

IN THE HIGH COURT OF SINDH, KARACHI

Before

Mr. Justice Mohammad Ali Mazhar

Mr. Justice Amjad Ali Sahito

CONSTITUTION PETITION NO.D-3328 OF 2012

Mr. Ijaz Ahmed Zahid, advocate for the Petitioner
Mr. Kashif Sarwar Paracha acting Additional Attorney
General alongwith Mr. Hussain Bohra, AAG
Mr. Abdul Qadeer Ahmed, Director, Audit, Commercial
Karachi.

Date of Hearing : 24.02.2021, 11.03.2021,
18.03.2021 & 31.03.2021

Date of Judgment : ____ .06.2021

J U D G M E N T

AMJAD ALI SAHITO--J., Through instant Constitutional
Petition, petitioner sought for the following relief(s):-

- a. That the letters of the respondent No.1 demanding the petitioner to submit itself to audit were without jurisdiction and are liable to be cancelled and withdrawn.
- b. The petitioner is not under the control of the Federal Government or the Provincial Government and that the petitioner is creation of a statute and was not established by them.
- c. That the demand of the respondent Nos. 1 and 3 for audit of the petitioner by the respondent No.1 is without jurisdiction and amendment to Article 170 by insertion of sub-clause 2 is not applicable to the petitioner.
- d. The respondent No.1's functions and powers are to be read together with Article 169 and as stipulated in Ordinance XXIII of 2001 and as such the demands of the respondent No.1 and on the respondent No.3 for audit

by the respondent No.1 are without jurisdiction.

- e. The respondent No. 1 and 3 are liable to be refrained from implementation their demand of auditing the petitioner.
- f. Cost of the petition in favour of the petitioner.
- g. Any other order or directions as the circumstances of the case may require in the interest of justice.

2. The pith and substance of the constitution petition are that petitioner/NBP being aggrieved and dissatisfied with the letter bearing No.598/Audit/NBP/2012 dated April 16th, 2012 issued by the Director General, Director General Commercial Audit & Evaluation Karachi, addressed to the petitioner/National Bank of Pakistan assailed hereinabove requiring Petitioner/NBP for audit of the accounts of Bank for the financial Year 2011-12 thereafter conversations took place between the parties in lis; after the failure of the negotiations; Petitioner/NBP approached this court with a plea that, respondent No.1 has no powers to conduct an audit of the Petitioner/bank as the National Bank of Pakistan had earlier audited their bank accounts via top two audit firms of the Country as provided under Section 35 of the Banking Companies Ordinance, 1962.

3. It is inter alia contended by the learned counsel for the petitioner that NBP does not fall within the domain of respondent No.1, the Bank is creation of statute and is not under the control of Federal Government and or Provincial Government as is envisaged by sub-Article(2) of Article 170 of the Constitution; that Article 168 to 171 of the Constitution of Islamic Republic of Pakistan, 1973, relates to the respondent No.1, Article 169 stipulates in respect of audit of accounts of

any authority or body established by the Federation or the Province, that the powers and functions of respondent No.1 first laid down by the Governor General's Order 9-A of 1952 was brought in force known as "The Pakistan (Audit and Accounts) Order, 1952, However by President's Order 21 of 1973, the Pakistan (Audit and Accounts) Order 1952, the 1952 order was repealed, this in turn was repealed by Ordinance XXII of 2001 i.e. Auditor General's (functions, Powers and Terms and Conditions of Service) Ordinance, 2001; that petitioner was not subjected to audit by the respondent No.1 whose functions even now are governed by the Ordinance XXIII of 2001,; that Article 169 and Article 170(2) are to be read together which will lead to the logical conclusion that the respondent No.1 has to be governed by the Ordinance XXIII of 2001; that the Banks (Nationalization) Act, 1974, also stipulates that the General Direction and superintendence of the affairs and business of the petitioner/NBP and overall policy making in respect of its operations shall vest in its Board; petitioner/bank is controlled by the Banking Companies Ordinance, 1962; that as per Section 40 of the Banking companies Ordinance, 1962, the inspection of the bank is focused on risk assessment policies and procedures and compliance with law, regulations and supervisory directives; that there is no budgetary allocation of funds by the respondent No.2 or any Provincial Government and the petitioner-bank incurs all its expenses from its own resources; that by virtue of National Bank of Pakistan ordinance, general superintendence and direction of the affairs and business of the petitioner bank shall be entrusted to the Central Board which may exercise all powers and do all such acts and things as may be exercised or done by the petitioner bank and are not by this Ordinance expressly directed or required to be done by the bank in general meeting; that under Section 34 of the Banking

