had been relaxed for making some appointments in the Oil & Gas Development Corporation but nothing had been brought on the record of the case to show that in those cases as well the Chairman, Oil & Gas Development Corporation had resisted the move on the ground that no new appointment was required and also that those appointments too were made only to meet the "essential requirements" of the parliamentarians and not the requirements of the Oil & Gas Development Corporation. No parallels had been established in that regard and, thus, the reference to some past instances was clearly inapt.

17. Applying the principles deducible from the above mentioned precedent cases to the case in hand we find that the prosecution had indeed succeeded in establishing a reasonable case of misuse of authority against the respondent under section 9(a)(vi) of the National Accountability Ordinance, 1999 and the respondent had surely failed to rebut the presumption contemplated by section 14(d) of that Ordinance. The evidence produced by the prosecution had proved beyond doubt on the basis of un-rebutted documentary evidence that, as already noticed by us above, the initiative for making the relevant appointments had been taken by the office of the respondent and not by the office of the Chairman, Oil & Gas Development Corporation; there was a tremendous pressure upon the respondent from the parliamentarians for making the appointments; the pressure from the parliamentarians was to cater

for "their" essential requirements of recruitment in the Oil & Gas Development Corporation; the respondent had been resisting that pressure for some time in the past; a list of applicants had been prepared by the respondent's office which list was based upon recommendations of the parliamentarians; the respondent had gone through the prepared list and had already approved it; the Chairman, Oil & Gas Development Corporation was to be "requested" to issue the letters of appointment; no selection process or consideration of qualifications or merit was involved before issuance of the letters of appointment; the respondent was motivated only to please the parliamentarians rather than looking after the interests of the Oil & Gas Development Corporation; merit and open competition had been sacrificed and bulldozed for accommodating the wishes of the respondent; the requirement of making the appointments in issue was not that of the Oil & Gas Development Corporation but the requirement was that of the respondent and that too not for advancing the interests of the Oil & Gas Development Corporation but for pleasing some parliamentarians who had been pestering the respondent in that regard for some time in the past; after submission of the note of resistance by the Chairman, Oil & Gas Development Corporation on 16.10.1996 the respondent relaxed the rules, the relevant file traveled back to the Chairman and letters of appointment were issued in favour of all the 145 candidates on that very day, i.e. 16.10.1996; the letters of appointment were sent on the same date, i.e. 16.10.1996 not on the addresses of the appointed candidates but were sent to the Principal Staff Officer of the respondent himself who was to deliver those letters of appointment to the respective parliamentarians who had recommended the relevant candidates; for facilitating the appointment of the pre-approved candidates the respondent had approved relaxation of some rules without anybody ever identifying the relevant rules being relaxed; and such relaxation of rules had been approved by the respondent as a special case without ever recording what was the basis or need for treating the matter as a special case. All this was proved by the prosecution through official record and the respondent had

remained contented with a bald assertion of his *bona fide*. In our considered opinion the case in hand was not a case of a mere procedural irregularity on the part of the respondent but was a clear case of misuse of authority by the respondent, a case of a wrong and improper exercise of authority for a purpose not intended by the law, a case of a person in authority acting in disregard of the law with the conscious knowledge that his act was without the authority of law, a case where there was a conscious misuse of authority for an illegal gain or an undue benefit and a case where the authority was exercised with intent to obtain or give some advantage inconsistent with the law. In keeping with the principles laid down by this Court in the above mentioned precedent cases we have entertained no manner of doubt that the case in hand was an open and shut case of misuse of authority where the respondent had used his authority in a manner contrary to the law knowing that he had no authority to act in the manner he acted. If the initiative for making the appointments in issue had come from the Chairman, Oil & Gas Development Corporation as a requirement for proper functioning of that Corporation then there might have been some substance in the respondent's assertion of his *bona fide* but in the present case it is written large on the record that it was the respondent who maneuvered the relevant appointments and that too against the resistance of the Chairman, Oil & Gas Development Corporation and against the interests of that Corporation and with the sole object of pleasing his political friends in the Parliament. To us such exercise of authority by the respondent was nothing short of willful and deliberate circumvention of the legal intent and process amounting to abuse and misuse of authority establishing his *mens rea*, guilty mind and criminal intent for the purposes of the provisions of section 9(a)(vi) read with section 14(d) of the National Accountability Ordinance, 1999.

18. It may be pertinent and relevant to mention here that the respondent is a highly educated person having earned his Master's degrees from the University of Peshawar, the University of Oxford

and the University of Southern California, he has held the highest bureaucratic positions in the civil service of the country, he and his family have been in politics for a long time, even prior to his relevant stint as a Federal Minister he had remained a member of the National Assembly and of the Senate besides serving as a Federal Minister and before approving/making the appointments in issue he had seen many of his comrades in politics facing criminal charges pertaining to misuse of authority brought against them by the National Accountability Bureau or its predecessor institutions. It was, therefore, quite naïve on the part of the respondent to maintain that what he did in this case was not criminally culpable or that he had no criminal intent in the matter. A deliberate and willful act which fairly and squarely attracts the definition and fulfils all the constituting ingredients of a criminal offence and which is accompanied by the knowledge that others acting in a similar manner have faced criminal charges in the past surely makes the act criminally liable and it cannot be argued with any degree of seriousness that such act had been committed with an intent which was licit or *bona fide*. Apart from that it is proverbial that ignorance of law is no excuse. In the circumstances of the case discussed above we have entertained no doubt at all that criminal intent on the part of the respondent stood amply established and his *actus reus* was duly accompanied by the requisite *mens rea* so as to constitute the relevant offence.

19. It may be true that this Court is generally slow in interfering with a judgment of acquittal passed by a court below but at the same time it is equally true that where acquittal of an accused person by a court below had come about on the basis of considerations which do not commend themselves for approval on the legal plane there such judgment of acquittal cannot be sustained and this is more so where the record of the case had not even been read by the court below correctly or properly. In the present case the crucial record of the case mentioned in paragraph No. 11 above had not been adverted to by the High Court with the care and attention it deserved and, thus, the vision of the High

Court remained blurred in respect of criminal intent of the respondent.

20. Doling out jobs in the public sector on the basis of corruption, nepotism, favouritism, lack of due process and misuse of authority has remained a bane of our society for some time and on many previous occasions this Court has been emphasizing the importance of transparency, merit and open competition in that respect. In the case of *In re: Abdul Jabbar Memon and others* (1996 SCMR 1349) the issue was of recruitment to public posts and offices without proper publicity or advertisement and on 06.03.1993 this Court had passed the following order:

> "The matter has come up for consideration in the presence of the Deputy Attorneys-General, Provincial Law Officers arid Mr. Anwar Kamal, Advocate/counsel for PIA. The interim order proposed to be made is hereby confirmed and the case adjourned to enable the Provincial Governments, the Federal Government and the counsel for PIA to seek appropriate instructions from their respective Governments/Departments and to ensure compliance with the order. The interim order is reproduced hereunder in extenso:--
>
> > "While inquiring into various complaints of violation of Fundamental/Human Rights, it has been found that the Federal Government, Provincial Governments, Statutory Bodies and the Public Authorities have been making initial recruitments, both ad hoc and regular, to posts and offices without publicly and properly advertising the vacancies and at times by converting ad hoc appointments into regular appointments. This practice is prima facie violative of Fundamental Right (Article 18 of the Constitution) guaranteeing to every citizen freedom of profession.
> >
> > Subject to notice to all concerned, and subject to final orders after full hearing in the matter, it is ordered as an interim measure that the violation of this Fundamental/Human Right shall be discontinued forthwith.
> >
> > Steps shall immediately be taken to rectify, so as to bring the practice in accord with the Constitutional requirement."

21. In the case of *Mushtaq Ahmad Mohal v. The Honourable Lahore High Court, Lahore and others* (1997 SCMR 1043) this Court had the following to observe on the subject:

> "16. ------- It may be observed that even otherwise, the Constitutional requirement, inter alia, enshrined in Article 18 of the Constitution which enjoins that "Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business" includes the right of a citizen to compete and participate for appointment to a post in any Federal or a Provincial Government department or an attached department or autonomous bodies/corporations etc. on the basis of open competition, which right he cannot exercise unless the process of appointment is transparent, fair, just and free from any complaint as to its transparency and fairness. The above objective enshrined in our Constitution cannot be achieved unless due publicity is made through public notice for inviting applications with the aid of the leading newspapers having wide circulation.
>
> It may be pointed out that the above question came up for consideration before this Court In re: Abdul Jabbar Memon and others 1996 SCMR 1349), wherein it concluded as under:--
>
> ---
>
> 17. We reiterate that the appointments to various posts by the Federal Government, Provincial Governments, Statutory Bodies and other Public Authorities, either initial or ad hoc or regular, without inviting applications from the public through the press, is violative of Article 18 read with Article 2A of the Constitution, which has incorporated the Preamble to the Constitution as part of the same and which inter alia enjoins equality of opportunity and guarantees for creation of an egalitarian society through a new order, which objective cannot be achieved unless every citizen equally placed or situated is treated alike and is provided equal opportunity to compete inter alia for the posts in aforesaid Government set-ups/institutions."

22. Selection of a candidate for appointment to a public post on the basis of "political dictation" came under discussion in the case of *Government of N.-W.F.P. through Secretary, Forest Department, Peshawar and others v. Muhammad Tufail Khan* (PLD 2004 SC 313) and this Court observed in that case as under:

> "5. ------- It is also reflected from the documents and the same is not denied that the selection of the respondent was made simply on political dictation. Neither any advertisement was made to fill these vacancies nor any interview was held. The codal formalities for the appointments of these posts were flagrantly violated. Such-like entries in the civil service cannot be countenanced as it generate frustration and despondency among all persons who were having excellent merit but every time they are bypassed through suchlike back door entries on political interference. Everybody who matters in the functioning of the society has always propagated for the adoption of transparency and merit in appointments, which are cardinal principles of good governance. The Constitution of Islamic Republic of Pakistan has also mandated the same as is reflected from the Article 18 which is in the following terms:--

> "18. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business."

6. However, when it comes to actual practice, these principles are blatantly ignored. The Courts are duty bound to uphold the Constitutional mandate and to keep up the salutary principle of rule of law. In order to uphold these principles it has been stated time and again by the superior Courts that all the appointments are to be made after due publicity in a transparent manner after inviting applications, through Press from all those who are eligible, deserving and desirous. Reference in this regard is made to Abdul Jabbar Memon (1996 SCMR 1349) where the learned Judges in a Human Rights case, directed the Federal Government, Provincial Governments, Statutory Bodies and the Public Authorities to avoid violation of fundamental rights (Article 18 of the Constitution) guaranteeing to every citizen's freedom of profession. This view was reiterated by a Bench of five learned Judges in a case reported in Munawar Khan v. Niaz Muhammad (1993 SCMR 1287) where it was observed as under:--

> "6. What we have noticed in all these cases which are under consideration before us is that appointments of both the parties contesting the appointments were made without such advertisements, publicity or information in the locality from which the recruitments were to be made. In view of the Constitutional requirement and the interim order already passed in Human Right Case 104 of 1992 it is expected that in future all appointments shall be made after due publicity in the area from which the recruitment had to take place. This will, however, not apply to short-term leave vacancies or to contingent employment."

Again in another case, reported in Mushtaq Ahmed Mohal v. Honourbale Lahore High Court (1997 SCMR 1043), a Bench of five learned Judges reiterated this view after quoting in extenso the order passed in the aforementioned case titled as Abdul Jabbar Memon (1996 SCMR 1349) stated as under:--

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Reference in this regard is also made to the case of Obaidullah v. Habibullah (PLD 1997 SC 835) where the learned Judges again reiterated the afore-quoted paragraph. Reference is also made to the case of Abdur Rashid v. Riazuddin (1995 SCMR 999).

