

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Amir Hani Muslim
Mr. Justice Ejaz Afzal Khan
Mr. Justice Tariq Parvez

CIVIL PETITION NO.701 OF 2016

(On appeal against the judgment dated 04-12-2015
passed by the Peshawar High Court, Peshawar, in
Writ Petition No.1796-P/2015)

Peshawar Electric Supply Company Ltd Petitioner.

Versus

Wafaqi Mohtasib (Ombudsman) Respondents
Islamabad and others

For the Petitioner	:	Mr. Abdul Rauf Rohaila, ASC Mr. M. S. Khattak, AOR
For Respondents (1-2)	:	Hafiz Ahsan-ud-Din Khattak, AOR Raja Abdul Ghafoor, AOR
On Court Notice	:	Rana Waqar Ahmed, Addl. AG
Date of hearing	:	25-07-2016.

JUDGMENT

AMIR HANI MUSLIM, J. - Through these proceedings, the Petitioner has impugned the judgment dated 04.12.2015, of the Peshawar High Court whereby Writ Petition filed by the Petitioner against the order of Wafaqi Mohtasib was dismissed, *inter alia*, on the ground that the Petitioner has failed to avail the alternate remedy provided under Article 32 of the

Establishment of the Office of Wafaqi Mohtasib Order 1983 (hereinafter referred to as the Order).

2. The relevant facts of the case are that owing to the unsatisfactory performance of WAPDA, its power wing was privatized and distribution companies were created in various areas for distribution of electricity which, for operational purposes, seek guidance from PEPCO. The Peshawar Electric Supply Company (Pvt.) Ltd (PESCO) was created and incorporated under the Companies Ordinance, 1984, to distribute electricity in the Province of Khyber Pakhtunkhwa. PESCO has no statutory rules and its employees are regulated by the service rules of WAPDA, PEPCO and Government Service Rules.

3. On 08.04.2004, WAPDA issued an Office Order, directing, *inter alia*, that 20% of the posts in BS-01 to BS-09 in all categories are reserved for the children of WAPDA deceased or retired employees and employees who died during service. The point in issue between the parties is that certain persons filed applications before the Wafaqi Mohtasib for a direction to the PESCO to appoint them in the PESCO against the said 20% quota, after relaxing certain conditions. Thereafter, the Wafaqi Mohtasib made recommendations for their appointments after relaxing the prescribed conditions. Not only that, the Wafaqi Mohtasib also

issued notices to the PESCO for implementation of these recommendations.

4. The PESCO impugned the recommendations of the Wafaqi Mohtasib and the letters for implementations before the Peshawar High Court, through a Writ Petition which was dismissed vide impugned judgment dated 04.12.2015, *inter alia*, on the ground of maintainability. Hence this Petition for leave to Appeal.

5. The learned Counsel for the Petitioner has contended that the jurisdiction of the Ombudsman is dependent on the provisions of Article 9 of the Order. According to him, Article 9(1) clearly demarcates powers conferred on the Ombudsman under the Order. In substance, the jurisdiction of the Ombudsman to entertain a complaint is dependent on the term “mal-administration” used in Article 9. He submits that neither the Ombudsman has the power to order and recommend any appointment in the Petitioner-Company, nor can it implement the recruitment policy of the Petitioner-Company, in view of bar contained under Article 9 of the Order. In support of his contention, he has relied upon the case of Raft Ullah Khan v. Settlement Commissioner, Lahore (1998 SCMR 84).

6. As against this, the learned Additional Attorney General while supporting the impugned judgment, has contended that the term “mal-administration” includes recruitment policy and the Ombudsman can recommend the appointment of this nature. He next contended that the Ombudsman can recommend under Article 9 of the Order for appointment on the 20% quota of the Petitioner’s employees by relaxing the age.

7. We have heard the learned Counsel for the Petitioner, the learned Law Officer and have perused the record with their assistance. The legislature has established the office of the Wafaqi Mohtasib by introducing the Order of 1983. By an Act XIV of 2013, called the Federal Ombudsman Institutional Reforms Act, the legislature has further supplemented the aforesaid Order. Both these legislative instruments are meant to confer powers on the Wafaqi Mohtasib to deal with the complaints of mal-administration against the public functionaries as provided under Section 2(2) of the Order.

