

HCJD/C-121
JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

WRIT PETITION NO. 4233/2014

BABAR SATTAR

VERSUS

FEDERATION OF PAKISTAN

through Secretary Ministry of Water and Power & 4 others

Petitioner by : **Mr. Babar Sattar Advocate in person.**
Respondents by : **Mr. Ali Shah Gillani Advocate for respondent No.1.**
Mr. Muhammad Shoaib Shaheen Advocate for
applicant in C.M. No.2595/2015.
Mr. Afnan Karim Kundi, Additional Attorney General.
Mr. Omer Rasul, Additional Secretary, M/o Water &
Power.
Malik Zahoor Awan, Standing Counsel.
Date of Hearing : **02-07-2015**

ATHAR MINALLAH, J.- The petitioner is one of the Independent Members of the Board of Directors of the National Transmission and Dispatch Company Limited (*hereinafter referred to as the 'NTDCL'*). The petitioner has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan 1973 (*hereinafter referred to as the 'Constitution'*), challenging the interference of the respondent No.1 in the affairs of the NTDCL in breach of the Companies Ordinance 1984, and the rules and regulations made there under. The prayer sought by the petitioner is as follows.-

"In view of the aforesaid it is prayed that this Honourable Court may be pleased to declare that the

Impugned Notification is ultra vires of the law and the Constitution, unlawful and of no legal effect.

It is further prayed that the Respondent No.1 be restrained from claiming any discretionary or exclusive right to make appointments or remove members of the BOD of NTDC or other Public Sector Companies at its pleasure.

It is further prayed that the Respondent No.1 be directed to act strictly in accordance with the Rules while dealing with NTDC and other Public Sector Companies and not interfere with the administration and management of NTDC that the Board and Management of the NTDC is responsible for in accordance with the provisions of the Companies Ordinance, the Rules and the Memorandum and Articles.

It is further prayed that penal action be initiated against those officials of the Federal Government who are involved in and liable for the issuance of the Impugned Notification in blatant contravention of the law, including, but not limited to, action in accordance with Rule 25 of the Rules read together with Section 506(2) of the Companies Ordinance.

It is further prayed that this Honourable Court grant any other relief that may be deemed just and appropriate in the circumstances."

2. The question raised by the petitioner essentially relates to the scope and extent of the powers vested in the Federal Government viz-a-viz the NTDCL and its obligations under and pursuant to the Memorandum and Articles of the latter, particularly the Public Sector

Companies (Corporate Governance) Rules 2013 (*hereinafter referred to as the "Corporate Governance Rules"*). The filing of the petition was triggered by issuance of a notification dated 29-09-2014 and the interference with the management of the NTDCL by the respondent no. 1. NTDCL has a pivotal role to play, particularly at a time when the nation is faced with the challenges of an energy crisis. The NTDCL and its management and control have inevitably assumed immense importance in protecting the interests of the consumer i.e the general public. Needless to mention that the august Supreme Court in OGRA through Secretary versus Midway II, CNG Station and others, 2014 SCMR 220, has declared the provision of electricity as an integral part of the fundamental right to life enshrined and guaranteed under Article 9 of the Constitution. Thus the questions raised through the instant petition are inextricably linked with the lives of each citizen, thereby making it a matter of enforcement of fundamental rights and public interest as well.

3. After the petition was filed and notices were issued, the respondent no. 1 took certain actions and passed the following orders without the approval or consent of the Board of Directors of the NTDCL;

- (i) On 03-11-2014 advertisements were published in various daily newspapers seeking applications from candidates for the appointment of a Managing Director.

- (ii) On 15-04-2015, issued office order, and purportedly expanded the Board of Directors by adding one Ex officio member and four private members.
- (iii) On 30-01-2015, suspended the Managing Director, NTDCL without the approval of the Board of Directors.
- (iv) On 01-04-2015, ordered the reinstatement of Mr Tahir Mehmud as MD, NTDCL.
- (v) Various orders were passed by another public sector company i.e the Pakistan Electric Power Company (Pvt) Limited (hereinafter referred to as "PEPCO") relating to administrative matters e.g posting/transfers etc of the officials and staff members of NTDCL.