Companies Ordinance, 1962, every banking company shall prepare its balance sheet and profit and loss account as per the prescribed format, the bank in accordance with the above section prepares the accounts on quarterly and yearly basis on the format prescribed by the State Bank of Pakistan, these accounts are circulated to the shareholders and printed in the newspaper; that financial statements of the bank are prepared in accordance with approved accounting standards as applicable in Pakistan. Approved accounting standards comprise of International Accounting Standards Board and Islamic Finance Accounting Standards Board and Islamic Finance Accounting Standards (IFASs) issued by the Institute of Chartered Accountants of Pakistan as are notified under the Companies Ordinance, 1962 and directives contained under the Companies Ordinance, 1984, and the State Bank of Pakistan; that the Bank is also subject to SBPO inspection on yearly basis as required by Section 40 of the Banking Companies Ordinance, 1962, SBP carries out detailed inspection of the bank, and covers all areas of banking operations like management, quality of assets, profitability, earnings, efficiency credit ratings, risk framework, financial statements, internal audit functions and its effectiveness, compliance and branch operations etc. The inspection also covers banks compliance with applicable laws and regulations; lastly learned counsel prayed that the instant constitution petition may be allowed. In support of his contention, he has relied upon the cases as PLD 1990 SC 452 PRINTING CORPORATION OF PAKISTAN Vs. PROVINCE OF SIND AND OTHERS, PLD 1984 SC 365 SHAHIDA KHAN Vs. ABDUL REHIM KHAN, PLD 2013 SC 829 BEGUM NUSRAT ALI GONDA Vs. FEDERATION OF PAKISTAN AND OTHERS, PLD 1998 SC 823 SYED MASROOR AHSAN AND OTHERS Vs. ARDESHIR COWASJEE AND OTHERS, PLD 1997 SC 32

SHAHID NABI MALIK AND OTHERS VS. CHIEF ELECTION COMMISSIONER ISLAMABAD AND 7 OTHERS.

4. Learned acting Additional Attorney General representing Federation of Pakistan contended that 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 federal government shall be conducted by the Auditor General, who shall determine the extent and nature of such audit; that the Auditor General Functions and Powers Ordinance, 2001 also authorizes the Auditor General to conduct the audit of any authority or body established by, or under the control of federal or provincial government; that the National Bank Ordinance also authorizes the federal government to appoint the auditor to examine the accounts of National Bank; that the 75% shareholding by National Bank of Pakistan is owned by the State Bank of Pakistan; that Section 41 of the State Bank of Pakistan Act, 1956 provides that federal government fully owns the shareholding in the State Bank of Pakistan; that since the majority of shareholding in the National Bank of Pakistan is held by State Bank of Pakistan which is fully owned by the federal government therefore it can safely be interfered that National Bank of Pakistan is an authority or body established by or under the control of federal government; that as per Article 170(2) of the Constitution and the provision of law the Auditor General of Pakistan is empowered to undertake the audit of accounts of National Bank of Pakistan; that Banks (Nationalization) Act, 1974 provides that the ownership, management and control of banks shall stand transferred and vested to all the federal government on the commencing day; that all shares in the capital of the bank held by persons other than federal government or provincial government corporation owned or controlled by the federal government or the State Bank of Pakistan shall stand transferred and vested

to federal government as commencing free of all trusts and liabilities and encumbrance as such all audits and accounts of the federal government shall be audited by the Auditor General of Pakistan. In view of the above the instant petition is liable to be dismissed. In support of his contentions, he has relied upon the case laws reported as 2018 SCMR 407 SINDH RURAL SUPPORT ORGANIZATION (SRSO) v. FEDERATION OF PAKISTAN and others, 2013 SCMR 1880 HAMID MIR and another v. FEDERATION OF PAKISTAN and others, PLD 1975 Supreme Court 244 SALAHUDDIN AND 2 OTHERS v. FRONTIER SUGAR MILLS & DISTHLLERY LTDS., TOKHT AND 10 others, PLD 1993 Supreme Court 412 SABIRUDDIN v. MUSHTAQ HUSSAIN BHATTI and 2 others, 2016 SCMR 1362 P.T.C.L and others v. MASOOD AHMED BHATTI and others and PLD 2015 Sindh 408 Syed QASIM ALI SHAH through Attorney v. ELECTION COMMISSION OF PAKISTAN through Secretary and 3 others.