7. However, in spite of all these directions, this salutary principle is being frustrated with impunity. This malady which has plagued the whole society shall be arrested with iron hands and the principle of merits shall be safeguarded, otherwise, it would be too late to be corrected. In the case in hand admittedly the appointment was made clearly in violation of the codal formalities simply on the dictation of a political figure."

23. The case of *Tariq Aziz-ud-Din and others: in re* (2010 SCMR 1301) was a case of discrimination in promotion of senior civil servants and this Court had observed in that case as follows:

> "34. Before parting with the judgment, we may observe that good governance is largely dependent upon the upright, honest and strong bureaucracy particularly in written Constitution wherein important role of implementation has been assigned to the bureaucracy, Civil service is the back bone of our administration. The purity of administration to a large extent depends upon the purity of the services. Such purity can be obtained only if the promotions are made on merit in accordance with law and Constitution, without favouritism or nepotism. It is a time tested, recognized fact that institution is destroyed if promotions/appointments are made in violation of law. It will, in the ultimate result, paralyze automatically. The manner in which the instant promotions in the Civil Services have been made, may tend to adversely affect the existence of this organ. Honesty, efficiency and incorruptibility are the sterling qualities in all fields of life including the Administration and Services. These criteria ought to have been followed in the instant case. Fifty-four persons were promoted in complete disregard of the law causing anger, anguish, acrimony, dissatisfaction and diffidence in ranks of services which is likely to destroy the service structure. ------- According to Article 4 of the Constitution the word "law" is of wider import and in itself mandatorily cast the duty upon every public functionary to act in the matter justly, fairly and without arbitrariness."

24. Appointment of a Chairman of the Oil and Gas Regulatory Authority (OGRA) came under scrutiny of this Court in the case of *Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others* (PLD 2012 SC 132) and the Court observed in that case as under:

> "28. The Executive's ability to make appointments to key positions of authority, and to dispense with the incumbents therein, needs to be examined in historical context as this will facilitate our understanding of the constitutional principle of separation of powers and the importance of judicial review in ensuring adherence to such separation. On account of our colonial legacy and its attendant pattern of governance, this examination takes us back to the pre-independence dispensation and to the British constitutional scheme. That was a time when almost all important State functionaries including not just the Prime Minister and the Cabinet but also judges and civil servants, were appointed and removed by the British monarch in his absolute unfettered discretion. It is for this reason they were said to "hold office during the King's pleasure". While this vestige of an absolute monarchy receded in Britain on account of emerging democratic conventions, in the colonies it survived. Even after several years of independence, this practice continued, as was manifested by the imperious dissolution of the Constituent Assembly in 1954, by the representative of the British Crown.
>
> 29. Much has changed since then. Pakistan now has a democratic Constitution which provides for the government of laws and not of men. It is for this reason that in our

Constitution there remain few positions where the incumbents "hold office during the pleasure" of someone else based on broad discretion. In its undiluted form this convention exists only in Article 100(2), Article 101(3) and Article 140(3) which relate to the appointments of a Governor, the Attorney General and the Advocates General respectively. Similarly, such discretionary powers do not exist in those statutes which relate to autonomous regulatory bodies like OGRA.

30. It is to be noted that even where appointments are to be made in the exercise of discretionary powers, it has become well settled that such powers are to be employed in a reasonable manner and the exercise of such powers can be judicially reviewed. In the Corruption of Hajj Arrangements' case (Suo Moto Case No. 24 of 2010) and in the case of Tariq Aziz-ud-Din (2010 SCMR 1301), it has been held that appointing authorities "cannot be allowed to exercise discretion at their whims, sweet will or in an arbitrary manner; rather, they are bound to act fairly, evenly and justly". There is an obligation thus imposed on the Executive to make appointments based on a process which is manifestly and demonstrably fair even if the law may not expressly impose such duty. In the Hajj corruption case supra, the Court has again clarified this point saying that *"[b]y now, the parameters of the Court's power of judicial review of administrative or executive action or decision and the grounds on which the Court can interfere with the same are well settled. Indisputably, if the action or decision . . . has been arrived at by the authority misdirecting itself by adopting a wrong approach or has been influenced by irrelevant or extraneous matters, the Court would be justified in interfering with the same"*.

31. Much before these declarations by legislatures and courts, we find exhortations to this effect in the common sense insights to be found in diverse systems and eras in history. We thus have in the classical texts of the Greek ancients, and the writings of those such as Sheikh Saadi, wherein the deleterious consequences of nepotism and cronyism in administrative appointments have been highlighted. Amongst other sources, one finds reference to this in the "Qaboos Namah", a book that Ameer Unsur Ma' ali Kaikaus wrote in the 11th century A.D. for the instruction of princes, including his son Gilan Shah, in the art of good governance. The Ameer cautioned that when "appointing officers to responsible positions, act carefully and grant positions only to those who are qualified for the duties entailed in that job; and also, beware that when an ignoramus who is not up to the assigned task gets appointed, he will never frankly concede his lack of ability to you; instead, to hide his lack of worth, he will boldly embark upon task after task, and make a mess of it all". [Kaikaus, The Book of Qaboos, page 206-7; Tehran (1963)]. And in a similar vein, warning against the hazards of turning public offices into sinecures, he advises that "if at all you wish to bestow favours upon someone, give him valuable gifts; do not, however, confer on him a high office for which he does not possess the requisite competence". [Kaikaus, The Book of Qaboos, page 207; Tehran (1963)]. We also find mention of some very pertinent principles in this regard in Nizamul Mulk Toosi's "Siyasat Namah", also written in the 11th century, which displays an uncanny cognizance of the evils of nepotism which seem eternally to haunt the corridors of high power even in this day and age. He emphasizes that "the ruler should make sure that he does not award public office to his cronies (merely on the basis of their friendship with him) . . . for such arrangements can give rise to

many an evil". [Toosi, The Book of Government, p. 120; Tehran (1994)] The modern day discourse on good governance, whether in the law or in Courts, is only an expression of these universal principles.

32. In the present case involving the respondent's appointment as Chairman OGRA, the law has travelled a great distance from the times of an absolute monarch or the time when the people of Pakistan were subject to colonial rule. Instead, it has come closer to the ethos of responsible governance, which was envisioned in the sage and ever-lasting wisdom adverted to above. Thus, we now have the express stipulation in the Ordinance which requires, firstly, that OGRA "shall be independent in the performance of its functions" and that "the Chairman shall be an eminent professional of known integrity and competence . . . ". These provisions in the Ordinance expressly limit the authority of the political executive or the government of the day, thereby ensuring that the crucial position of Chairman, OGRA, does not end up becoming a cushy sinecure and an anti-people drain on public resources, for want of competence, integrity or efficient regulation.

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36. To test the validity of the appointment process in this case, it would be useful to adopt a test based on the following considerations:
(a) whether an objective selection procedure was prescribed;
(b) if such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise, i.e. selection of the sort of candidate envisaged in section 3 of the Ordinance;
(c) if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigour, objectivity, transparency and due diligence to ensure obedience to the law.

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55. The detailed discussion above has highlighted the seriously flawed nature of the selection process and the manner in which it was undertaken. Also, we have touched upon the allegations of wrong doing in the preceding paragraph, for the purpose of the Orders in paragraph 57 below.

CONCLUSIONS

56. Based on the foregoing discussion, it is clear that in order to enforce the fundamental rights of the People of Pakistan, it is essential that good governance in OGRA is ensured. To achieve this objective it is crucial that 'highly qualified' persons of 'known competence and integrity' are appointed as Chairman and Members of OGRA. This can only happen if the highest and most exacting standards of diligence, transparency and probity are employed in the selection of these persons. This quite obviously has not been done. We are clear, therefore, that the selection process seriously and irretrievably undermined merit. It is such actions which potentially result in direct harm to the people of Pakistan and also contribute towards heart-burn and disillusionment amongst genuine and competent aspirants for public office. The direct impact of ignoring merit and the eligibility criteria prescribed by the

> Ordinance also has the potential of causing harshly adverse consequences including unjustified inflation in retail prices for consumers, thus depriving the people of Pakistan of their incomes, assets, quality of life and dignity. Among many other harmful consequences thrown up by cases such as the present one, is the unnecessary clogging of Court dockets thus reducing the Court resources available for resolution of other cases. It is clear this case would not have arisen if the selection process had been designed and implemented to ensure fulfillment of the requirements of the Ordinance. Civil servants and other holders of public office have to remain conscious that in terms of the Constitution "it is the will of the People of Pakistan" which has established the Constitutional Order under which they hold office. As such they are, first and foremost fiduciaries and trustees for the People of Pakistan. And, when performing the functions of their Office, they can have no interest other than the interests of the honourable People of Pakistan in whose name they hold office and from whose pockets they draw their salaries and perquisites."

25. In the case of *Muhammad Ashraf Tiwana and others v. Pakistan and others* (2013 SCMR 1159) the matter in issue was selection and appointment of a person as the Commissioner and Chairman of the Securities and Exchange Commission of Pakistan in terms of the requirements of the Securities and Exchange Commission of Pakistan Act 1997. This Court had the following to observe in that case:

> "20. The second challenge made by the petitioner to the appointments of Commissioners and Chairman SECP is far more weighty. It has by now become well settled that Courts will look into the process of appointments to public office. It is the process which can be judicially reviewed to ensure that the requirements of law have been met. In the case of Muhammad Yasin supra, the process of appointment to public office has been made the subject of judicial review to ensure adherence to the command of the law. This is also a requirement of good governance and has been a subject of comment from ancient times. Abu al-Hassan al-Mawardi (d. 1058 A.D), the famous scholar from Baghdad devoted a substantial portion of his 11th century treatise on constitutional law, the al-Ahkam al Sultaniyyah, to the qualifications for holding public office. These are universal principles of good governance and are reflected in sections 5 and 6 of the Act which lay down stringent criteria for the kind of person the Federal Government may appoint as Commissioner/Chairman SECP. Section 5(1) of the Act specifies that a Commissioner "shall be a person who is known for his integrity, expertise, experience and eminence in any relevant field, including the securities market, law, accountancy, economics, finance, insurance and industry." Under the law, the federal Government has the authority to appoint the Chairman and Commissioners of SECP. The Federal Government, however, has no absolute and unbridled powers in this behalf. It is constrained by the aforesaid requirements of the Act. We have come a long way from the days of the whimsicality of Kings and Caesers, such as Caligula who could conceive of appointing his horse Incitatus

as Consul of Rome. The element of subjectivity and discretion of the Government has been severely limited by the legal requirement that an appointee must be a person having integrity expertise, eminence etc. This requirement imposes a duty on the Federal Government to put in place a process which ensures that the requirements of the law are met.