The above orders and actions were placed on the record of this Court through various applications.

4. The petitioner has contended that; the Regulation of Generation and Distribution of Electric Power Act 1997 (*hereinafter referred to as the 'Act of 1997'*) provided for the unbundling of the power utility business and its corporatization, whereby Generation, Transmission and Distribution were separated; it was made mandatory to issue licences only to companies incorporated under the Companies Ordinance 1984; as a result of the incorporation of the NTDCL, the Federal Government was

left with no authority in relation to the affairs of the company, except in the manner provided under the Companies Ordinance 1984 and the rules made there under; the Corporate Governance Rules provide for the mechanism regarding how a Public Sector Company shall be governed, and the said rules are binding on the Federal Government; Section 183 of the Companies Ordinance 1984 neither deals with the determination of the size of the Board, nor vests power in the Federal Government to make such a determination; Section 183 does not address the manner or procedure for the nomination or removal of a Director by the Government, or how the latter is to exercise discretion in this regard; it is settled law that discretion cannot be exercised in an arbitrary, whimsical or in an unstructured manner, and reliance has been placed on the case of '*Aman Ullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others*' [PLD 1990 SC 1093], '*Muhammad Yasin v. Federation of Pakistan through Secretary Establishment Division Islamabad and others*' [PLD 2012 SC 132]; the Federal Government, in exercise of its power vested under Section 506 of the Companies Ordinance 1984, has structured its own discretion and determined the manner for its exercise; the Corporate Governance Rules have been enacted for structuring the discretion and are to be read with the provisions of section 183; the Corporate Governance Rules determine the process for nomination, which ensures transparency and merit, while leaving the ultimate power of nomination with the Federal Government; In the case of '*Ghazanfar Ali v. Federation of Pakistan, etc.*' [2014 CLD 664] the Federal Government had conceded that the Corporate Governance Rules apply to similarly placed Public Sector Companies; the plain reading

of Section 198, 199 and 200 of the Companies Ordinance 1984, read with Rule 5(2) of the Corporate Governance Rules makes it obvious that the Federal Government has no power to appoint or remove the Chief Executive Officer; the doctrine of pleasure has almost been rejected by the jurisprudence laid down by the superior courts; reliance has been placed on the cases of '*Khawaja Muhammad Asif v. Federation of Pakistan and others*' [2013 SCMR 1205], '*Barrister Sardar Muhammad Ali v. Federation of Pakistan*' [PLD 2013 Lahore 343], '*Shabana Akhtar v. District Coordination Officer*' [2012 PLC (CS) 366], '*Muhammad Yasin v. Federation of Pakistan through Secretary Establishment Division*' [PLD 2012 SC 132], '*Sheikh Zayed Hospital and Post Graduate Medical College v. Dr. Muhammad Saeed*' [2010 PLC (CS) 967], '*Aman Ullah Khan v. Federal Government of Pakistan*' [PLD 1990 SC 1092]; subsidiary legislation is binding on the Federal Government, particularly when it has laid down the procedure and mechanism to regulate discretion; reliance has been placed on the case of '*Khawaja Ahmed Hassan v. Government of Punjab*' [2005 SCMR 186], '*United Liner Agencies of Pakistan (Pvt.) Ltd, Karachi v. Miss Mahenau Agha*' [2003 SCMR 132]; the Board of Directors has a fiduciary duty, and any interference by the stakeholders in violation of the law is illegal; public authorities have a trust to exercise and to do what is explicitly authorized; the Federal Government is under an obligation to treat and distribute its trust as largess; the Corporate Governance Rules are mandatory, and it is settled law that when the law prescribes something to be done in a particular manner, it should be done in that manner or not at all; Article 24-A of the General Clauses Act 1897 imposes a duty to act in a fair, just and reasonable manner.