5. We have heard the learned counsels for the parties and perused the record. The core contention of the learned counsel for the National Bank of Pakistan (**“NBP”**) is that the Bank is governed by the Banking Companies Ordinance, 1962, Companies Ordinance, 1984, State Bank of Pakistan Prudential Regulations and Code of Corporate Governance, thus the Bank is required to get its accounts audited by the firm of Chartered Accountants; on the other hand learned Additional Attorney General and Assistant Attorney general submitted that Article 170(2) of the Constitution of Islamic Republic of Pakistan, 1973, (Constitution) provides that the audit of the accounts of the Federal and the Provincial Government and the accounts of any authority or body established by or under the contract of the Federation or a Provincial Government shall be conducted by the Auditor General of Pakistan, who shall determine the extent and

nature of such audit, hence the question before us is that **“whether the funds and accounts of the Federation, a Provincial Government and District Government in the hands/collected by NBP are subject to audit and falls within powers and functions of the Auditor General of Pakistan (AGP)”**. Before opening upon the subject, it is expedient to reproduce Art; 170 of the Constitution of Pakistan, 1973 which reads as under;

“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 the Provincial governments 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.]”

6. Further, the Auditor General shall in connection with the performance of his duties under the Auditor General (Function, Powers and Terms and Conditions of Service) Ordinance, 2001 (A.G. Ordinance) have authority to audit all expenditure from the Consolidated Fund of the Federation and of each Province 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 changed and whether the expenditure conforms to the authority which governs it. Further, the Auditor General audits all transactions of the federation and of the provinces relating to public accounts. The Auditor General also authorized to conduct an Audit of any authority or body established by or under the contract of

the Federal or a Province Government as the case may be. Section 8 of the A.G. Ordinances, provides that:-

8. Provisions relating to Audit;- Auditor General shall:-

- (a) -----
- (b) -----
- (c) -----
- (d) **audit, subject to the provisions of the Ordinance the accounts of any authority or body established by the Federation or a Provincial and in each case to report on the expenditure, transactions or accounts so audited by him.**

7. In addition to the foregoing, Section 28 of the National Bank of Pakistan Ordinance, 1949 (NBP Ordinance) also authorized the Federal government to appoint an auditor to examine the accounts of the NBP, it is appropriate to reproduce Section 28 of the NBP Ordinance which reads as follows:-

28. Government Auditors.

“Without prejudice to anything contained in the foregoing provisions, the [Federal Government] may appoint such auditors as it thinks fit to examine and report upon the accounts of the bank”

8. Section 12 of the NBP Ordinance provides that, the General Superintendence and directions of the affairs and business of the Bank shall be entrusted to all Central Board which may exercise all powers and do all such acts and things as may be exercised or done by the bank and not by this Ordinance expressly directed or required to be done by the Bank is General Meeting, the definition of the Central Board provides in Section 2(b) of the NBP Ordinance “the Central Board means the Central Board of Directors of the Bank”. Five out of nine Directors are being appointed by the Federal Government. The said Directors and members appointed by Federal Government cannot be removed by

shareholders except the appointing authority as per Section 18 (2) & (3) of Ordinance, 1949. Section 14 offers the mechanism for the appointment of the Central Board and Section 16 provides power to Federal Government to appoint Managing Director for a period not exceeding five years. Further sub-section (2) of Section 14 NBP Ordinance delivers that the Chairman of the Central Board shall be appointed by the Federal Government from amongst the Directors.

