

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. NO. D-4136 of 2012

Present:-

Mr. Justice Sajjad Ali Shah.

Mr. Justice Muhammad Junaid Ghaffar.

Sindh Rural Support Organization ----- Petitioner

Versus

Federation of Pakistan & others----- Respondents

Date of hearing: 15.10.2015.

Date of judgment: 24.11.2015.

Petitioner: Through Mr. Ali Almani Advocate.

Respondents Through Mr. Salman Talibuddin Additional Attorney General of Pakistan along with Mr. Ainuddin Khan DAG.

J U D G M E N T

Muhammad Junaid Ghaffar, J. Through instant petition the petitioner has impugned notice dated 20.9.2012 issued by the office of Director General, Audit, Sindh, for conduct of audit for the period since beginning of the programme undertaken by the petitioner till 30.6.2012.

2. Precisely the facts as stated are that the petitioner is a Non-Profit company registered under Section 42 of the Companies Ordinance, 1984 since 29.5.2003, with the object of developing rural areas in Sindh by initiating and supporting social and economic welfare programme. The petitioner company is managed by its Board of Directors out of which, 10 are from the private sector and three are Civil Servants and employees of Government of Sindh. It is stated that somewhere in 2005, the Government of Sindh transferred the management of the Public

Healthcare Infrastructure to the petitioner company, when such programme was initially called as the President's Primary Healthcare Initiative and later renamed as Peoples Primary Healthcare Initiative. It is further stated that the petitioner has entered into an agreement with the Government of Sindh, for running such programmes and has also entered into separate agreements with each of the 21 Districts of Government of Sindh, by taking over the management of the Public Healthcare Infrastructure in those districts. It is the case of the petitioner that though the funds are provided solely by the Government of Sindh for running such program, however, in view of special agreement / memorandum of understanding, the petitioner is required to maintain a separate set of accounts and to maintain the funds in a separate bank account, whereas, the petitioner is also required to get such accounts audited through an independent auditor, therefore, the petitioner is aggrieved by the impugned notice, whereby, the Auditor General of Pakistan as well as the Director General Audit Sindh, intends to conduct the audit of the petitioner company, which according to the petitioner, owing to such agreement as aforesaid, cannot be conducted.

3. Counsel for the petitioner has contended that though the funds in question are provided by the Provincial Government, however, in view of the agreement between the parties, the petitioner is required to get the funds and its spending audited by an independent auditor, and such audits are being regularly conducted, therefore a second audit intended to be conducted by the Auditor General is not warranted. Counsel has further contended that the petitioner is not a Government Organization nor is being managed or controlled by the Government of Sindh, or for that matter, the Federal Government, therefore, in view of Article 169 and 170 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner's accounts cannot be audited by the office of Auditor General of Pakistan. Counsel has further contended that without prejudice, even otherwise the Auditor General's (Functions, Powers and Terms and Conditions of Service), 2001 dated 12.5.2001 (Ordinance No. XXIII of 2001) is beyond the scope and mandate of the Constitution; therefore, the same cannot be invoked or applied in respect of the accounts of the petitioner, therefore the impugned notice is liable to be set aside.

4. Conversely, learned Additional Attorney General has contended that the audit being conducted by the private / independent auditors is in fact a requirement of the Companies Ordinance and therefore, has got nothing to do with the audit now intended to be conducted by the office of the Auditor General of Pakistan, which has a much wider and broader scope. The learned Additional Attorney General further contended that since it is an admitted position that the funds being utilized by the petitioner are provided by the Government of Sindh / Federal Government, therefore, even if any agreement has been entered into between the parties, the authority of the office of the Auditor General remains intact, and squarely falls within the ambit of Article 169 and 170 of the Constitution read with Ordinance XXIII of 2001.

5. We have heard the Counsel as well as the learned Additional Attorney General and perused the record. By consent instant petition is being finally decided at Katcha peshi stage.