8. It is not possible to mould the term “mal-administration” used in Article 9(1) of the Order under a rigid definition. The dictionary meaning of the term ‘mal administration’ is “to handle a matter inefficiently or improperly”. In its wider sense, it refers to various types of mal-practices which

are opposed to law, fair play and principles of equity and justice. In common parlance, the introduction of the office of the Ombudsman and the conferment of powers upon it through the Order was styled to check administrative excess and abuses of bureaucracy. However these powers, within the Order, are not absolute and are subject to the restrictions contained in Article 9 of the Order. In other words, the Wafaqi Mohtasib can only exercise powers which are not in conflict with the language of Article 9 (1) and (2) of the Order. The term “mal-administration” has been interpreted by this Court in a number of cases reported as Muhammad Mumtaz Khan Bhaba vs. Special Court of Mr. Justice Munir A Shaikh, (1994 SCMR 728), Shafaatullah Qureshi v. federation of Pakistan (PLD 2001 SC 142) and Capital Development Authority vs. Zahid Iqbal (PLD 2004 SC 99)

9. In the case in hand, the learned High Court while dismissing the Writ Petition of the Petitioner has, *inter alia*, held that the Petition was not competent as an alternate remedy, in terms of Article 32 of the Order, was available. The grievance of the Petitioner was that the Wafaqi Mohtasib did not have the jurisdiction to order and or recommend the appointment of a person on the 20% quota reserved for the employees of different categories referred to in paragraph 3 above, who were admittedly

over age. We have to examine as to whether the Order confers authority on the Ombudsman to entertain grievance of the nature under the garb of powers granted to him under Article 9 of the Order. In other words, whether the Wafaqi Mohtasib can recommend the appointment of this nature by relaxing the upper age limit of a person? We are of the considered view that the appointment and or recruitment in a public sector company like Petitioner is an executive function and such function cannot be performed by the Wafaqi Mohtasib under Article 9 of the Order which excludes his jurisdiction to entertain a complaint of the nature.

10. If, *ex facie*, the Ombudsman is not conferred with such a power, and the order of the nature is passed by it, the High Court can always in exercise of its constitutional jurisdiction rectify such error. An alternate remedy provided under Article 32 of the Order cannot restrict the Constitutional jurisdiction of the High Court once it comes to the conclusion that the Order of the Wafaqi Mohtasib was outside the domain of Article 9. Sub-Article 2 of Article 9 clearly indicates that jurisdiction of Wafaqi Mohtasib is expressly excluded in cases of personal grievances of public servants or functionaries serving in any “Agency” in respect of the matters relating to their service. The term “Agency” has been

defined in Article 2(1) of the Order which means a Ministry, Division, Department, Commission or office of the Federal Government or a statutory corporations or other institution established or controlled by the Federal Government. The Petitioner is a Company and is controlled by the Government and clearly falls within the purview of term “Agency”, therefore, the jurisdiction of Wafaqi Mohtasib is barred under clause 2 of Article 9 of the Order.

11. The question as to whether the learned High Court can entertain a Constitutional Petition against an order of the Wafaqi Mohtasib, it is well established law that his order can be interfered with by the learned High Court in exercise of its constitutional jurisdiction if the Petitioner satisfies that the order of the Wafaqi Mohtasib is without jurisdiction. We have not lost sight of Article 32 of the Order which provides alternate remedy to the aggrieved to approach the President of Pakistan by filing a representation against the Order of Wafaqi Mohtasib, but where the Order of the Wafaqi Mohtasib, on the face of it, is against the language of Article 9 of the Order or without jurisdiction, the High Court can exercise its constitutional jurisdiction so as to prevent injustice done to an aggrieved.

12. In this backdrop we are satisfied that the jurisdiction of Wafaqi Mohtasib is limited as provided under Article 9 of the Order and he cannot order and or recommend appointment of a person in the Petitioner-Company under any of the categories mentioned hereinabove which power rests with the executive authorities. The above are the reasons for our short order which reads as under:-

“For reasons to be recorded later, this petition is converted into Appeal and allowed. The impugned judgment is set aside.”

Judge

Judge

Judge

Islamabad the,
25th July 2015.
Not approved for reporting.
Sohail/**