21. ------- It is obvious that if the requirements of section 5(1) are to be adhered to, there has to be a process which ensures that the widest possible pool of qualified candidates is available to the Federal Government. From this pool, through a transparent selection process, appointments can be made. In our judgment in the case of Muhammad Yasin supra, we had set out a three pronged test for appointments to public office: "(a) whether an objective selection procedure was prescribed; (b) if such a selection procedure was made, did it have a reasonable nexus with the object of the whole exercise, i.e. selection of the sort of candidate envisaged in [the law]; (c) if such a reasonable selection procedure was indeed prescribed, was it adopted and followed with rigour, objectivity, transparency and due diligence to ensure obedience to the law." -------

22. We asked learned counsel for the Federation to show us the process through which the name of respondent No. 4 came up for consideration before the Federal Government. We had sought relevant information vide our order dated 13-9-2011 but this was not complied with. In our order dated 13-6-2012 our direction was expressly repeated. In response, the petitioner filed C.M.A. 2955 of 2012 on 5-7-2012, which provided only a fraction of the requisite departmental record. Therefore, on 13-9-2012, we reiterated our order, but to no effect. Ultimately, on 8-11-2012, the petitioner filed a contempt petition to enforce our orders seeking the relevant record. It was only after this extreme step that the Federation finally submitted some official record and documents in Court through C.M.A. 1342 of 2013 on 13-3-2013 and C.M.A. 1562 of 2013 on 26-3-2013 filed during the course of the hearing. In C.M.A. 1342 of 2013, it was also repeated that the appointment of the respondent was in line with previous practice. However, it was, for the first time added that the then Finance Secretary and Finance Minister had a meeting with respondent No. 4 and "after due consideration his name was recommended for appointment to the Prime Minister of Pakistan". We find this assertion in para 4 of C.M.A. 1562 of 2013 to be wholly unsubstantiated by any material on record. It appears to be false and misleading. The concise statement filed on behalf of the Federation on 25-10-2011 does not make any such averment. C.M.A. 2955 of 2012 filed on 5-7-2012, also did not make any mention of the Finance Minister and Finance Secretary's meeting with respondent No. 4 nor is there any official noting to this effect. We, therefore, find it strange that C.M.A. No.1562 of 2013 which was filed on 26-3-2013 for the first time mentioned any process at all. The averment aforesaid is also belied by the noting on official files which preceded the appointment of respondent No. 4 as Chairman, SECP, and which has been brought on the record through C.M.A. 2955 of 2012, C.M.A. 1342 of 2013 and C.M.A. 1562 of 2013. We may reiterate, based on the record which was provided by the Federal Government after much foot-dragging spanning more than one year, that no process, let alone a credible, fair and transparent one was adopted by the Government. We may add that, rather than recognizing the potential conflict between SECP and respondent No. 4, a common Concise Statement was filed by them. It was only at a subsequent stage that respondent No. 4 instructed separate counsel. Importantly, neither in the Concise Statement nor

during the prolonged hearing of the case was any mention made, of any meetings or interview of respondent No. 4 with the Minister or Finance Secretary.

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28. Furthermore, in view of the requirements of section 5, there is a need to devise a proper mechanism for targeting and attracting a pool of qualified potential appointees. Randomly entertaining CVs, with or without the backing of political patrons, or seeking nominations from arbitrarily selected consultees do not meet this requirement. The requirement can be achieved through a number of different means, be it by open advertisement, or through the auspices of talent scouts who have the needed expertise and who ensure confidentiality to applicants or through any other sufficiently transparent and inclusive process. The details of the mechanism are not our concern at present; these may be worked out by the Federal Government and recorded in the report which we have sought from the Government. What is clear, however, is that the process that went into the impugned appointment clearly does not meet the requirement of the law and the appointment has, therefore, been set aside and struck down.

29. ------- What is missing is due diligence or a fair and demonstrably transparent selection process. In the notings on official files, as observed above, a wholly haphazard and un-structured culture of contacts, recommendations or sifarish appears to have pervaded the corridors of Government in the matter of appointment of Commissioners. In this respect some names as noted above, were floated by random individuals such as the Secretary Finance and the Governor Punjab based on no apparent process and based on no apparent reason. When this glaring omission was pointed out to learned counsel representing the Federation and it was mentioned that individuals, political or otherwise, even when well intentioned, could not be treated as arbiters of integrity, expertise, experience and eminence of recommendees, learned counsel was unable to give any satisfactory response. He merely repeated his submission that the respondent's appointment was made as per past practice.

30. It is obvious to us that such lack of process has irretrievably undermined the selection and appointment of the respondent as Chairman. This itself is a serious flaw in the selection and appointment process. The only documents attached to the summaries were self generated CVs of these persons. Once again there is nothing at all on the record and there was no submission made by learned counsel for the respondents which would show that any inquiry let alone due diligence was undertaken to ascertain the correctness or otherwise of the contents of the CVs. So much so, even the most cursory exercise to verify such contents from any source mentioned in the CVs, was not attempted by the Government. In the absence of such due diligence, we are clear that it would be impossible to ascertain objectively the qualifications of recommendees in the Summary as to integrity, expertise, experience and eminence etc. as required by section 5(1) of the Act.

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65. ------- We wish to add that issues of appointments to senior positions in public bodies, which have been highlighted in this petition and in other cases which have come up before us, have under-scored the need for a transparent, inclusive and

> demonstrably fair process for the selection of persons to be appointed to such senior positions. The Federal Government may consider the necessity of putting in place independent mechanisms and of framing open, fair and transparent processes so that the objectives for which public bodies are established can be efficiently achieved and at the same time the pernicious culture of arbitrariness, favouritism and nepotism is eliminated. A copy of this reasoning may be sent to the office of the competent appointing authority and the Law Ministry."

26. The case of *Contempt proceedings against Chief Secretary, Sindh and others: In the matter of* (2013 SCMR 1752) pertained to illegal or irregular postings, transfers and promotions, etc. in the Sindh Police and this Court had observed in that case as follows:

> "121. By the impugned legislations 'absorption' of an employee in ex-cadre group would deprive the seniority and progression of career of meritorious civil servants. A substantial number of unfit and unmeritorious officers and beneficiaries have been absorbed in the important groups, services, positions with the help of authorities and such legislations allow this to continue. The absorption, by way of impugned instruments, would practically cause removal of constitutional and legal differentiations that exist between various cadres, posts and services. Moreover, the culture of patronage will intensify the activity of bringing more politicization, inefficiency and corruption in the provincial services. The Civil Servants Act and Rules framed provide transparency in appointments, which would disappear and the employees who could not get in service through competitive process may also be obliged to look for a political mentor instead of relying on merits in order to protect their careers. We may also observe here that the absorption under the aforesaid impugned instruments is not only confined to non-civil servants to civil servants but through these impugned instruments non-civil servants, who were serving on non-cadre posts, have been transferred and absorbed to cadre posts, the pre-requisite of which is competitive process through Public Service Commission or by other mode provided in the relevant recruitment rules. Law of such nature which is violative of the recruitment rules will encourage corruption and bad governance and the public at large will loose confidence in the officials who are being absorbed under the garb of the aforesaid impugned instruments.
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> 123. Though the Court interpreted the provisions of Federal Civil Servants Act of 1973 in the aforesaid judgment but the law and the rules prescribed therein are identical to the language of the Act of 1973 with minor exceptions. We therefore, can safely hold that the impugned instruments empowering validation to the absorbees and appointment by transfer (absorption) of non-civil servant to a cadre post in Sindh Government are contrary to the parameters guaranteed by the Constitution under Articles 240 and 242 and absorptions in such manner to extend favours to unmeritorious employees by the Sindh Government. Such absorption has led to the burnt of increasing lawlessness and violence on one hand and on the other hand meritorious officers despite discharging their duties with utmost dedication and

professional excellence are affected with a griping sense of insecurity in respect of their future prospects in careers.

124. We have also noticed the absorption of employees from different departments/organizations in the Sindh Police through the impugned legislation and the material placed before us reflects that almost all of them have been absorbed for political considerations. The senior police officers in the rank of D.I.G, SSP, SP, DSP etc., without undergoing the mandatory police training, are posted in field particularly in Karachi, which has resulted in deteriorating law and order situation in Sindh specially in Karachi owing to their lack of competence. This Court in the case of Watan Party and another v. Federation of Pakistan and others (PLD 2011 SC 997) popularly known as "Karachi Law and Order case", has noticed this situation and observed as under:--

> "31. It seems that the police primarily being responsible to enforce law and order has no intention to deliver. Either they are scared or they are dishonest or absolutely lack the requisite skills. -------. Another reason appears to be that police force has been highly politicized, recruitments have been made in political consideration. It came to light during hearing of the case that in police force many police officers have been recruited on political considerations who have managed to occupy such posts for extraneous considerations and senior officers in the rank of SSP, SP and DSP etc. have been inducted into the force from other organizations without following any rules and even they have not un dergone training for the purpose of policing.

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137. The concept of power under our Constitution is distinct from other constitutions of common law countries. Under the Constitution of Pakistan, the sovereignty vests in Allah and it is to be exercised by "the people within the limits prescribed by Him", as a sacred trust. The Authorities in Pakistan while exercising powers must keep in mind that it is not their prerogative but a trust reposed in them by the Almighty Allah and the Constitution. The impugned legislation is promulgated to benefit patent class of persons specific and violative of Article 25 of the Constitution as it is not based on intelligible differentia not relatable to the lawful object. The impugned legislation on deputation is violative of the service structure guaranteed under Articles 240 and 242 of the Constitution which provides mechanism for appointments of Civil Servants and their terms and conditions as envisaged under Act of 1973 and the Rules of 1974 framed thereunder. The object of the Act of 1973 is to maintain transparency in appointments, postings and transfers of Civil Servants, whereas deputationists who otherwise are transferred and appointed by the Sindh Government under the impugned instruments have destroyed the service structure in Sindh and has blocked the promotions of the meritorious civil servants in violation of the fundamental rights guaranteed to them under Articles 4, 8, 9, 25, 240 and 242 of the Constitution, as discussed hereinabove and are liable to be struck down.

> 154. Indeed out of turn promotion has become a vehicle of accelerated progression for a large number of favourite officers using various measures and means. A large number of favourite police officers were conferred out of turn promotions under section 9A of the Act of 1973. This Court repeatedly disapproved the culture of patronage creeping in the Sindh police by abuse of authority which has gravely eroded efficiency, morale and image of the police officers. In the recent order of this Court in the case of Suo Motu No.16 of 2011, this Court has observed as under:--
>
> > *"It is also a hard fact that the police has been politicized by out of turn promotions and inductions from other departments time and again, through lateral entries which has brought unrest amongst the deserving police officers waiting their promotions on merits. The posting and transfers of the police officers also lack merits. The complete service record of a police personnel which could reflect posting and transfer is not maintained by the relevant wing. Even many police officers posted within the Karachi on senior positions lack qualifications and competence both.....If this is the state of affairs, how can there be peace in Karachi. It seems instead of depoliticizing police force further damage has been caused by the government by introducing their blue eyed persons in police force through lateral entries and then granting them retrospective seniority and out of turn promotions."*

27. Illegal appointments and massive corruption in the Employees Old-Age Benefits Institution were at issue in the case of *Syed Mubashir Raza Jaffri and others v. Employees Old-Age Benefit Institutions (EOBI) through President of Board, Board of Trustees and others* (2014 SCMR 949) and this Court had observed in that case as under:

> "22. In the 1st case of Muhammad Yasin (*supra*) the appointment of Chairman Oil and Gas Regulatory Authority (OGRA) was declared illegal. In the 2nd case of Muhammad Ashraf Tiwana (*supra*) the appointment of the Chairman Securities and Exchange Commission of Pakistan (SECP) was held to be in contravention to statutory requirements. Both these cases reiterated the principle that appointments made in a statutory body or Corporation under the control of Provincial or Federal Government in an arbitrary and capricious manner cannot be allowed to hold the field. In the 3rd case of Tariq Aziz-ud-Din (*supra*) this Court underscored the integral link between good governance and a strong and honest bureaucracy. It was stated that this could only come about if appointments made were based on a clear merit criterion, in accordance with the relevant laws and rules as opposed to favouritism and nepotism. In the 4th case of Syed Mahmood Akthar Naqvi (*supra*) the Supreme Court, examining the issue of political pressure placed on the civil service by the executive, held that the matter was one of public importance as such undue influence by political powers infringed the fundamental rights under Articles 9, 14, 18 and 25 of the Constitution. In the 5th case, which is a more recent judgment of this Court, relating to contempt proceedings against

the Chief Secretary Sindh and others (2013 SCMR 1752), wherein, inter alia, vires of certain legislative instruments introduced by the Sindh Government regarding regularization and absorption of civil servants (particularly, in the police department) was under scrutiny/challenge, the Court examined all the relevant aspects of the case in detail and expressed its views about the maintainability of petitions, absorption, deputation, out of turn promotions and re-employment in Government service qua their subsequent validation through some legislative instruments; principle of locus poenitentiae and effect of such legislation attempting to nullify the effect of the judgments of the Superior Courts. In this regard, while striking down these pieces of legislation, being contrary to the spirit of Articles 240 and 242 of the Constitution and various provisions of Sindh Civil Servants Act 1973, it laid down several guiding principles. The principle of law propounded in this judgment, with reference to many other earlier judgments of the apex Court, lend full support to the case of the present petitioners, as regards illegal appointments, contract appointments, absorptions and their regularization etc., particularly, when these acts are motivated to frustrate and nullify some earlier judgments/orders of the Superior Court in a dishonest, colourful and mala fide manner, as discussed in the earlier part of this judgment and hereinafter. All the cases discussed above reveal that the jurisdiction of this Court has been clear and consistent with regard to the manner in which appointments to public offices are to be made strictly in accordance with applicable rules and regulations, without any discrimination and in a transparent manner. Thus, it is essential that all appointments to public institutions must be based on a process that is palpably and tangibly fair and within the parameters of its applicable rules, regulations and bye-laws. But conversely, it is a sad fact of our bureaucracy that it can be so susceptible to the whims and wishes of the ruling elite class etc, which results in an obvious weakening of state institutions such as the EOBI, whereby the general public, whose interest such establishments have been charged with protecting, are adversely and heavily affected in different ways.