5. Mr. Ali Shah Gillani, Advocate, appeared on behalf of the respondent No.1 and submitted that the petitioner cannot be treated as an 'aggrieved person' as he is a Member of the Board of Directors; the jurisdiction of this Court has been invoked despite the fact that the petitioner had statutory or alternate remedies provided under the Companies Ordinance 1984; the ex-parte ad-interim relief granted was beyond the prayer; the interim relief granted tantamounted to granting the final relief; there is no live issue, as the notification dated 29-09-2014 was subsequently withdrawn; the allegations of *malafide* raised by the petitioner are not supported by any material placed on record; the notification was issued while the instant petition was pending and, therefore, amounts to adjudicating the matter *suo moto*; it is settled law that this Court has no jurisdiction to act *suo moto*; reliance has been placed on '*Dr. Imran Khattak and another v. Ms. Sofia Waqar Khattak, PSO to Chief Justice and others*' [2014 SCMR 122]; Section 183 of the Companies Ordinance 1984, particularly the second proviso thereof, vests power in the Federal Government to nominate or remove a Director; the Corporate Governance Rules have to be examined by harmoniously reading the relevant rules with the provisions of the Companies Ordinance 1984; Rule 3(4) of the Corporate Governance Rules provides for the filling of a casual vacancy by the Directors, while the Rules have not defined as to how a casual vacancy occurs; in the case of the NTDCL, the Directors are nominated by the Federal Government and they serve at the pleasure of the latter; the best interest of the company constitutes the best interest of the Federal Government, and it is for the latter to take

decisions in the interest of the NTDCL; the Parliament, in its wisdom, has granted the Federal Government the powers under Section 183 of the Companies Ordinance 1984; reliance has been placed on '*Province of East Pakistan and others v. Sirajul Haq Patwari and others*' [PLD 1966 SC 854]; the Federal Government, giving effect to its constitutionally mandated socio economic policy objectives, has vast powers to control the NTDCL; Article 30 of the Constitution extends to the Federal Government the responsibility to decide whether its actions, or those of any authority performing functions on its behalf, are in accordance with the principles of policy; the nominating power of the Federal Government are in accordance with the legislative meaning and intent and in furtherance of Article 37 and 38, read with Article 30 of the Constitution, and the pleasure granting proviso under Section 183 of the Companies Ordinance 1984; reference has been made to various definitions of the expression 'control' in support of the contention that it is the Federal Government's constitutional mandate to control the NTDCL; the doctrine of pleasure is based on notions of subjectivity and upon political considerations; reliance placed on '*Muhammad Yasin v. Federation of Pakistan through Secretary Establishment Division*' [PLD 2012 SC 132] is misconceived and inapplicable to the facts and circumstances in the instant petition; the doctrine of pleasure, as interpreted by the august Supreme Court, was in the context of constitutional appointment, and will not extend to the powers of the Federal Government exercised under Section 183 of the Companies Ordinance 1984; the law has to be saved and not destroyed.

6. Mr. Afnan Karim Kundi, learned Additional Attorney General, argued on behalf of the Federation and submitted that the Corporate Governance Rules are directory in nature rather being mandatory; it has, therefore, been stressed by the learned counsel for the respondent No.1, and the learned Additional Attorney General, that though the Corporate Governance Rules are valid and *intra vires*, but to the extent of nomination of the Directors of the Board of the NTDCL under Section 183 of the Companies Ordinance 1984 they are to be treated as directory and, therefore, would not come in the way of powers conferred on the Federal Government to directly nominate or remove a Director.

7. Learned counsels and the Additional Attorney General have been heard and the record perused with their able assistance.

8. **PRELIMINARY OBJECTIONS.-**

The learned counsel for the respondent No.1 has taken two preliminary objections; firstly, that the notification dated 29-09-2014 was withdrawn vide notification dated 08-05-2015 and, therefore, the petition had become infructuous and, secondly, the subsequent events i.e. the advertisement dated 03-11-2014 inviting applications for the appointment of a Managing Director of the NTDCL, enhancing the size of the Board of Directors and appointing Directors vide notification dated 15-04-2015 are outside the purview of the prayer and cannot be taken into consideration. This Court is mindful of the settled principles enunciated by the august Supreme Court in '*Dr. Imran Khattak and another v. Ms. Sofia Waqar*