6. Perusal of the record reflects that there is no denial that the funds in question which are being utilized by the petitioner company belong to and are provided by the Government of Sindh for the purposes of Healthcare program. Insofar as the agreement between the petitioner and the Government of Sindh is concerned, we have not been assisted as to whether the Government of Sindh can enter into any such agreement, whereby the condition of audit of public funds through the office of Auditor General can be dispensed with, or substituted by a private auditor, nor we have been provided with any supporting document or material, whereby the Chief Minister or the Government of Sindh can dispense with such mandatory requirement of Audit in terms of Article 169 and 170 of the Constitution merely on the basis of any agreement. In fact to our understanding the agreement provides for an independent / additional audit to further safeguard the interest of the Government and spending of its funds in a transparent manner, and neither has exempted its funds from audit by the Auditor General of Pakistan, nor in law can it do so. The intention does not seem to have the statutory audit dispensed with. Once it has come on record that the funds in question belong to the Government, either Provincial or Federal, the condition of audit of such funds by the office of the Auditor General cannot be dispensed with as the same is not permitted in law.

Such exemption or dispensation can only be allowed or sanctioned either by law or under special and or extraordinary and peculiar circumstances, satisfying such requirement of dispensation of audit with an acceptable reasoning, which in our view in the instant case, does not appear to exist. Merely for the fact that a public sector development programme of healthcare has been handed over to a private organization on the basis of an agreement, be it for any transparency in spending the funds, its audit cannot be dispensed with, as it is sine qua non in law. The funds flowing out from the Government are required to be audited by the office of Auditor General in terms of Article 169 and 170 of the Constitution read with Ordinance XXIII of 2001, which caters for such audit in terms of Section 8 of the said Ordinance. It would be advantageous to refer to Section 8 which reads as under:-

- “8. Provisions relating to Audit.—The Auditor-General shall---
- a. audit all expenditures from the Consolidated Fund of the Federation and of each Province and to ascertain whether the moneys shown in the accounts as having been disbursed were legally available for, and applicable to, the service or purpose to which they have been applied or charged and whether the expenditure conforms to the authority which governs it;
 - b. audit all transactions of the Federation and of the Provinces relating to Public Accounts;
 - c. audit all trading, manufacturing, profit and loss accounts and balance sheets and other subsidiary accounts kept by Order of the President or of the Governor of a Province in any Federal or Provincial department; and
 - d. audit, subject to the provisions of this Ordinance, the accounts of any authority or body established by the Federal or a Province, and in each case to report on the expenditure, transactions or accounts so audited by him.”

7. While justifying the act of outsourcing the program it has been averred on behalf of the petitioner that inspired by the unprecedented success of the experience of outsourcing of the Primary Health Care Infra-structure in Punjab to the Punjab Rural Support Program, the Federal Government in Association with all the Provincial Governments decided to outsource the Management of Public Health Care throughout Pakistan to the Rural Support Organizations. The program was initially called as the President’s Primary Health Care Initiative and was renamed as the Peoples Primary Health Care initiative, whereas, there are other parallel support Programs being run in other Provinces as well, which are sister organizations of the petitioner, who are managing and implementing the Public Health Care in the respective territories. It would not be out of place to mention that the Auditor General for

Pakistan while appearing before the Hon'ble Supreme Court of Pakistan in the case of **Hamid Mir and other Versus Federation of Pakistan [2013 SCMR 1880]**, whereby the issue of disclosure and audit of various funds, including the fund known as Secret Service Fund, was under discussion, had informed the Hon'ble Supreme Court that there are various organizations / programs which are being run by or with the funds of the Federal / Provincial Governments, however, despite efforts, they have refused to get their accounts audited by the office of the Auditor General. The Hon'ble Supreme Court while dilating upon the issue has been pleased to observe at Para 8, 36 and 37as under;

8. In response to the Court's queries, the Auditor General also submitted a list of 19 Organizations which refuse to have their accounts audited by the Auditor-General, contending, inter alia, that they are independent of the Federal Government and do not receive budgetary allocations. The Auditor General has expressed his opinion that these organizations fall within the ambit of Articles 169 and 170 of the Constitution and, therefore, are required to submit their finance for audit by the auditor General. These bodies have been listed in our order of 6.6.2013.