9. Because of above, the Article 170(2) of the Constitution read with Section 9 & 11 of the Auditor General's (Functions, Powers and Terms and Conditions of Service) Ordinance, 2001, empowered the Auditor General of Pakistan to audit the accounts of any Authority or body established by or under the control of the Federation or a Provincial Government. In this context reliance is placed in the case of **Hamid Mir and others v. Federation of Pakistan and others (2013 SCMR 1880)**, which reads as follows:-

“10. The answer to this question is given with reasonable clarity by the express words of sub-Article (2) of Article 170 of the Constitution. It states that “the audit of the accounts of the Federal and the Provincial Governments 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. “The broad scope and wide significance of this Article has been noted in our Order dated 07-05-2013. “The Constitution does not recognize any exception to the provisions of Article 170(2)...In this view of the matter, the Consolidated Fund and Public Accounts cannot remain unaudited” (para 11). Even before the introduction of Article 170(2) in 2010, the Auditor General's (Functions, Powers and Terms and Conditions of Service) Ordinance, 2001, made it “abundantly clear that where the amount is charged on the Consolidated Fund or relates to the Public Accounts of the Federation or the Provinces,

the same must be audited by the Auditor-General without exception” (Order dated 7-5-2013, para 11). Also in our Order of 7-5-2013, (para 13), we noted that: “sub-Article (2) of Article 170 of the Constitution was added by the 18th Amendment which amply empowers and directs the Auditor General to fulfill his constitutional obligations as watchdog of the people of Pakistan. It is only through audit that it can be ensured that the had earned income of citizens of this country is being spent for lawful purposes. Without the audit specified by the Constitution and the two statutes, referred to hereinabove, there can be little or no room for any transparency. Absence of audit by the Auditor General, apart from being violative of the Constitution and law, is a sure and certain invitation to corruption and lack of accountability.”

In another case **Suo Motu** case No. 12 of 2015, the Hon’ble Supreme Court of Pakistan observed that:-

“3. After hearing the learned counsel for DHA, Lahore we note that no such submission has been made, which would even remotely suggest that DHA falls outside the scope of Article 170(2) *ibid*. On the contrary, it is clear from the wording of the said provision that all such bodies, which are *inter alia* established by the Federal or the Provincial Governments, shall be subjected to audit conducted by the Auditor General. There can be no doubt at all the DHA Lahore is admittedly a creation of an Ordinance initially promulgated by the Province of Punjab in September 1999, and subsequently, given cover by the Chief Executive’s Order No.XXVI of 2002. We, therefore, cannot possibly accept the stance of DHA that it is not subject to audit by the Auditor General. The reason which so far was given by DHA to the Auditor General was that in para-37 of our judgment in the case of Hamid Mir *supra*, the matter of audit of DHA by the Auditor General was *subjudice*. We may clarify that there was no order restraining the Auditor General from the audit of DHA. We reiterate that restraining the Auditor General from the audit of DHA. We reiterate that Auditor General is the competent constitutional authority for

conducting the audit of DHA. He may, therefore, proceed expeditiously to do so and the parties who are the subject to the audit shall provide the relevant record etc. to enable such audit”

In another case of SINDH RURAL SUPPORT ORGANIZATION (SRSO) v. FEDERATION OF PAKISTAN and others, reported in **2018 SCMR 407**, which reads as follows:-

“The Auditor General of Pakistan, in exercise of its authority per mandate of constitution may conducting such studies and analysis and audit of such “substantially financed authority or body” from time to time as may be required by the Federal, Provincial or District government (section 10 ibid) and to carry out scrutiny of the accounts by which the sanctioning authority satisfies itself as to the fulfillment of the conditions on which such grant or loan was given to any such substantially funded body and or authority (section 11 ibid). Thus it could be seen that the purpose and object of audit as mandated under the constitutional dispensation serves entirely different purpose than the statutory annual audit of a company including one licensed under section 42 of the Companies Ordinance, 1984 (per sections 252 to 260 of the Ordinance, 1984), which essentially relates to statutory compliance and to keep a vigil and eye on financial health, misfeasance of the company by the, directors, shareholders and the regulatory authority i.e. Securities and Exchange Commission of Pakistan, non-compliance thereof is visited by penal consequences. Role of Auditor General of Pakistan is constitutional and as noted above, is much wider than statutory auditors under the Ordinance, 1984 ibid. It is an Auditor General who has to determine as to how the accounts in respect of funds and or loan received by the substantially funded bodies and or auhtor4ities’ are to be kept, in what form and manner, in accordance with such principles or the methods as may be determined in accordance with rules and regulations as may be framed there-under”