Khattak, PSO to Chief Justice and others' [2014 SCMR 122] and those relating to the moulding of relief. A plain reading of the prayer sought in the instant petition, and the assertions and grounds articulated in the memo thereof, makes it obvious that it challenges and questions the exercise of discretion of the respondent no. 1 and its acts and omissions relating to the nomination or removal of members of the Board of Directors. Direction has also been sought against respondent no. 1 to, inter alia, act strictly in accordance with the Corporate Governance Rules while dealing with the affairs of the NTDCL and not to interfere with the management and administration thereof. In other words, through the petition the scope and extent of the power and discretion which may be exercised by the Federal Government has been questioned. The advertisement, dated 03-11-2014, and the notification dated 15-04-2015 have a direct nexus to the cause of action and the defence of the case. By no stretch of the imagination does it amount to setting up a new case. Both the advertisements and the notification issued subsequent to the filing of the petition fall within the ambit of the prayer sought in the petition and the grounds taken therein. Placing reliance on judgments of the august Supreme Court, the law in this regard was eloquently stated in the case of *'All Pakistan Textile Mills Association through Secretary v. Federation of Pakistan through Secretary Commerce, Ministry of Commerce, Islamabad and 2 others'* [PLD 2009 Lahore 494] and the same is reproduced as follows.-

"There can be no cavil with the rule that a Court seized of a matter, which is competent and maintainable before it, can

always mould the relief as is warranted by the facts of the case, even taking into account the subsequent development occurring during the pendency of the lis; besides, the judgments cited by the appellant's counsel, reference in this behalf can also be made to Salahuddin and 2 others v. Frontier Sugar Mills and Distillery Ltd. Takht Bhai and 10 others PLD 1975 SC 244, however, the rule is subject to important limitations; that no prejudice is caused to the defendant/respondent by doing so; such events must have nexus to the cause of action or the defence of the case and should not amount to setting up a new case by the parties; either side must get a chance of meeting the effect of the subsequent events, which in ordinary course should be incorporated by appropriate amendment of the pleadings."

Reference may also be made to the cases of '*Mst. Amina Begum and others v. Mehar Ghulam Dastagir*' [PLD 1978 SC 220], '*Marghub Siddiqi v. Hamid Ahmed Khan and 2 others*' [1974 SCMR 519], '*Salahuddin & 2 others v. Frontier Sugar Mills & Distillery Ltd. Tokht Bhai and 10 others*' [PLD 1975 SC 244], '*Mehrab Khan through Attorney v. Province of Sindh through Secretary Irrigation and Power Department, Government of Sindh and 5 others*' [2005 CLC 441], '*Messrs Facto Belarus Tractors Limited Karachi and another v. Federation of Pakistan through Secretary, Ministry of Industries, Production and Special Initiatives Islamabad and others*' [PLD 2006 Karachi 479].

9. There is no force in the objections raised by the learned counsel for the respondent no. 1, as this Court is satisfied that in the light of the settled principles the publishing of the advisement seeking

application for appointment of a MD and the notification of expansion of the Board of Directors, are events which can be taken into consideration and, in the facts and circumstances of the case, no prejudice will be caused to the respondents. The said acts and orders have a direct nexus with the cause of action disclosed in the petition and covered within the ambit of the prayer sought. It is also misconceived that after the withdrawal of notification dated 29-09-2014, the proceedings have become *suo moto* in nature. The objections are, therefore, without force.

ON MERITS

10. The questions for consideration, therefore, are (a) whether under section 183 of the Companies Ordinance 1984 the Federal Government has unfettered and unstructured power to nominate or remove a member of the Board of Directors, (b) whether the Corporate Governance Rules are directory and not binding on the Federal Government, (c) whether the Federal Government or any other public sector company has the power or jurisdiction to interfere with the administration and management of the NTDCL, which otherwise falls within the exclusive ambit of its Board of Management and, lastly, (d) the legality of the advertisement dated 03-11-2014 and the notifications removing the Managing Director, expanding the Board of Directors and nominating an Ex officio and four other private persons as Directors.