- (1) Securities and Exchange Commission of Pakistan (Finance Division).
- (2) People's Primary Health Initiative (PPHI) Provincial Support Unit, KPK.
- (3) Trust for voluntary organization (TVO) (Economic Affairs Division)
- (4) National Police Foundation (Ministry of Interior)
- (5) National Database and Registration Authority (NADRA) M/o Interior
- (6) Wah Nobel Private Ltd M/o Defence Production
- (7) Agri Business Support Fund (Ministry of Food Security and Research).
- (8) Pakistan Ordinance Factories Welfare Trust Fund (Ministry of Defence Production)
- (9) Punjab Rural Support Program
- (10) Punjab Land Development Company
- (11) Punjab Power Development Company
- (12) Punjab Industrial Estate
- (13) Punjab Coal Mine Company
- (14) Punjab Agriculture and Meat Company
- (15) Pakistan Telecommunication Company Ltd (M/o Information Technology)
- (16) Pak China Investment Company Finance
- (17) Defence Housing Authority (M/o Defence)
- (18) Federal Board of Revenue (FBR)
- (19) Trust for Voluntary Organization (TVO)

This immunity claimed against audit by the Auditor General appears to be unjustified in the light of the text of Article 170(2). Notices have therefore, been issued to these institutions and the matter shall be decided after giving an opportunity of hearing of them. (Emphasis supplied)

36. From the above discussion, the distinction between "audit" and "secrecy" is made clear. It would be for the Auditor-General to ensure the audit of each rupee spent from the Consolidated Fund and the Public Accounts, without exception. Parliament may make a law imposing reasonable restrictions" on public disclosure of such parts of the Auditor General's Report as may be classified. Such law, needless to say, will need to pass muster under the Constitution.
37. Notices have been issued to the 19 Institutions mentioned in Para 8 above, to justify their claim that their finances/accounts are not subject to audit by the Auditor General. This matter relating to the aforesaid 19 bodies has been listed for hearing on 22.7.2013.

8. It appears that 19 Organization, which are listed hereinabove also includes Peoples Primary Health Care Initiative as well as Punjab Rural Support Program (Identical to the Petitioner's Program), which in the opinion of the Auditor General of Pakistan are though required to submit the details of their Finances for Audit by the Auditor-General, but, have refused to have their accounts audited as desired by the Auditor General. In the concluding part of Para 8 above, the Hon'ble Supreme Court has categorically observed that the immunity claimed against audit appears to be unjustified. Subsequently the Hon'ble Supreme Court while hearing Suo-Moto Case No.12 of 2015 vide order dated 8.9.2015 has once again reiterated the earlier view and the following observations are important as well as necessary for deciding the instant matter and reads as under:

2. The Auditor General has informed us that there are 19 Organizations, which were resisting audit by the Auditor General initially. The names of these 19 organizations are given in Para 8 of the afore-cited judgment [*Hamid Mir Supra*]. Subsequently, according to the Auditor General a total of 8 (6+2) organizations are now submitting to audit by the Auditor General. We were also informed by the Auditor General that within four months of the aforesaid judgment, as directed therein, the natural, extent and scope of the audit to be done by the Auditor General was settled by the Auditor General himself in terms of Article 170(2) of the Constitution. He further stated that although communications have been addressed from time to time to DHA, Lahore, they are resisting the audit, consequently the Auditor General in his report to the Public Accounts Committee of the National Assembly has informed the said Committee about the response of the DHA.
3. Here we may mention that we had held in Para 8 of our judgment that the immunity which was claimed by the 19 organizations mentioned in the aforesaid Para against the audit by the Auditor General appears to be unjustified in the light of the text of Article 170(2) of the Constitution.

9. Counsel for the petitioner has vehemently relied upon the provisions of Articles 169 and 170 of the Constitution and has contended that insofar as Ordinance XXIII of 2001 is concerned, the same is beyond the scope and mandate of the powers and functions of the Auditor-General as contemplated under Articles 169 and 170 *ibid*. It would be advantageous to refer the Articles 169 and 170 of the Constitution, which reads as under:-

Article-169

Functions and powers of Auditor-General. The Auditor-General shall, in relation to:-

- (a) the accounts of the Federation and of the Provinces;
and
- (b) the accounts of any authority or body established by the Federation or a Province.

Perform such functions and exercise such powers as may be determined by or under Act of [Majli-e-Shoora (Parliament)] and, until so determined, by Order of the President.

170. Power of Auditor-General to give directions as to accounts. [(1)] The accounts of the Federation and of the Provinces shall be kept in such form and in accordance with such principles and methods as the Auditor-General may, with the approval of the President, prescribe

[(2) The audit of the accounts of the Federal and of the Provincial Government and the accounts of any authority or body established by, or under the control of, the Federal or a Provincial Government shall be conducted by the Auditor-General, who shall determine the extent and nature of such audit.]