10. The Auditor General of Pakistan is a government organization and the prime and supreme audit institution in the Country for ensuring public accountability and fiscal transparency and oversight in government operation. Learned acting Addl. Attorney General argued that the federal government holds directly and indirectly 75% of the shareholding in the NBP Bank after the dissolution of banking council vide amendment in 1997 in Banks (Nationalization) Act, 1974, all the assets, properties, and rights of banking council were transferred to State Bank of Pakistan, which is almost wholly owned by the Federal Government to the extent of 95% of its share, hence federal government owns directly or indirectly holds the 75% share in the Banks. The federal government has a sizeable representation on the central board of directors of the NBP and has a majority shareholding (75% through SBP) with the ownership of the assets including equity. He has also claimed that the stance of the NBP claiming exemption from audit by the Auditor General of Pakistan because of the external audit conducted by the Chartered Accountant under the Companies Ordinance, 1984 is not correct in the aforementioned instance of NBP because the audit of entities following Companies Ordinance, 1984 (now Companies Act, 2017) have also been conducted by the department of Auditor General of Pakistan i.e. SSGC, Port Qasim Authority, SNGPL, PSO, PNSC. Moreover, an audit of the Auditor General of Pakistan is placed before the President of Pakistan, who shall place it before both the House of Parliament in view of Article 177 of the Constitution of Pakistan for transparency and accountability.

11. Further, an agreement between the State Bank of Pakistan (SBP) and (NBP) was held and as per clause 2(a)(b)(c), (d), it was agreed between the parties that the NBP

will collect taxes, duties, fees, levies and receipt of whatever description or nomenclature (hereinafter referred to as “**receipts**”) of the Federal Government, Provincial Government or District government to effect payment, of Federal, Provincial government and district government and maintain the separate counters at the designated branches dealing with government receipts and payments. It was also decided that the NBP shall provide such account, scrolls, vouchers, reconciliations and other information, both in hand and soft forms, as may be required by the concerned Accountant General(s), the Bank, and of Federal Government, Provincial Governments and District Governments. The NBP shall record collections and disbursements, communicate data, render accounts and reconciliations in accordance with the rules notified by the Federal Government, Provincial Governments, and District Governments. All the transaction of the Federal, Provincial and district as the case may be that needs to be audited by the AGP in respect of any authority or body established by or under the control of the Federal or Provincial Government. Further, Section 8, 9, and 14 of the Auditor General's (Functions, Powers and Terms and Conditions of Service) Ordinance, 2001 are very much clear that the Auditor General shall audit all transactions of the Federation and the Provinces relating to public accounts. Suffice it to say that the NBP may conduct an audit through a chartered accountant for the satisfaction of his own or private shareholders/accounts holders, but once public money is involved the role of the Auditor-General shall start. Whereas Article 170(2) of the Constitution of Islamic Republic of Pakistan, 1973, (Constitution) provides that the audit of the accounts of the Federal and the Provincial Government and the accounts of any authority or body established by or under the contract of the Federation or a Provincial Government shall be conducted by the Auditor General of Pakistan, who

shall determine the extent and nature of such audit, Further in case of conflict between any provision of the Constitution; and the subordinate piece of legislation on a subject, the Constitution provision will prevail over the latter, subordinate legislation cannot run contrary to Constitutional provision. In the case of Syed Qaim Ali Shah V. Election Commission of Pakistan & others (**PLD 2015 Sindh 408**) this court (the judgment authored by one of us Muhammad Ali Mazhar-J) has held that;-

“11. It is well settled known that Article 199 of the Constitution casts an obligation to act in aid of law and protect the rights within the framework of the constitution against the infringement of law and constitution. All laws fall within encompass of sub-constitution legislation and they cannot claim superiority over the constitutional power and jurisdiction vested under Article 199 of the Constitution. The constitution being supreme must obviously prevail. The courts derive powers from the constitution and function under it. It is settled principle of constitutional interpretation that provision enshrined in the constitution shall prevail notwithstanding anything contrary contained any piece of subordinate legislation. In case of conflict between any provision of constitution and the subordinate piece of legislation on a subject, the constitutional provision will prevail over the latter, subordinate legislation cannot run contrary to constitutional provision. It is an elementary rule of construction of constitutional instrument that effect should be given to every part and every word of the constitution”

12. In view of the above, and the dictum laid down by the Hon’ble Supreme Court of Pakistan cited supra, the instant constitution petition is dismissed along with the listed application. Interim order granted in the instant petition is hereby vacated.

JUDGE

JUDGE