

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Companies Original no.2 of 2023

Khurshid Ahmed Qureshi, and others
versus
Livestock and Dairy Development Board (LDDDB), and others

Petitioners by: Mr. Aftab Rashid, advocate

Respondents by: Barrister Munawar Iqbal Duggal, Additional Attorney General
Mr. Muhammad Tayyib Malik, advocate
Syeda Muneeza Fatima and Ms. Erfa, advocates
Mr. Muzafar Ahmed Mirza, Chief Prosecutor, SECP
Aqib Anwar, Administrator, LDDDB
Jarrar Hussain, Company Secretary

Date of Hearing: **13.05.2024**

Sardar Ejaz Ishaq Khan, J:- The genesis of this company petition was the challenge to the surreptitious appointment of the directors of Respondent No. 1, Livestock and Dairy Development Board (LDDDB). LDDDB is a not-for-profit company, incorporated under section 42 of the erstwhile Companies Ordinance, 1984, as a company limited by guarantee without share capital. It was incorporated by the Government of Pakistan with 3 *ex-officio* members. With the passage of time, the number of its members grew to 31, pre-dominantly private members, and neither the petitioners nor the respondents had any explanation to offer as to how the *ex-officio* members were empowered, without the Government's consent, to continue adding private members of the company to dilute the control of the Government.

2 The grounds for the challenge in this petition to the new Board of directors were, *inter alia*,

(i) that elections were not held, which was mandatory under section 159 of the Companies Act, 2017 ("CA'17"), read with Article 35(ii) of the Articles of Association,

- (ii) that the petitioners were deprived of their candidature rights by reason of the company not announcing the number of directors to be elected, and
- (iii) that the board appointments exceeded the limit of 7 directors, which necessitated an election.

It was contended that the Board appointments were therefore in violation of various provisions of the CA'17, including section 159, whereby the waiver of election was permissible only if the Board seats did not exceed the number of persons intending to contest the elections.

3 The respondents conceded that the purported annual general meeting at which the Board under challenge was appointed was invalid. Therefore, the petition to that extent was allowed vide the short order dated 13.05.2024.

4 In parallel, the respondents maintained that the new Board was now being appointed by the Government itself under section 10 of the *State-Owned Enterprises (Governance and Operation) Act, 2023* ("SOE Act"). The respondents' primary contention was that LDDB was a 'State-Owned Enterprise' ("SOE") per the SOE Act and, therefore, the nomination of the ex-officio members and the independent directors on its Board had to come exclusively from the Federal Government, given the non-obstante clauses in sections 3(1) and 9 of the SOE Act, that ought to prevail over the CA'17 for being a general law, the non-obstante clause in section 4 of the CA'17 notwithstanding.

5 The petitioners, private members of LDDB, took the position that the SOE Act could not override the provisions of CA'17, which required election by the voter members of a company under section 159, and that the Articles of Association of LDDB stipulating appointments to the Board of LDDB through elections by the voter members could not be overridden by the SOE Act.

6 The petitioners further argued that LDDB was not an SOE because it was a company limited by guarantee and, therefore, the concept of 'ownership' – through issued share capital – did not arise. In the alternative, they argued that LDDB had 31 members, of which 21 were private members and not ex-officio/public servant members, which brought the Government's control of LDDB to below 50%.

7 Before we venture to dilate on these questions, it must be observed that the SOE Act is a somewhat infelicitous piece of drafting, without deep thought appearing to have gone into it, and with several contradictions with the CA'17 in relation to the constitution of the Boards of SOEs. Some of these contradictions surfaced during the hearings, including that, if the Board nominations and appointments were to come directly and exclusively from the Government, then partial divestment of SOEs would run into problems, with the privatization investors being marginalized for Board appointments, a situation which will quite likely not be acceptable to the investors. However, we ought not go into such contradictions in any detail, as they are not directly germane to this petition, and no detailed submissions were heard in this regard. Therefore, it needs to be emphasized that this judgment is confined to the appointments to the Board of LDDB only – it is neither intended to nor shall be read to lay down a precedent for appointments to the Boards of SOEs generally.