24. Having discussed as above, another important aspect of the case, which needs serious consideration is about the fate of the illegal appointees, which is subject matter of consideration in the present proceedings. If we look at this aspect of the case from the angle of those who have succeeded to get appointments in the manner, as discussed above, some of them may claim that since they met the requisite qualifications for the posts and were thus appointed, they cannot be made to suffer due to illegalities committed by the management of EOBI. However, when we place their cases for appointment in juxtaposition to the other applicants, who had applied for these vacancies and are 23648 in number, we find that these candidates having equal right of opportunity as citizens of this country, in terms of Article 25 of the Constitution were thrown out of the competition despite the fact that they also met the requisite qualifications and might have been more meritorious, but could not exert either political pressure or avail the fruits of nepotism and corruption, forming basis for the selection and appointment of other candidates, many of whom had not even applied for the job in terms of the advertisement for these vacancies made in the month of April, 2009, and in this manner they succeeded in getting entry from the backdoor at the cost of many other bona fide candidates, whose applications were literally thrown in the dust bin in an un-ceremonial manner just for the sake of accommodating the blue eyed ones. All these factors, are over and above the violation of

> rules, regulation and other codal formalities meant for these appointments, inter alia, highlighted by the fact finding committee on recruitment/appointment in its report, which is a serious subject for the reason that it is based on examination of the entire original record of such proceedings of appointments, right from the date of publication of advertisement regarding these vacancies, and till date none has come forward to question the impartiality of the committee or the authenticity and correctness of such report. In these circumstances, in our opinion, if the appointment of any single appointee during this process is protected on one or the other pretext or for any other consideration it will amount to protecting their ill-gotten gains, acquired through unlawful means, and to perpetuate corruption and discrimination under the disguise of sympathetic consideration for such appointees for the sake of their economic well being."

28. Under the Federal and Provincial Rules of Business a Federal Minister, a Provincial Minister or a member of the Parliament or of a Provincial Assembly has no direct role whatsoever in the matters of appointment, posting, transfer or promotion, etc. of a person in the concerned ministry, division or department. Under the said Rules of Business a Federal Minister, a Provincial Minister or a member of the Parliament or of a Provincial Assembly has no role even in the exercise of executive authority of the relevant ministry, division or department vesting in some officer of such ministry, division or department. Interference of a Minister or a member of the legislature in such matters has repeatedly been declared by different courts of the country, including this Court, to be without lawful authority and of no legal effect. In the case of *Administrator, Punjab Dairy and Poultry Development Board and 3 others* v. *A. G. Afzal* (1988 SCMR 1249) this Court had observed that the legality of an order passed by a Provincial Minister reinstating an employee during the pendency of his departmental appeal before the competent authority against termination of his service was questionable. Later on in the case of *Ahmad Khan* v. *Member (Consolidation), Board of Revenue, Punjab, Lahore and others* (PLD 1990 SC 1070) a Provincial Minister for Consolidation had passed an order for a fresh consolidation of land which order had been set aside by the Lahore High Court, Lahore and later on in the said matter this Court had held as follows:

"The learned Judge in the High Court made the following observations with regard to the validity of the orders/directions issued by the Minister:--

> "Under the law Minister for Consolidation has no jurisdiction or authority to pass any order in respect of consolidation scheme already confirmed under the law against which all objections and judicial proceedings in the nature of appeals and revisions had already been exhausted and disposed of. The impugned order of Minister for Consolidation was, therefore, wholly without jurisdiction and void ab initio. Law is firmly settled that if the basic order is without lawful authority, whole series of such orders together with superstructure of rights and obligations built upon them fall to the ground. ------- "

In addition to the aforesaid reasons in the impugned judgment of the High Court we are also of the view that another argument advanced before the High Court from the respondents' side, was also valid; namely, that "Minister for Consolidation had no authority to interfere with the confirmed consolidation scheme as under the West Pakistan Consolidation of Holdings Ordinance, 1960, the authorities who could act were the Collector, Commissioner and Board of Revenue." The statutory functionaries alone could have interfered with the orders challenged before them. The Minister not being such a functionary had no jurisdiction to deal with the matter in any manner whatsoever. His action thus for this additional ground was also void ab initio and could not at all be acted upon.

Learned counsel for the petitioner faced with the aforestated formidable position, argued that in addition to the order passed by the Minister in this case the Boar of Revenue had also passed independent order; therefore, the said order would cure the defects pointed out above. We do not agree with him. The order of the Minister as already been explained, was coram non judice. It could not at all be cured by any functionary even if he was acting under the law in purported exercise of his own jurisdiction. Because obviously this exercise also got tainted by the original orders passed by the Minister.

In this case there is an additional feature; namely, that the learned Member, Board of Revenue did not act according to his own independent judgment and this is further shown in the order of the Member of the Board of Revenue relied upon by the learned counsel. It is clearly stated therein that "under the orders of the Minister of Consolidation Punjab, the Member (Consolidation) Board of Revenue Punjab has been pleased to allow re-consolidation in village Kotli Bhagu, Tehsil Daska, District Sialkot". The aforegoing supposition is strengthened by further direction issued by the Board of Revenue namely, that the District Authorities were required "to comply with the above orders and submit a report for information of the Minister for Consolidation, Punjab". This order was passed in 1987. As shown above, not only this but subsequent orders passed in this case for implementation of the Orders of the Board of Revenue, whether by saying so or otherwise, would all be treated as void and nullity."

29. Those cases were followed by the case of *Mrs. Aqeela Asghar Ali and others v. Miss Khalida Khatoon Malik and others* (PLD 1991 SC 1118) wherein some adverse remarks recorded against a civil servant had been expunged by the competent authority after a successful approach had been made by the concerned civil servant in that regard to the Chief Minister of the Province. This Court had deprecated the said approach through the following observations:

> "In the first place what is to be noted is that application on which the remarks were expunged was addressed by the appellant/civil servant to the Chief Minister. The Chief Minister does not appear to be a departmental authority for the purposes of entertaining an appeal or representation against the refusal to expunge a remark or to deal with the delays in disposal of such representation. It was a political appeal made by the civil servant. We find that all the contesting civil servants in this case had been recklessly approaching the Chief Minister for the redress of their grievances. This is to be deprecated. It erodes the discipline in service. It makes the examination of the merits of the case influenced, partial and tainted. With such a political appeal the appellant/civil servant in the background, it was incumbent upon the Government of the Punjab to show that the decision of the competent authority was not abridged, tainted or influenced by such outside command."

30. Then came the case of *Munawar Khan v. Niaz Muhammad and 7 others* (1993 SCMR 1287) wherein this Court had declared the legal position in the above mentioned regard in the following terms:

> "Leave to appeal was granted under Article 212(3) of the Constitution in these appeals to examine, inter alia, the following questions of law of public importance arising therein:--
>
> "(a) Whether, Hon'ble Members of the Legislative Assemblies or Ministers act within the powers and jurisdiction to get appointments made to Government offices and posts?
>
> (b) Whether, they cannot 'interfere' with the rights of civil servants?
>
> (c) Whether, they are bound by the procedure prescribed for the appointment of Government servants?
>
> (d) Whether, in the context of the present case the public representatives can be deemed to have violated the 'Law of the land', through the act/omission of a Government functionary?
>
> (e) Was the Tribunal correct in expressing the view that the public representatives are required to perform functions other than what they have done in this case?

> (f) Whether, their conduct in the present case is an example of unnecessary interference in the affairs of the Government functionaries?
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> 8. As regards the allocation of quota of posts to the local M.P.As. or M.N.As. for recruitment to the posts, we find it offensive to the Constitution and the law on the subject. The Ministers, the Members of National and Provincial Assemblies, all are under an oath to discharge their duties in accordance with the Constitution and the law. The service laws designate, in the case of all appointments, a departmental authority competent to make such appointments. His judgment and discretion is to be exercised honestly and objectively in the public interest and cannot be influenced or subordinated to the judgment of anyone else including his superior. In the circumstances, allocation of such quotas to the Ministers/MNAs/MPAs and appointments made thereunder are all illegal ab initio and have to be held so by all Courts, Tribunals and authorities."

31. The later case of *Pir Mazharul Haq and others v. The State through Chief Ehtesab Commissioner, Islamabad* (PLD 2005 SC 63) was a case of according of approval by a Provincial Minister to regularization of a plot. This Court had declared in clear terms that

> "27. It must be noted that a Minister has no legal right whatsoever to make allotment of any plot at his own whims and wishes and the question of any deviation from the prescribed policy does not arise. No Minister has any right to oblige the persons of his own choice at the cost of public exchequer to earn popularity and to increase his vote bank."

32. Illegal interference of Ministers and legislators, etc. in the exercise of executive authority of the competent authorities in the civil service has also been commented upon and set aside by different High Courts and Tribunals, etc. in many cases and some of such cases are detailed below with a summery of what was held therein:

Mahmood Bakhsh, etc. v. Secretary Irrigation, Government of Punjab, Lahore, etc. (1985 Law Notes (Lahore) 1143):

> A Provincial Minister has no jurisdiction to direct the competent authorities under the Canal and Drainage Act to include a particular area in the Canal Commanded Area.

Muhammad Rashid v. Azad Jammu & Kashmir Government through Chief Secretary and 20 others (PLJ 1987 SC (AJK) 57):

> A Minister's order regarding grant of lease was void *ab initio*.

Ch. Muhammad Zaman, etc. v. Azad Government of the State of J & K, etc. (NLR 1987 Service 111):

> Imposition of a penalty by an Advisor to the President was without jurisdiction.

Masti Khan v. The State (KLR 1987 Criminal Cases 131):

> An order passed by a Chief Minister of a Province transferring investigation of a criminal case was without lawful authority.

Muhammad Zaman and 8 others v. The Minister for Consolidation and 3 others (PLD 1988 Lahore 416):

> A Provincial Minister for Consolidation has no jurisdiction to interfere in a consolidation scheme or to order reconsolidation.

Abdul Rauf v. Director, Local Government and Rural Development, Sargodha and another (PLJ 1989 Lahore 288):

> Transfer of an employee at the instance of a Provincial Minister was without jurisdiction.

Ashnaghar v. Secretary Education, Government of NWFP, Peshawar, etc. (NLR 1990 TD 245):

> Dismissal order passed at the direction of an MPA was set aside as without jurisdiction.