11. In order to address these questions, it would be beneficial to examine the relevant statutes and the object and purpose behind establishing the NTDCL as an incorporated entity.

The ACT OF 1997

With the object of providing for the regulation of Generation, Transmission and Distribution of electric power and matters connected there with, the legislature enacted the Regulation of Generation, Transmission and Distribution of Electric Power Act 1997 (*hereinafter referred to as the "Act of 1997"*), which was published in the official gazette on 16-12-1997. The enactment of the Act of 1997 was in pursuance of the policy to unbundle the energy sector. The components of Generation, Transmission and Distribution were separated. Chapter III of the Act of 1997 provides for the grant of licences. Section 24 provides as follows.-

"24. Licensees to be companies.— Except the WAPDA, the SHYDO or any other person specially exempted by the Authority, a generation, transmission or distribution licence shall not be granted to any person unless it is a company registered under the Companies Ordinance, 1984 (XLVII of 1984)."

The legislative intent in promulgating the Act of 1997 was obviously to ensure that the unbundled sectors would be

autonomous and independent in the sense that each entity will be an incorporated company and governed under the provisions of the Companies Ordinance 1984, and the rules/regulations made there under. It was a significant development and the legislature clearly intended that the unbundled sectors were not to be treated or governed as attached Departments of the Federal Government, despite being wholly owned by the latter. Section 3 of the Act of 1997 established the National Electric Power Regulatory Authority (*hereinafter referred to as the "NEPRA"*) as a regulatory body and, inter alia, vested in it the exclusive power to grant licenses for generation, transmission and distribution of electric power. In order to be eligible for the grant of a license, it was made mandatory that the person or entity which is licensed ought to be a company registered under the Companies Ordinance 1984, except WAPDA, SHYDO or any other person/body specifically exempted by NEPRA. The legislature clearly intended that the licensed companies were to be managed and controlled through the systems, principles and processes concomitant with corporatisation rather than direct bureaucratic or State intervention. Thus governance, management and control of the unbundled sectors was envisioned through corporate governance rather the Rules of Business and normal governmental channels.

ESTABLISHING THE NTDCL

Pursuant to the mandatory requirement prescribed under Section 24 of the Act of 1997, the NTDCL was incorporated as a Public Sector Company on 06-11-1998. The certificate of commencement of business was issued by the Joint Registrar of Companies on 24-12-1998. The Memorandum of Association enumerated the objectives for which the NTDCL had been established. The Articles of Association, *inter alia*, specified the powers and duties of the Directors, the manner in which casual vacancies occurring in the Board of Directors are to be filled, and the procedure for removal of Directors have been provided there under. Needless to mention that the Articles of Association are subject to the provisions of the Companies Ordinance 1984. The NTDCL is not 100% owned by the Federal Government. 88% shares are owned by the latter while 12% by the employees of NTDCL, pursuant to the Benazir Employees Stock option Scheme.

It appears that the Federal Government had not given much priority to such an important corporatized entity, as is evident from the fact that its Board of Directors remained dysfunctional for a considerable time. It was made functional by constituting the Board by notifying its seven members vide notification dated 27-09-2013. The eighth member is

the Managing Director in Ex Officio capacity. Four members were nominated from the private sector.

CORPORATE GOVERNANCE RULES

The Public Sector Companies (Corporate Governance) Rules, 2013 were notified on 08-03-2013. The Rules were framed in exercise of powers conferred by Section 506 of the Companies Ordinance 1984, read with clause (b) of section 43 of the Securities and Exchange Commission of Pakistan Act, 1997. The notification i.e. S. R. O. 180 (I)/2013 was issued with the approval of the Federal Government. Sub-rule (3) of Rule 1 declares that the Corporate Governance Rules shall apply to all Public Sector Companies, as defined in clause (g) of rule 2. The definition of Public Sector Company is expansive and it, *inter alia*, includes companies, whether public or private, which are directly or indirectly controlled, beneficially owned or in which not less than fifty percent of the voting securities or voting powers are held by the Government or any instrumentality or agency of the Government. Rule 3 provides for the composition of the Board and provides that it shall consist of executive and non-executive directors, including Independent Directors. An Independent Director is defined in clause (d) of sub-rule (1) of Rule 2. Sub-rule (2) of Rule 3 provides that the Board shall have forty percent of its total members as Independent

Directors within the first two years of the notification of the Rules and the same is to be raised to a majority of Independent Directors in two years from the date of the notification of the Rules.

