IN THE HIGH COURT OF SINDH, KARACHI

Election Appeals Nos. 08 to 10 of 2007

Present: ***Mr. Justice Nadeem Azhar Siddiqi &***
Mr. Justice Dr. Rana Muhammad Shamim, JJ

JUDGMENT

Date of Hearing : 08.12.2007 & 10.12.2007

Appellant : Haji Khan Bhatti through Mr. Muhammad Anwar Tariq, Advocate.

Respondent : Returning Officer NA-211 through Mr. Agha Zafir Ali, Assistant Advocate General Sindh.

NADEEM AZHAR SIDDIQI, J : By this common order we intend to dispose of Election Appeals Nos.08 to 10 of 2007 filed by the appellant challenging the order dated 01.12.2007 by which the nomination paper of the appellant was rejected under Article 63(k) of the Constitution of Islamic Republic of Pakistan on the ground that the appellant is working in Pakistan Telecommunication Company Limited in which the Government has 26% share or interest.

The facts necessary for the disposal of the above appeals are that the appellant has submitted his nomination papers from (1) NA-211, Naushero Feroz-I, (2) PS-19, Naushero Feroz-I and (3) PS-23, Naushero Feroz-V. All the three nominations papers were rejected for the reason that the appellant is serving in Pakistan Telecommunication Company Limited (PTCL) in which the Government has 26% share/interest.

The learned counsel for the appellant submits that the PTCL is no more a body owned or controlled by the Government and the Government has no controlling share in it. He submits that pursuant to a Shareholder Agreement dated 12.4.2006 the Government has sold the entire "B" Shares to M/s. ETISALT International Limited with the right to manage the affairs of PTCL. He further submits that the

Government has divested its interest from PTCL before June 2005 and the appellant cannot be treated as employee of an organization having government interest and bar contained under Article 63(1)(k) is not applicable. He has referred to various provisions of Shareholders Agreement and Memorandum of Articles of Association of PTCL and submits that mere holding of 26% share is not sufficient to treat the appellant as an employee of organization having controlling share of Government. The learned counsel refers to Section 9-A of Public Investment (Financial Safeguard) (Amendment) Ordinance, 2006 and submits that PTCL is no more a corporation having public interest. He has relied upon the reported case of GHULAM RASOOL v. MUHAMMAD HAYAT (PLD 1984 SC 385).

Conversely, the learned AAG for the State has supported the order of the Returning Officer and submits that alongwith Article 63(1)(k) Article 63(1)(e) also applies to the case of appellant. He submits that the government has not totally divested its interest from PTCL and is authorized to nominate four directors. He further submits that the PTCL employees can avail the jurisdiction of Federal Service Tribunal, as the PTCL is still a statutory body.

We have heard the learned counsel for the appellant, AAG for the State, perused the record made available before us and the law cited at bar.

It is an admitted position that PTCL is a statutory body established/created under Section 3 of Pakistan Telecommunication Corporation Act, 1991 and that the Government has 26% share in it. It is also an admitted position that the appellant is still in the employment of PTCL. Article 63(1)(e) and (k) of the Constitution of Islamic Republic of Pakistan read as under: -

> "**63. Disqualification for membership of Majlis-e-Shoora (Parliament)(1)** A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora (Parliament), if
>
> (a)to (d).....

> **(e)** he is in the service of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest; or
>
> (f)to (j).....
>
> **(k)** he has been in the service of Pakistan or of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest, unless a period of two years has elapsed since he ceased to be in such service."

From the perusal of the above provisions, it appears that the case of the appellant falls under clause (e) of Article 63(1) of the Constitution of Pakistan and not under Article 63(1)(k) of the Constitution for the reason that Article 63(1)(k) deals with the employee, who has been in the service of Pakistan or any statutory body, which is owned and controlled by the Government. Article 63(1)(e) applies to the persons who are still in the service of statutory body, which is owned or controlled by the Government or in which the Government has a controlling shares or interest. The contention of the learned counsel for the appellant is that for applying the bar contained in Article 63(1)(e) or (k) it is necessary that the Government has controlling share in the organization.

Perusal of Clause (e) to sub-article (1) of Article 63 of the Constitution of Pakistan it appears that the same is consisting of two categories, namely, (1) he is in the service of any statutory body or any body which is owned or controlled by the Government, (2) or in which the government has a controlling share or interest. In between the two categories the word "or" has been used which is generally used to give choice or alternative.

In the Judgment reported as SABIRUDDIN v. MUSHTAQ HUSSAIN BHATTI (PLD 1993 SC 412) the Hon'ble Supreme Court while interpreting Article 63(1)(e) has observed as under:-

> "With respect, we may observe that due and proper attention has not been paid to the provisions of the Banks Nationalization Act, 1974, nor much emphasis has been laid on the language of

> Article 63(1)(e) which refers to the service in any body which is owned or controlled by the Government or in which the Government has a controlling share or interest. The pivotal word to be construed is "control". If any body, organization or corporation is under the control of the Federal Government, any person employed in it stands disqualified from being a member or a candidate for the election to the Zila Council."

In another reported case of GHULAM RASOOL VS MUHAMMAD HAYAT (PLD 1984 SC 385) the Hon'ble Supreme Court while dealing with the similar type of provision available in House of Parliament or Provincial Assemblies (Election) Order (5 of 1977) observed as under: -

> "On the contrary the scheme of legislation is such that each category has been enumerated and each category is distinct and separate. Given the meaning that it has the respondent would certainly be hit by disqualification clause and would be ineligible to hold a public office."

From the perusal of the above two reported judgments, it appears that the Hon'ble Supreme Court has bifurcated the provision into two categories. The Hon'ble Supreme Court has given much stress on the word "control" and unless it is shown that the Government has control or having controlling share or interest the appellant cannot be disqualified from contesting the election.

In this case, from the perusal of Shareholder Agreement it appears that the Government is authorized to nominate four directors on the board of PTCL without having any control upon the affairs of PTCL and the investor (the company who acquired the shares of PTCL) shall be entitled to appoint five directors and the Chief Executive Officer shall have the power and authority as set out in the devolution of powers to determine and implement the issues and matters including the day to day operation of the company business. By operation of Ordinance No.XIV of 2005 the PTCL is no more a corporation established with the aid of public revenue.

In the concluding para of reported case of GHULAM RASOOL v. MUHAMMAD HAYAT (PLD 1984 SC 385) the Hon'ble Supreme Court has held as under: -

> "It is not disputed that not more than three out of eight Directors are nominees of the Government and that the Government share in the Company does not exceed 34.76%. It is, therefore, clear that the Government has no proprietary control as such. The plenary statutory and regulatory control of the Government by itself would not in the circumstances entail disqualification of the employee of a non-statutory, non-governmental company, undertaking or enterprise."

Since the Government has no control and controlling share or interest in the PTCL mere fact that PTCL is a statutory body wherein the Government has 26% share would not entail disqualification.

In view of the above, the appeals are allowed. The cases are remanded back to the Returning Officer to accept the nomination papers of the appellant if not suffer from any other disqualification.

The appeals are disposed of in the above terms.

Karachi
Dated 13.12.2007.

JUDGE

JUDGE

Farhan