Muhammad Ayub and 6 others v. Minister for Education, Punjab Province, Lahore and 2 others (1990 PLC (C.S.) 278):

> Termination of service upon a verbal direction of a Provincial Minister was set aside as without lawful authority.

Shagufta Bibi v. Deputy Education Officer (Women). Tehsil and District Sahiwal (1990 PLC (C.S.) 345):

> An order of transfer of an employee passed in compliance of an order of a Provincial Minister was set aside as without lawful authority.

Muhammad Afzal v. District Education Officer (Female), Rahimyar Khan and 2 others (PLJ 1990 Lahore 206):

> An order of termination from service passed in compliance of a direction of a Provincial Minister was set aside as without lawful authority.

Muhammad Asif v. Secretary Government of Punjab, etc. (KLR 1990 Labour and Service Cases 319):

> In the matter of transfer of an employee a Provincial Minister does not figure anywhere in the rules and administrative instructions.

33. In the case of *Abdul Malik and others v. Government of Balochistan through Secretary, Home and Tribal Affairs Department and others* (2013 PLC (C.S.) 736) a learned Division Bench of the High Court of Balochistan, Quetta had reiterated the legal position in this respect in very clear terms besides declaring that exerting political influence in such matters is unconstitutional and illegal and warning the pliant, yielding and compliant civil servants against surrendering their jurisdiction and executive authority before the whims and wishes of the political rulers. The matter before the High Court pertained to some appointments made in the Balochistan Levies Force upon a Minister's directive in relaxation of rules and on *ad hoc* basis. The relevant portions of the judgment handed down by the Court in that case are reproduced below:

> "5. We have heard the learned counsel and gone through the documents on record. The second Summary dated June 8, 2012 states that all four gentlemen mentioned therein were appointed on ad hoc basis and in relaxation of rules, "*on the directives of Hon'ble Chief Minister Balochistan and Hon'ble Minister for Home*". There is no power vesting in either the Home Minister or the Chief Minister to issue a directive for the appointment of Risaldar Majors and the Home Secretary was correct in stating (in the second Summary) that the said ad hoc appointments 'cannot be justified'. Unfortunately, the very same Home Secretary, namely

Mr. Naseebullah Khan Bazai, had earlier, himself, moved a summary recommending the appointments to be made on ad hoc basis and in relaxation of rules, probably to please his Minister. He only came to remember the law and the rules when we directed for the production of the record and sought the reason/s for the 'relaxation of rules'. His earlier subservient attitude can be gauged from the fact that the Home Minister wanted Mir Maqbool Ahmed to be appointed as Risaldar Major vide his letter dated January 12, 2012 and on the very same day the Home Secretary moved the Summary recommending his appointment. The indecent haste with which the Home Secretary acted is a sad reflection on his conduct. Sadly, the then Chief Secretary also did not record his objection on the Summary, nor that it was in contravention of the Rules.

6. It is the duty of the bureaucracy to point out if any law, rule or regulation is being violated and not to move a summary which is in clear contravention thereof. The method of appointment of civil servants is attended to by the Act and the Rules. Section 5 of the Act provides:

> *"5. Appointments.--- Appointments to the Balochistan Service or to a civil service of the Province of Balochistan or to a civil post in connection with the affairs of the Province of Balochistan shall be made in the prescribed manner by the Government of Balochistan or by a person authorized by it in that behalf. "*

The word 'prescribed' is defined in section 2(f), as under:---

> "*prescribed*" means prescribed by rules.

The Legislature of Balochistan has enabled the Government of Balochistan to enact rules pursuant to subsection (1) of section 25, which is reproduced hereunder:---

> *"25. Rules.--- (1) The Government or any person authorized by it in this behalf may make such rules as appear to him to be necessary or expedient for carrying out the purposes of the Act."*

In exercise of the powers vesting in the Government under the above cited provision the Government has made the Rules. The Balochistan Legislature has not granted the Government any power to 'relax' any rule. There is also no provision in the Rules enabling the Government to do anything in purported 'relaxation of rules'. In view of this clear legal position it is not understandable how two senior bureaucrats, one heading a department and the other heading the bureaucracy in the province, acted in purported 'relaxation of rules' and wrongly advised the Chief Minister to do so too.

7. In the case of Abdur Rasheed (supra) a chowkidar was appointed on the recommendation of a Member of a Provincial Assembly and the Hon'ble Supreme Court held that, *"The appointment made on the recommendation of M.P.A. was held to be void, ab initio and illegal."* In the case of Abdul Jabbar Memon (supra) a different bench, presided over by the Chief Justice of Pakistan held as under:---

> *"While inquiring into various complaints of violation of Fundamental/Human Rights, it has been found that the Federal Government, Provincial*

> *Governments, Statutory Bodies and the Public Authorities have been making initial recruitments, both ad hoc and regular, to posts and offices without publicly and properly advertising the vacancies and at times by converting ad hoc appointments into regular appointments. This practice is prima facie violative of Fundamental Right (Article 18 of the Constitution) guaranteeing to every citizen freedom of profession."*

The following year a bench of five learned judges of the Supreme Court, in the case of Mushtaq Ahmed Mohal v. Hon'ble Lahore High Court, 1997 SCMR 1043, held, as under:---

> *"17. We reiterate that the appointments to various posts by the Federal Government, Provincial Governments, Statutory Bodies and other Public Authorities, either initial or ad hoc or regular, without inviting applications from the public through the press, is violative of Article 18 read with Article 2A of the Constitution, which has incorporated the Preamble to the Constitution as part of the same and which inter alia enjoins equality of opportunity and guarantees for creation of an egalitarian society through a new order, which objective cannot be achieved unless every citizen equally placed or situated is treated alike and is provided equal opportunity to compete inter alia for the posts in aforesaid government set-ups/institutions."*

In Muhammad Tufail Khan's case (supra) the Hon'ble Supreme Court reiterated and reproduced the above paragraph, and concluded in the following terms:---

> *"7. However, in spite of all these directions, this salutary principle is being frustrated with impunity. This malady which has plagued the whole society shall be arrested with iron hands and the principle of merits shall be safeguarded, otherwise, it would be too late to be corrected. In the case in hand admittedly the appointment was made clearly in violation of the codal formalities simply on the dictation of a political figure."*

8. The appointment to the post of Risaldar Major in the Balochistan Levies Force is a sensitive appointment. The Levies Force has been established, 'for maintenance of law and order' and designated as an 'essential service'. The Levies officers in their area of jurisdiction have been given the same powers as police officers under the Code of Criminal Procedure. If persons are appointed as levies officers on the personal whims of a Minister or on the basis of sifarish the fundamental rights of those aspiring to such posts are transgressed, including their right to aspire to such posts (Article 18), to be considered equal before the law (sub-article (1) of Article 25) and the guarantee that they will not be discriminated against (sub-article (2) of Article 25).

9. The facts that have come on record in these two petitions disclose that a number of violations were committed in making the said appointments. Firstly, the Rules were relaxed, secondly, the appointments were made on ad hoc basis, thirdly, they were made without placing advertisements by inviting all interested persons and, fourthly, no test was conducted. The appointments

contravened the provisions of the Constitution of this country, the Balochistan Civil Servants Act, 1974, the Balochistan Civil Servants (Appointment, Promotion and Transfer) Rules, 2009 and a number of judgments of the Hon'ble Supreme Court (inter alia as mentioned above).

10. We have noted that far too often rules are purportedly relaxed, which to state the obvious defeats the very purpose of enacting rules in the first place. Rules can only be relaxed if the rules permit their relaxation, and the conditions stipulated for relaxation are strictly met. However, the applicable Rules did not permit that the Rules could be relaxed.

11. The Minister concerned also ought to have abided by the oath that he took at the time he became a Minister, when he solemnly swore that he would not allow his personal interest to influence his official conduct or official decisions, that he would preserve, protect and defend the Constitution of Pakistan and that he would do right to all manner of people according to the law, without fear or favour, affection or ill-will. The protection accorded under Article 248 of the Constitution, amongst others to ministers, only extends to acts done or purported to be done in the exercise of powers and performance of their office. Therefore, if a minister seeks the appointment of a particular individual he would not be able to take shelter behind Article 248. In addition if a minister seeks the appointment of a particular individual he would also be contravening his oath of office. However, as we had not issued notice to the Minister concerned we are not proceeding further in this regard.

12. There, however, is no excuse for the conduct demonstrated by senior bureaucrats in recommending that illegal appointments be made. They ought not to have moved summaries in blatant disregard of the Constitution, the Act, the Rules and the precedents of this court and Hon'ble Supreme Court. If at all the Summary was moved, on the insistence of the Minister, it should have been clearly mentioned that it was done so on the Minister's behest, but that was in contravention of the Constitutional of Pakistan, the Act, the Rules, and the precedents of the Hon'ble Supreme Court. Unfortunately, senior bureaucrats permitted themselves either to be coerced or bullied by the Minister or else did so to ingratiate themselves with him. Bureaucrats need to be reminded that they are servants of the State and not of ministers. They, like everyone else, are bound to abide by the Constitution of Pakistan, the law, rules and judgments of the Hon'ble Supreme Court, and in failing to do so they betray the civil service, and thus the people. The bureaucracy's abject subservience to ministers is destroying the confidence of the people in it. In accommodating the illegitimate and illegal demands of ministers and acting as their handmaidens the bureaucracy reduces its own prestige and betrays the interest of the people, and at times with disastrous consequences.

13. In the districts of Kohlu, Sherani and Khuzdar the law and order situation is far from satisfactory, therefore, extra caution should have been exercised in making the appointments to the posts of senior Levies officers. If persons come to occupy these posts on the basis of sifarish of a minister their loyalty would not be to the State, but to their benefactors, who may call upon them not to proceed against certain criminals and/or involve their opponents in false criminal cases. The consequences then of one illegal appointment are manifold. And if the person recommended is also not qualified or competent, or both, as often the case has been when resort has

> been made to favoritism, then, even in cases wherein his political benefactor has no interest he may not be able to conduct himself properly, including apprehending criminals and/or properly prosecuting them. Resultantly, the people pay the price.
>
> 14. The Constitution of Pakistan contains the Fundamental Rights and it was enacted unanimously in the year 1973, and reflects the will of the entire nation, but is rendered meaningless if, for instance, bureaucrats become tools in the hands of ministers and permit the violation of the Fundamental Rights. Laws, made by the Provincial Legislature, too are mocked if they are observed in the breach. And rules, formulated by the government, commanding the confidence of the majority in the assembly, are derided if bureaucrats or individual ministers flout the same. If a bureaucrat pampers a minister and knowingly flouts the Constitution laws or rules he does so either because he is corrupt or lacks strength of character. He may also apprehend that in case he does not abide by the dictates of a minister he may be moved to an unwelcome post or made an 'officer on special duty' i.e. an officer without a post; however, such an apprehension or fear is no defence or justification and on this altar of fear or apprehension the Constitution, laws and rules must not be sacrificed. Bureaucrats must not, and cannot be permitted to, breach the Constitution, the law and/or the applicable rules. And, when this is done the State is eroded. Another consequence of appeasing a minister's illegal demand renders him into supra-Constitutional being, and is destructive of good governance. Bureaucrats are under a bounden duty to say 'no' when the provisions of the Constitution, any law or rule are sought to be violated; and, if they do not then they must suffer the consequences."