Perusal of the above reflect that Article 169 provides for the functions and powers of the Auditor General in relation to the accounts of the Federation and of the Provinces and additionally for the accounts of any Authority or body established by the Federation or a Province and shall perform such functions and exercise such powers as may be determined by or under the Act of the Parliament. In our view Ordinance XXIII of 2001 is in line with the provisions of Article 169 of the Constitution, as it defines the functions and powers of the Auditor General in respect of both, the accounts of the Federation and of the Provinces as well as accounts of any authority or body established by the Federation or a Province. In fact these are two distinct provisions, one which relates to the accounts of the Federation and the Provinces, and, the other, for the account of any Authority or body established by the Federation or a Province. In the instant matter the question is not that since the petitioner is not an authority or body established by the Federation or a Province, therefore is immune from audit by the Auditor General, but since the audit in respect of funds and the accounts of the Federation and of the Provinces, can be conducted by the Auditor General, therefore the petitioner is not exempt from the audit by the Auditor General, owing to the fact that the funds belong to the Province. Similarly the provision of Sub Article-(2) of Article 170 of the Constitution also provides the same i.e. account of the Federal and the Provincial Government and the account of any Authority or body established by or under the Control of the Federal or a Provincial Government can be audited by the Auditor General. When these are read in juxtaposition, it becomes clear that the powers of the Auditor General have been separately provided for the accounts of the Federation and of the Provinces, as well as for the accounts of any authority or body

established by the Federation or a Province. Even if the petitioner is not an authority or body established by or under the Control of Federal or the Provincial Government, it is an undeniable fact that the funds being utilized by the petitioner are provided from the account of the Province and of the Federation, therefore, we do not see any reason or ground to arrive at the conclusion that the provisions of Ordinance XXIII of 2001 are either beyond the scope and mandate of Articles 169 of the Constitution or are ultra-vires to the Constitution and therefore, the contention in this regard so raised on behalf of the petitioner is hereby repelled. Moreover, even after the 18th amendment, there is not much change and or difference in the scope of Article 170(2) of the Constitution, as it merely enlarges the powers and scope of audit by the Auditor General, as according to us, even before the 18th amendment, the accounts of the Federation and or a Province were required to be audited by the Auditor General.

10. Though the Counsel for petitioner has made an attempt which has also been raised in the grounds of Memo of Petition that Ordinance, No. XXIII of 2001 is beyond the scope and mandate of Article 169 and 170 of the Constitution however, neither any such prayer has been made in the instant petition, nor the vires of the Ordinance have been so challenged. Even otherwise the intent of the legislature appears to be that the functions of the State / Government, specially in respect of public sector programmes, which are supposed to be run by the organizations, bodies or authorities as are established by or under the control of the Government, audit is required to be carried out by the office of the Auditor General. However, in the instant matter, though the functions of the Government have been entrusted to a private organization through an agreement, but in any manner, this could not permit or be allowed to circumvent the mandatory requirement of audit, specially, when Section 8 of the Ordinance, No. XXIII of 2001 clearly and in unequivocal words provides, that the Auditor General shall audit all expenditures from the Consolidated Fund of the Federation and of each Province and to ascertain, whether, the moneys shown in the accounts as having been disbursed, were legally available for, and applicable to, the service or purpose to which they have been applied or charged and whether the expenditure conforms to the authority which governs it. In our view Section 8 of Ordinance XXIII of 2001 gives a very wide scope and intent of

the legislature, which reflects, if the funds which are being utilized, flow from the Consolidated Fund of the Federation or the Province, the same are to be audited by the office of the Auditor General. The manner and mode adopted in the instant matter and as pleaded on behalf of the petitioner, appears to be based on some malafide and to avoid the mandatory audit of the funds by the office of the Auditor General of Pakistan, which needs to be deprecated and appears to be an attempt to exercise discretion in a Non transparent manner by the Provincial Government, without there being any such justification.

11. In view of hereinabove facts and circumstances of the instant case, we are of the opinion that the office of the Auditor General of Pakistan has the authority to audit the accounts of the petitioner by virtue of Article 169 and 170 of the Constitution read with Section 8 of the Ordinance, No. XXIII of 2001 therefore, instant petition being misconceived in facts and law is hereby dismissed along with listed applications.

JUDGE

JUDGE