8 An SOE is defined in section 2(o) of the SOE Act as “*a corporate body falling within the scope of section 2*”. This is circular drafting, because the definition itself appears in section 2. Section 3(1) of the SOE Act makes the Act applicable to “*...entities owned and controlled by the Federal Government...*”. As LDDB is a company limited by guarantee, the question of ‘ownership’ did not arise in the conventional sense, and therefore the question remained whether LDDB could be regarded as controlled by the Federal Government. Section 2(d) is relevant in this context and, in so far as relevant, is reproduced below:

2(d) "Controlled by the Government" means, in the case of a company, if the Federal Government directly or indirectly *has the right to appoint a majority of directors ...*

9 Under section 12 of the SOE Act, the Board of an SOE company is to consist of independent directors, ex-officio directors, and the chief executive officer. Section 12 occurs in Chapter 5 of the SOE Act. Chapter 5 commences with section 9(1), which stipulates that Chapter 5 is to apply “*...to all boards of state-owned enterprises, notwithstanding anything contained in any other law for the time being in force.*” Section 12(2) of the SOE Act stipulates that “[T]he majority of the board shall consist of independent directors...”, and the independent directors in question are to be nominated by a 3-member ‘Board Nominations Committee’, consisting of the relevant Minister in Charge, the

Secretary of the relevant Division, and the Secretary of the Finance Division, that is to say, the Board Nominations Committee is to consist entirely of office-bearers of the Government.

10 Therefore, the aforesaid statutory provisions entail cumulatively that LDDB is an SOE, with the Government carrying the right to appoint a majority of its directors by virtue of the requirement under section 12 for the Board to comprise of independent directors, ex-officio directors and the CEO, and with the majority of the directors being independent directors, who in turn are to be appointed by the Board Nominations Committee comprising the Government's office-bearers.

11 The non-obstante clause under section 4(a) of the CA'17 is countered by the non-obstante clauses under sections 3(1) and 9(1) of the SOE Act. With two competing non-obstante clauses, the non-obstante clause in the special law is to prevail – see *Amjad Qadoos v. The Chairman National Accountability Bureau (NAB) Islamabad* (2014 SCMR 1567). The CA'17 is the general law on companies, in that it deals with all kinds of companies, whereas the SOE Act is a special law dealing with a narrower category of companies, namely, the ones which are state-owned. Therefore, sections 3(1) and 9(1) of the SOE Act will prevail over the non-obstante clause in section 4 of the CA'17.

12 I conclude by saying that LDDB was incorporated by the Federal Government with three ex-officio members. It is funded entirely by the Federal Government, including the salaries of its officers and its operational expenses. No valid legal basis was proffered by the petitioners as to how, and under what legal authority, its membership got expanded to 31, with the majority being private members, who ended up wresting the control of LDDB out of the Government. May be that was a good thing, may be it was not. But for the private members to come and assert their legal right to control LDDB, they have to demonstrate that their induction as members of LDDB was legally valid, and was not a matter of largesse by any incumbent officials of the Government without proper advice to and permission from the Federal Government to increase LDDB's membership by induction of private members to a level where the Government's voting power stood reduced to a minority. These factors have been relevant in coming to the conclusions in this petition. But now, with the advent

of the SOE Act, the petitioners are unable to show how they and their cohort private members would get around the SOE Act's requirement that the majority of the Board must be independent and ex-officio directors, with the former nominated by the Board Nominations Committee of the Government.

13 The above are the reasons for the short order dated 13.05.2024. It is reiterated that, for the reasons given in paragraph 7 above, this judgment is not a precedent for appointments to the Boards of SOEs generally and remains confined to the petition at hand only.

(Sardar Ejaz Ishaq Khan)
Judge

Imran