34. For what has been discussed above it is quite clear to us that in the matter of getting 145 persons appointed to various jobs in the Oil & Gas Development Corporation the respondent had ignored the mandate of Articles 18 and 25 of the Constitution, he had defied the law declared in the above mentioned judgments rendered by this Court and by some other Courts and Tribunals, he had utilized his authority under the relevant law for extraneous considerations and purposes, he had used his position and power against the interests of the relevant Corporation of which he was incharge and he had done all that to dish out undue favours to others by imposing his will upon a hesitant or unwilling competent authority. We have, thus, felt convinced that the charge under section 9(a)(vi) of the National Accountability Ordinance, 1999 stood fully established against the respondent. This appeal is, therefore, allowed, the impugned judgment passed by the Lahore High Court, Lahore on 13.06.2002 is set aside, the judgment passed by the Accountability Court, Lahore on 30.11.2000 and the

conviction and sentence of the respondent recorded through that judgment are restored with the modification that the sentence of fine passed against the respondent is remitted as the criminal case in hand is about two decades old, the respondent has already undergone his entire sentence of imprisonment and the period of his disqualifications under section 15 of the National Accountability Ordinance, 1999 has also expired by now. We feel that insisting upon payment of fine by the respondent or sending him behind the bars for non-payment of fine at such a late stage would amount to, in the words of Shakespeare, insisting upon a pound of flesh. This appeal is disposed of in these terms.

35. The office of this Court is directed to send a copy of this judgment to the Chairman, National Accountability Bureau who is directed to bring this judgment to the notice of all the Federal and Provincial Ministers and the Secretaries of all the Federal and Provincial ministries, divisions and departments in the country who may stand warned that through this judgment and the previous judgments of this Court and of the other Courts and Tribunals mentioned in this judgment the legal position on the subject stands sufficiently explained and clarified and if they or their subordinates, in terms of the provisions of section 9(a)(vi) of the National Accountability Ordinance, 1999, misuse their authority so as to gain any benefit or favour for themselves or any other person, or render or attempt to render or willfully fail to exercise their authority to prevent the grant or rendition of any undue benefit or favour which they could have prevented by exercising their authority then, unless the contrary is established in clear terms, criminal intent on their part, for the purposes of the provisions of section 14(d) of the National Accountability Ordinance, 1999, shall from now onwards be more readily inferred than was done by the courts in the past. It must be realized and appreciated by all concerned that Ministers and legislators exerting pressure upon civil servants for political favours in the public sector and a bureaucracy ready to oblige them form a deadly alliance and their unholy collaboration works as a recipe for

destruction of merit, weakening of the State structure and promotion of injustice in the society. It is but obvious that a society which allows merit to be sacrificed at the altar of political patronage, which does nothing to prevent weakening of the State structure and which closes its eyes to injustice is doomed to self-destruct. It is, therefore, about time that the National Accountability Bureau and the courts of the country come down heavily upon such predators of a strong, just and decent society.

(Asif Saeed Khan Khosa)
Judge

I agree with my learned brother Asif Saeed Khan Khosa, J.

(Iqbal Hameedur Rahman)
Judge

Most humbly this appeal merits dismissal for reasons given in the appended note.

(Umar Ata Bandial)
Judge

Announced in open Court at Islamabad on 20.01.2016

(Asif Saeed Khan Khosa)
Judge

Islamabad
20.01.2016

Approved for reporting.

Umar Ata Bandial, J. – I have had the honour of reading the majority opinion rendered by my learned brother Asif Saeed Khan Khosa, J. I respectfully agree with the directions issued therein in the matter of commission of offence of misuse of authority under the National Accountability Bureau Ordinance, 1999 **("NAB Ordinance")**. However, on appreciation of the evidence available on record and the law applicable to the facts of the present case under the provisions of Article 12 of the Constitution of Islamic Republic of Pakistan, 1973 **("the Constitution")**, I consider it lawful and fair to dismiss the instant appeal.

2. The impugned judgment dated 13.06.2002 by the learned Division Bench of the Lahore High Court that has acquitted the respondent after reversing the judgment dated 30.11.2000 of the learned Accountability Court, Lahore that had convicted the respondent for committing the offences under Section 3(1)(d) Ehtesab Ordinance, 1996 **("Ehtesab Ordinance")** read with Section 35 of the NAB Ordinance. Accordingly, the learned Trial Court sentenced the respondent to imprisonment for one year and a fine of Rs.5,000,000/- (Rupees five million) in default of payment whereof he was ordered to undergo further imprisonment for a period of one year. The respondent was granted the benefit of Section 382-B Cr.P.C in serving his sentence and was subjected to disqualification to contest election or hold public office under Section 15 of the NAB Ordinance (for a period of 10 years) as "warranted under Article 12 of the Constitution." During the pendency of his appeal before the learned High Court the respondent was released on bail after having undergone 16 months of incarceration.

3. The charge on which the respondent was convicted is available in Cr. Misc. Application No.415 of 2006 **("Cr.MA")**. It reads as follows:

> "1. That you while holding public office as Federal Minister for Petroleum and Natural Resources, Incharge Oil and Gas Development Corporation, by misusing your authority, directed the Chairman Oil and Gas Corporation on 16.09.1996 to appoint 145 persons in Oil and

Gas Development Corporation in flagrant violation of the Rules and Procedure as laid down in Service Rules of OGDC and subsequently approved their appointment on 16.10.1996 without lawful authority.

2. That 27 persons amongst 145 approved by you joined service while the remaining could not join service due to the ban imposed by the Govt. in November, 1996.

3. That you as a holder of public office misused your authority by way of allowing pecuniary advantage to 27 persons and attempting to allow pecuniary advantage to the remaining 118 persons and thus you committed the offence of corruption and corrupt practices as defined under Section 9(a) (vi) read with the schedule of Offences annexed to the said Ordinance and punishable under Section 10 of the NAB Ordinance No.XVIII of 1999 which is within the cognizance of this Court."

4. The respondent pleaded not guilty to the said charge and after the recording of prosecution evidence comprising, *inter alia,* seven witnesses was concluded, he made a statement on oath under Section 340(2) Cr.P.C. apart from recording his statement under Section 342 Cr.P.C. The incriminating evidence in the case is primarily documentary in nature comprising of the undisputed official record. The office noting relevant to the charged offence is Exb.PW-6/1, Exb.PW-6/9, Exb.PA, Exb.PB, Exb.PB/1 in the record of the learned Trial Court. It is reproduced below *in extenso* for convenience of reference:

"OFFICE OF THE MINISTER FOR PETROLEUM AND NATURAL RESOURCES

Islamabad, Sept. 15, 1996.

1. As Minister is kindly aware that we have been under tremendous pressure from the Parliamentarians to cater for their essential requirements of recruitment in the OGDC. Since Budget Session we have been withstanding this pressure and telling them that their requests for recruitment will be acceded to as soon as the position is eased. We have since prepared a list of applicants based on the recommendations of the parliamentarians. Minister has already been pleased to go through the list and has since approved it.

2. Before the Chairman OGDC is requested to issue appointment letters, Minister may like to see.

(signatures)
16/9/96
(R.A. Hashmi)
Principal Staff Officer

The Minister

(signatures)
16/9/96

PSO

(signatures)
23/9/96

Chairman OGDC

3. Principal Staff officer to the Federal Minister for Petroleum & Natural Resources has conveyed the approval of the Minister for appointment of 145 applicants in OGDC against various posts.

4. In this respect, it is submitted that appointments in OGDC are made against the advertised post after necessary test and interview. However, in the recent past, a number of appointments have been made on the directives of the Prime Minister's Secretariat without advertising the post, as a special case. In the instant case if the directives of the Honourable Minister are carried out, approval will be required for relaxation of existing policy and the rules. In such case, the applicants will be appointed on the basis of qualifications and experience and will be given the same designation as offered to the Prime Minister's Secretariat under Phase- I, Phase-II, Phase-III of appointment and the special cases.

5. Approval may kindly be solicited from the Minister for Petroleum & Natural Resources for appointment of 145 in relaxation to the rules, as a special case.

6. Submitted please.

(signatures)
30/9
(AIJAZ MUHAMMAD KHAN)
Chief Personal Officer

MANAGER (PERSONEL)

7. In view of para 4/N, Para 5/N may kindly be considered.

(signatures)
30 Spt 1996
AM(P)

CHAIRMAN

8. With reference to para-1 of the note of Principal Staff Officer, the factual position has been briefly explained in para-4. It may be added that existing work force in the OGDC is considerably in excess of its requirements and a severe burden on its budget. However the proposal at Para-5 is submitted for consideration and approval.

(signatures)
16.10.96
(M. MUBEEN AHSAN)
Chairman OGDC

Minister for Petroleum & Natural Resources

Approved.

(signatures)
16/10/96

Chairman OGDC

(signatures)
16/10

AM(Personnel)

(signatures)
16 Oct 1996
AM(P)

CPO (R)"

(emphasis supplied)

5. A glance at the above office noting makes it clear that the respondent desired the appointment of 145 persons in the Oil and Gas

Development Corporation **("OGDC")** in order to oblige parliamentarians. These handpicked persons were short listed by the Personal Staff Officer **("PSO")** of the respondent without advertisement or the conduct any test or interview; in other words, without undertaking any selection process. The respondent ignored the Chairman, OGDC's (PW-3) note that the existing work force in the OGDC was in excess of its requirement and was a severe burden on its budget. This comment indirectly meant that the Chairman OGDC was opposed to further recruitment in OGDC. Having said that, the Chairman OGDC (PW-3) in paragraph-8 of the office note advised the respondent to approve paragraph-5 of the office note. Paragraph-5 of the office note is a request by the Chief Personal Officer (PW-1) soliciting the approval of the respondent for appointment of 145 persons "in relaxation of the rules as a special case." The respondent obliged and consequently relaxed unspecified rules in order to facilitate the appointment of 145 persons in the OGDC without any selection process, ascertainment of their merit, allegedly against the operational requirement of the ODGC and by imposing additional financial burden on OGDC's financial resources.

6. The allegation by the learned Deputy Prosecutor General NAB is that relaxation of rules was granted illegally by the respondent for the extraneous purpose of doing political favours, which is contrary to the interim order passed by this Court as early as 06.03.1993 in **Re: Abdul Jabbar Memon & others** (1996 SCMR 1349) as duly affirmed in **Munawar Khan vs. Niaz Muhammad** (1993 SCMR 1287) decided on 04.04.1993 and reiterated with clarity and force in **Mushtaq Ahmad Mohal vs. Honourable Lahore High Court** (1997 SCMR 1043) decided on 31.03.1997. The interim order passed in **Abdul Jabbar Memon's case** (1996 SCMR 1349) is reproduced and relied in the two afore-noted subsequent judgments of this Court. This interim order directs as follows:

> "While inquiring into various complaints of violation of Fundamental Human Rights, it has been found that the Federal Government, Provincial

> Governments, Statutory Bodies and the Public Authorities have been making initial recruitments, both ad hoc and regular, to posts and offices without publicly and properly advertising the vacancies and at times by converting ad hoc appointments into regular appointments. This practice is prima facie violative of Fundamental Right (Article 18 of the Constitution) guaranteeing to every citizen freedom of profession.
>
> Subject to notice to all concerned, and subject to final orders after full hearing in the matter, it is ordered as an interim measure that the violation of this Fundamental/ Human Right shall be discontinued forthwith.
>
> Steps shall immediately be taken to rectify, so as to bring the practice in accord with the Constitutional requirement." ***(emphasis supplied)***

7. The afore-noted interim order invokes Article 18 of the Constitution which guarantees the freedom of profession to every citizen, for directing all Governments, statutory bodies and public authorities to make initial recruitment, both ad-hoc and regular, to posts and offices not of handpicked persons, but of persons selected after 'publicly and properly' advertising the vacancies for competition; likewise before converting ad-hoc appointments into regular appointments. This direction has been reinforced subsequently through several elaborate and considered judgments of this Court that are referred in the majority opinion. These are, however, not read presently because they post-date the incriminating facts constituting the offence charged against the respondent.

8. Accordingly, the learned Deputy Prosecutor General NAB has prayed for the setting aside of the impugned judgment of the learned High Court and for the restoration of the respondent's conviction and sentence in terms of the judgment dated 30.11.2000 delivered by the learned Accountability Court.

9. In response to submissions made on behalf of the appellant, the learned counsel for the respondent has highlighted that the Prime Minister and Cabinet of which the respondent was a member was dismissed by the then President of Pakistan on 05.11.1996 under Article 58(2)(b) of the Constitution. Notwithstanding the fact that 'offers of appointment' were issued on 16.10.1996 in favour of 145 persons short listed by the respondent's office, only 3 persons were given employment before the dismissal of the Federal Cabinet on

05.11.1996. These three persons were granted temporary employment as is evident from their separate notifications of joining OGDC (included in Exb.PW-4/1 to Exb.PW-4/19). The temporary employment of all appointees is confirmed by Ijaz Mohammad Khan, Chief Personnel Officer, OGDC (PW-1), Saeed Ahmad Khokhar, Manager Process & Plans, OGDC (PW-2), Mobeen Ehsan, the Chairman OGDC (PW-3) and Akhtar Hussain, Chief Staff Officer, OGDC (PW-4). The OGDC Employees (Service) Regulations, 1994 **("Service Regulations")** expressly provide in the Regulation No.1(4) that these Service Regulations do not apply to *"a person employed purely on temporary basis or against a Project."* The *Explanation* to Regulation No.1(3) states that *"appointment on temporary or casual basis is not a regular service of the Corporation."* It is claimed therefore that the disputed temporary appointments do not entail the breach of any rules or regulations. Hence, the relaxation of rules sought by the Chairman, ODGC (PW-3) in his note of 16.10.1996 was false and *mala fide*. That the Chairman, OGDC had himself without resort to advertisement or any selection process appointed 68 persons on the direction of the Prime Minister Secretariat vide order dated 10.09.1996 ***(Exb.DW-1/8** available at page 588 of the **Cr.MA)*** and made similar appointments of 385 persons vide order dated 13.11.1995 ***(Exb.DW-1/9** available at page 578 of the **Cr.MA)***. That as a matter of departmental practice and precedent the respondent supervised the affairs of OGDC. In the present context, he had on 28.09.1994 granted *"relaxation of rules for fulfillment of Government's desire to provide immediate employment opportunity"* ***(Exb.DW-1/2** available at page 408 of the **Cr.MA)***, which was sought by the predecessor of the Chairman, OGDC on 27.09.1994.

10. After dismissal of the Federal Cabinet on 05.11.1996, the OGDC notified the joining report of 24 other appointees vide notifications issued from 06.11.1996 to 01.02.1997 who were named in the list conveyed by the

respondent's office. It is argued that the said appointments were made by the OGDC of its own violation as the respondent was no longer in the office. In the foregoing background, the respondent has been convicted for the commission of the offence under Section 3(1)(d) of the Ehtesab Ordinance which is as follows:

> **"3. Corruption and corrupt practices:** (1) A holder of public office or any other person is said to commit the offence of corruption and corrupt practices:
> **…**
> **(d)** if he, by corrupt, dishonest or illegal means obtains or seeks for himself or for any other person any property, valuable thing, pecuniary advantage or undue favour. …"

11. The Ehtesab Ordinance, 1996 was promulgated as Ordinance No.CXI of 1996 on 18.11.1996. This Ordinance repeals, *inter alia*, the Holders of Representative Offices (Punishment for Misconduct) Order, 1997 [President's (Post Proclamation) Order No.16 of 1977] **("PPPO of 1977")** which contained the following corresponding offence in its Section 3(2)(e):

> **"3. Misconduct:** (1) …
> (2) A holder of representative office is said to commit the offence of misconduct ---
> **…**
> **(e)** if he, by corrupt, dishonest or illegal means obtains for himself or for any other person any valuable thing or pecuniary advantage, or"

The afore-referred office noting (Exb.PB/1) shows 16.10.1996 as the date when the respondent approved relaxation of rules and thereby allegedly committed the offence charged. Although the learned Trial Court has convicted the respondent for the offence committed under Section 3(1)(d) of the Ehtesab Ordinance which came into force on 18.11.1996 in my humble view, under the provisions of Article 12 of the Constitution, the applicable law containing the offence constituted by the alleged delinquent acts of the respondent is Section 3(2)(e) of the PPPO of 1977. There is generally a minor difference in the elements of the offences envisaged in the two statutes but in the present context the essential ingredients of these offences are common. These ingredients are, the resort to corrupt or dishonest or illegal means by an accused to obtain for himself or for any other person any valuable thing or pecuniary advantage. The respondent was convicted

by the learned Accountability Court for the afore-mentioned offence under Section 3(1)(d) of the Ehtesab Ordinance read with Section 35 of the NAB Ordinance. It will be noticed that the conviction is not under Section 9(a)(vi) of the NAB Ordinance which proscribes misuse of authority by an accused as an offence. The reason lies in the limitations imposed in Article 12 of the Constitution. Therefore, before evaluating the facts of the case in the light of the said offences, it is useful to peruse Article 12 of the Constitution:

> "**12.(1)** No law shall authorize the punishment of a person –
>
> **(a)** for an act or omission that was not punishable by law at the time of the act or omission; or
>
> **(b)** for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed."

The meaning and effect of Article 12 of the Constitution was dilated in **Bhai Khan vs. State** (PLD 1992 SC 14) in the following terms:

> "These Articles prohibit convictions and sentences being recorded in the criminal jurisdiction under ex post facto laws. Previously ex post facto laws imposed liability and punished acts which earlier were lawful when done. Such laws retrospectively created offences for acts or omissions that were not punishable at the time they were done or retrospectively punished persons for offences by penalties greater than or of different kinds from those prescribed for such offences at the time the same were committed. The broad range and nature of ex post facto laws is ably set out by Qadiruddin Ahmad, J. in para 20 of his judgment in Nabi Ahmad v. Home Secretary, West Pakistan (PLD 1969 SC 599 at 610-11). Being against equity and all notions of fairplay and justice, these ex post facto laws over a period of time came to be abhorred. Slowly but surely such ex post facto laws were avoided by resorting to beneficial construction or rendered invalid by legislation and the above Articles in both the Pakistan and Indian Constitutions clearly render invalid such ex post facto laws and cover acts and omissions which may even have their commencement in the pre-Constitution period. See Keshawan M. Memon v. State of Bombay AIR 1951 SC 128. Where ex post facto laws only mollify or lessen the rigours of criminal law, but do not otherwise aggravate them, doubt has been expressed as to whether such laws fall within the prohibition of such Articles. The Indian Supreme Court in Rattan Lal v. The state of Punjab (AIR 1965 SC 444) has treated such a law as not falling within the prohibition."

According to its Section 2, the NAB Ordinance takes effect retrospectively from 01.01.1985. However, the operative effect of the said statutory intent to enforce the law retrospectively was interpreted in the case of **Khan Asfandyar Wali vs. Federation of Pakistan** (PLD 2001 SC 607) wherein the Court expressed the following view:

> "218. Article 12 of the Constitution does not deprive the legislature of its power to give retrospective effect to an enactment, which the legislature is competent to enact. It merely provides that no law shall authorise the punishment of a person for an act or omission that was not punishable by law at the time of the act or omission; or for an offence by a penalty greater than, or of a kind different from, the penalty prescribed by law for that offence at the time the offence was committed. Seen in this perspective, the act of 'wilful default', is not an act or omission which was punishable by law at the time the same was committed but an act or omission committed 30-days after the promulgation of the Ordinance whereby the offence of 'wilful default' under section 5(r) was created. …"
>
> 219. So far as the punishments and creation of offences by the impugned Ordinance are concerned, they are protected by Article 12 of the Constitution, in that, under Article 12 of the Constitution ex post facto legislation can neither create new offences nor provide for more punishment for an offence than the one which was available for it when committed. This is the limited impact of Article 12 of the Constitution. …" ***(emphasis supplied)***

12. Having established that the offence as constituted on 16.10.1996 is relevant for the purpose of prosecuting the respondent, we may now revert to the facts of the case. It is not alleged by the prosecution in this case that as a result of the disputed appointments, the respondent has procured any advantage for himself. Instead, it is alleged that temporary employment for 3 persons and for 24 persons employed by mechanical act of the Chairman, OGDC is the 'valuable thing' secured in this case by the respondent. The financial gain representing remuneration received by the said temporary employees has not been challenged as being excessive through any evidence. Their notifications of joining (Exb.PW-5/1 to Exb.PW-5/19), however, record their temporary employments in Basic Scale-1 and upwards with the highest basic pay drawn being less than Rs.2100/- per month.

13. The crux of the prosecution case is that according to the office noting the respondent allegedly relaxed the rules for the extraneous object of (temporarily) appointing persons handpicked by his office to different posts in OGDC. In this regard, we have already noticed that the Service Regulations of OGDC do not apply to its temporary employees. Under the Service Regulations the procedure for appointment of staff in lower scales through a Departmental Selection Committee after advertisement applies to recruitment made against existing vacancies. In the present case, the Chairman OGDC (PW-3) explained that temporary appointments were made because there were no vacancies. Financial loss to OGDC on account of the temporary appointments obtained by the respondent is not alleged nor that he received illegal gratification or other advantage. As such the respondent's act does not satisfy the threshold of being "corrupt" which is common and necessary ingredient of the offences under Section 3(1)(d) of the Ehtesab Ordinance and under Section 3(2)(e) of the PPPO of 1977. Therefore, he cannot be said to have acted by corrupt means to cause the outcome of temporary appointments. The prosecution has also not alleged that the respondent committed any fraudulent, devious, surreptitious, false or misleading act to obtain the disputed appointments. In fact, he acted brazenly and recklessly to disregard the reservations expressed by the Chairman, OGDC (PW-3) contained in paragraph-8 of the office noting (Exb.PB) but heeded his advice to presumptuously relax the rules without considering the need for or the result of doing so. It can be said that the respondent acted most irresponsibly, perhaps haughtily, to secure his wishes because he did not even consider the two reservations about overstaffing and financial burden expressed by the Chairman, OGDC (PW-3) in paragraph-8 of the said noting. Irrespective of the respondent's audacious style and conduct, his approach on the file is forthright and direct; he assumes responsibility on record for what he authorized, namely, appointment

made after relaxation of rules. Consequently, in my humble view, the respondent acted in a straightforward manner without being dishonest. The meaning of expressions "corrupt", "dishonest" and "illegal" occurring in the NAB Ordinance was considered judiciously in **Hakim Ali Zardari vs. State** (PLD 2002 Lahore 269) and may be referred as follows:

> "27. The expression "illegal" would of course connote anything done against the express provision of law. The term "Corrupt, dishonest and improper" are overlapping and have not been defined in the Ordinance under which the appellant was tried. These are terms of a Penal Statute and have to be construed in the light of the explanation contained in the section itself and in the manner in which they are used in the ordinary parlance. Because as per Crawford:
>
> > "Criminal and Penal Statutes must be strictly construed, that is, they cannot be enlarged or extended by intendment, implication, or by any equitable considerations. In other words, the language cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purpose which the statute was enacted". (Page 460 of Crawford's Interpretation of Laws by Earlt T. Crawford, Saint Louis Thomas Law Book Company, 1940).
>
> 28. It would, therefore, be in accord with this doctrine of interpretation of Penal Statutes if we adhere to the Dictionary meanings of the terms in question. The Black's Law Dictionary (6th Edition) defines the above expressions as under:
>
> > **Corrupt.--** Spoiled; tainted; vitiated; depraved, debased; morally degenerate. As used as a verb, to change one's morals and principles from good to bad.
> >
> > **Dishonesty. –** Disposition to lie, cheat, deceive, or defraud; untrustworthiness; lack of integrity; lack of honesty; probity or integrity in principle, lack of fairness and straightforwardness; disposition to defraud, deceive or betray.
> >
> > **Improper.** – Not suitable; unfit, not suited to the character, time and place.
>
> 29. In English Law the expression "dishonesty" which is anonymous (synonymous) with "fraud" (as per Black's Law Dictionary) has been a subject or immense debate. For Alridge and Parry, the basic elements of dishonesty are as under:
>
> > "It is commonly and conveniently referred to as 'dishonesty', and in the case of many offences is expressly so described. However, the use of this un-technical terms should not be allowed, to obscure the fact the concept it represents is a highly complex one. It embraces at least three and arguably four, distinct requirements: viz that the defendant's conduct should fail to conform to –
> > (1) generally accepted standards of honest conduct, both:
> > (a) as they actually are, and
> > (b) as he believes them to be; and
> > (2) the limits of what he is legally entitled to do – at any rate:
> > (a) as he believes them to be and arguably also

(b) as they actually are."

(Alridge and Parry on Fraud, Second Edition, page 1002)"

14. In the absence of the respondent's conduct being corrupt or dishonest, the third element of an act constituting the offence alleged against him, namely, its illegality, remains available to the prosecution to prove his guilt under Section 3(1)(d) of the Ehtesab Ordinance or more relevantly under Section 3(2)(e) of the PPPO of 1977. Illegality of the respondent's action cannot be presumed merely from the impunity or the audacity with which he took it for obtaining the desired appointments. The illegality of his actions must stem from a violation of express law governing temporary employment in the OGDC. As observed earlier, the Service Regulations of OGDC do not apply to the disputed appointments. Therefore, by asking the respondent to relax the rules by the Chairman, OGDC (PW-3) did not secure a valid sanction but actually accomplished the transfer of total responsibility to the respondent for the disputed appointments made by the Chairman, OGDC on the asking of the respondent. The important legal fact is that neither under the OGDC Ordinance, 1961 nor the Rules of Business of the Federal Government, 1973 does a Federal Minister had power to relax rules for recruitment

for employees of OGDC. Also relaxation of rules for temporary employment was meaningless as there were no OGDC rules in the field. By the mirage of relaxation of unspecified and non-existent rules, the Chairman, OGDC (PW-3) managed to protect himself against any fallout from such appointment, considering that the Federal Government was in the doldrums and was ousted less than three weeks thereafter. However, to advise relaxation he invented objections that were not uttered on 13.10.1996 when he ordered appointments without competition of 68 persons nominated by the Prime Minster's Secretariat. If he had intended the objections seriously, he should not have advised a means to commit the objected action. Insofar as the respondent is concerned, there was precedent

and departmental practice for relaxation of rules by him. There is no doubt that the respondent was callous and cursory in his style, but one cannot blame him for trusting the suggestion of the Chairman, OGDC which was actually false. Indeed the respondent as DW-2 claimed (wrongly) that he had power to relax the rules, had done so in the past and did so presently. His misinformed self esteem, however misplaced, reflects a state of mind that is clear and upfront. Therefore, he was not conscious of committing any illegality by relaxing the rules because in his mind the Chairman, OGDC (PW-3) *bona fide* invited him to do. On 16.10.1996 the purpose of seeking handpicked appointments as being illegal appears never to have crossed the respondent's mind.

15. This brings the present discussion to the other essential prerequisite for the establishment of criminal liability. Apart from a delinquent act satisfying the ingredients of the offence allegedly committed, the prosecution must also prove the guilty mind of an accused, that is his *mens rea* to commit such an offence. The precedents on the subject of *mens rea,* in offences falling under NAB Ordinance have been extensively examined in the majority opinion. In this context, the offence committed when an accused adopts an illegal course of action is dealt with directly by the two authorities, **State vs. M. Idrees Ghauri** (2008 SCMR 1118) and **Wahid Bakhsh Baloch vs. The State** (2014 SCMR 985). In the case of **M. Idrees Ghauri** (2008 SCMR 1118) it is held that wrongful exercise of power or action without lawful authority is not actionable unless the accused has criminal motivation. For this purpose it is necessary that the accused person is aware that his action is illegal and still commits the same to benefit himself or another person. In the second case of **Wahid Bakhsh Baloch** (2014 SCMR 985), consistently with the above said view, it is held that in order to be guilty an accused must have knowingly acted without lawful authority, against law or practice. There is no *mens rea* for an offence where an accused has

followed advice of a competent authority that is actually against the law. Both judgments converge on the present facts to propound the view that conscious knowledge of an accused that a particular act is illegal is necessary to make him criminally culpable for doing such act. The facts of the instant case do not disclose actual or conscious knowledge of the respondent that temporary appointments in OGDC or that relaxation of rules was illegal. It is quite another matter that his action did not in fact entail illegality because temporary appointments in OGDC are not governed by any rules. That the relaxation of rules by the respondent was inconsequential.

16. As a fallback, the prosecution relies upon the law laid down by this Court in **Abdul Jabbar Memon's case** (1996 SCMR 1349) and **Munawar Khan's case** (1993 SCMR 1287) to allege illegality of action taken by the respondent. Whereas the first case contains an interim order, however, the **Munawar Khan's case** (1993 SCMR 1287) is relevant to the present facts. The instructive contents therefrom are reproduced herein below:

> "6. What we have noticed in all these cases which are under consideration before us is that appointments of both the parties contesting the appointments were made without such advertisement, publicity or information in the locality from which the recruitments were to be made. In view of the Constitutional requirement and the interim order already passed in Human Right Case 104 of 1992 it is expected that in future all appointments had to take place. This will, however, not apply to short-term leave vacancies or to contingent employment.
>
> 7. …
>
> 8. As regards the allocation of quota of posts to the local M.P.As or M.N.As. for recruitment to the posts, we find it offensive to the Constitution and the law on the subject. The Ministers, the Members of National and Provincial Assemblies, all are under an oath to discharge their duties in accordance with the Constitution and the law. The service laws designate, in the case of all appointments, a departmental authority competent to make such appointments. His judgment and discretion is to be exercised honestly and objectively in the public interest and cannot be influenced or subordinated to the judgment of anyone else including his superior. In the circumstances, allocation of

> such quotas to the Ministers/ MNAs/MPAs and apointments made thereunder are all illegal ab initio and have to be held so by all Courts, Tribunals and authorities." ***(emphasis supplied)***

The above said ruling condemning political appointments is highly relevant to the present case, but it also highlights a travesty of regulatory legislation: that temporary employment is a permissible backdoor entry to posts in public sector bodies and enterprises because no positive law, rule or regulation governs such employment. Whereas rules have been framed to prescribe the selection process for appointment to temporary posts in government departments, a lacuna remains in existence for autonomous State owned bodies and enterprises. Resultantly, temporary employment has been adopted as a means for preferential entry into service followed by regularization at a later stage under some devised mechanism or policy. The great body of case law on the subject of non-transparent and no-competitive employment in the public sector referred to in the majority opinion pertains to regular appointments governed by rules. This includes the landmark statement of law made in **Mubashir Raza Jaffri vs. EOBI** (2014 SCMR 949). All those cases decide the invalidity of the impugned appointments in the judicial review jurisdiction rather than the culpability of their perpetrator under accountability laws in the criminal jurisdiction. Indeed for determining criminal liability of an accused for the commission of illegality it is necessary for the safe administration of justice that the regulatory law requiring compliance is express, positive and certain rather than derived from judicial precedents that adjudicate the invalidity of consequential appointments. The enforcement of a prescribed process for making temporary employment in the service regulations of autonomous State owned bodies and enterprises incorporating the principles laid down by judicial precedent is therefore required and is hereby directed. Once there is positive law to test the legality of executive action granting temporary

employment, then a reliable threshold for ascertaining criminal liability for violation thereof will become available.

17. Weighed on the touchstone of good governance and responsible leadership, there is no doubt that the respondent acted wrongly. There is also no doubt that if the appointments made at his instance were to be challenged in Court of law, these would be struck down as political appointments. However, the fact remains that upon considering the record, the adoption by the respondent of a means suggested by the Chairman, OGDC (PW-3) which enjoys past precedent and practice, namely, relaxation of rules, does not in the absence of his knowledge of illegality or willful commission of an illegal act amount to an offence under Section 3(1)(d) of the Ehtesab Ordinance or Section 3(2)(e) of the PPPO of 1977. The learned High Court in the impugned judgment acquitted the respondent of the offence charged against him. The reversal of a finding of acquittal of an accused is resorted exceptionally by an Appellate Court. Such an order is passed where the finding of the acquitting Court is found to be perverse, shocking or impossible. The comprehensive statement of law made in **Ghulam Sikandar vs. Mamaraz Khan** (PLD 1985 SC 11) is most apt. The same is reproduced below:

> "However, notwithstanding the diversity of facts and circumstances of each case, amongst others, some of the important and consistently followed principles can be clearly visualized from the cited and other cases law on the question of setting aside an acquittal by this Court. They are as follows:-
>
> **(1)** In an appeal against acquittal the Supreme Court would not on principle ordinarily interfere and instead would give due weight and consideration to the findings of Court acquitting the accused. The approach is slightly different than that in an appeal against conviction when leave is granted only for the re-appraisement of evidence which then is undertaken so as to see that benefit of every reasonable doubt should be extended to the accused. This difference of approach is mainly conditioned by the fact that the acquittal carries with it the two well-accepted presumption: *One* initial, that, till found guilty, the accused is innocent; and *Two* that again after the trial a Court below confirmed the assumption of innocence.
>
> **(2)** The acquittal will not carry the second presumption and will also thus lose the first one if on points having conclusive effect on the

> end result the Court below: (a) disregarded material evidence; (b) misread such evidence ; (c) received such evidence illegally.
>
> **(3)** In either case, the well-known principles of re-appraisement of evidence will have to be kept in view when examining the strength of the views expressed by the Court below. They will not be brushed aside lightly on mere assumptions keeping always in view that a departure from the normal principle must be necessitated by obligatory observances of some higher principle as noted above and for no other reason.
>
> **(4)** The Court would not interfere with acquittal merely because on re-appraisal of the evidence it comes to the conclusion different from that of the Court acquitting the accused provided both the conclusions are reasonably possible. If however, the conclusion reached by that Court was such that no reasonable person would conceivably reach the same and was impossible then this Court would interfere in exceptional cases on overwhelming proof resulting in conclusion and irresistible conclusion; and that too with a view only to avoid grave miscarriage of justice and for no other purpose. The important test visualized in these cases, in this behalf was that the finding sought to be interfered with, after scrutiny under the foregoing searching light, should be found wholly as artificial, shocking and ridiculous."

18. The foregoing principles of law narrated in relation to the reversal of the findings of acquittal merit consideration and application in the present case. This would be a strong additional ground available under the law to exercise restraint in relation to attaching criminal liability to the conduct of the respondent.

19. Having expressed my humble view in relation to the facts of this case, it is noted with great admiration that the clear principles of law now governing the matter of employment to public posts that are regulated by rules or regulations have been ably set out in the majority opinion rendered be my learned brother Asif Saeed Khan Khosa, J. The terse and abbreviated reliance on Article 18 of the Constitution for ensuring transparent appointment of pubic posts in governmental, statutory or autonomous entities through competition has been elaborated extensively by him, with which I respectfully agree. Having endorsed those views, I support the direction given in paragraph 35 of the said opinion.

20. For the foregoing reasons and discussion, I do not find any merit in this appeal and dismiss the same accordingly.

(Umar Ata Bandial, J.)

JUDGMENT OF THE COURT

By a majority of two against one this appeal is allowed in the terms noted in the opinion recorded by Asif Saeed Khan Khosa, J. which opinion is declared to be the judgment of the Court.

Judge

Judge

Judge

Islamabad
20.01.2016

Approved for reporting.