The Rules provide for a strict test, criteria and scrutiny process for selecting candidates for appointment/nomination by the Federal Government. Persons proposed to the Federal Government for nomination as Independent Members are required to have a requisite range of skills, competence, knowledge, experience and approach. The object for such criteria has been declared as ensuring that the 'Board as a group includes core competencies and diversity considered relevant in the context of the Public Sector Company's operations'. Rule 3(7) further provides that the appointing authorities, whether the Federal Government or the other share holders, apply the 'fit and proper criteria' given in the Annexure. The Annexure enumerates the factors or criteria to be taken into consideration for determining a 'fit and proper person'. The list, though not exhaustive, inter alia, includes the qualities of financial integrity, repute and recognition in the relevant profession, known competence, good character etc. In order to achieve the object of head hunting and scrutiny of suitable candidates, Rule 12(e) makes it mandatory for the Board to constitute a 'Nomination Committee' to identify and recommend the

candidates for the Board for consideration by the shareholders, after examining their required skills and characteristics . According to Rule 3(4) any casual vacancy is filled by the Board.

Rule 5 enumerates the responsibilities, powers and functions of the Board. It, *inter alia*, provides that a Director appointed or elected, shall hold office for a period of three years, unless he resigns or is removed in accordance with the provisions of the Companies Ordinance 1984. It further provides that the removal of a Director shall only take place in the event of misconduct, or if the Director has not performed according to the desired standard, to be determined through a performance evaluation.

In case of appointment to the position of Chief Executive, sub-rule (2) of Rule 5 provides the procedure i.e. the Board is vested with the power to evaluate the candidates based on the 'fit and proper' criteria, and the guidelines specified by the Securities and Exchange Commission of Pakistan. After evaluation, the Board recommends to the Federal Government at least three individuals for appointment as Chief Executive of the Public Sector Company. The Chief Executive is appointed after receiving concurrence of the Federal Government.

Drafting a code of conduct for the Board, senior management and other employees is also the responsibility of the Board.

A plain reading of the Corporate Governance Rules manifests that these have been formulated for ensuring that the interests of the NTDCL and its stakeholders are protected, and the former is governed through transparent and stringent processes. The Rules aim at achieving the highest standards of corporate governance, particularly in ensuring that the persons scrutinised and recommended to the Federal Government for appointment as Members of the Board possess requisite skills, integrity and competence. Likewise, the Rules envisage a system of performance evaluation of the Board itself, thus making the latter accountable to the stakeholders. There can be no cavil that the Corporate Governance Rules have been framed so as to regulate and direct the discretion of the stakeholders, particularly the Federal Government.

11. A plain reading of the Companies Ordinance 1984, read with the Corporate Governance Rules, Memorandum and Articles of Association of NTDCL makes it obvious, and thus it can be concluded as follows;

- (i) A comprehensive, transparent and exhaustive process has been prescribed for appointment/nomination of a

member of the Board of Director so as to regulate the discretion of the Federal Government i.e the Board of Directors constitutes a 'Nomination Committee' for scrutinising the candidates on the basis of 'fit and proper' criteria; after completing the rigorous scrutiny process, the Committee recommends the names of persons meeting the standard of the 'fit and proper' criteria to the Board; The Board, after deliberating on the report of the Nomination Committee, recommends suitable candidates to the shareholders, particularly the Federal Government, for appointment as Members on the Board of the NTDCL. The Member is appointed on the Board by the respective appointing authority pursuant to the aforementioned transparent and meticulous scrutiny process.

- (ii) The size of the Board is determined either by the Board of Directors or by the shareholders through a special resolution. However, in order to fill any vacancy, after the size has been expanded, the appointment to fill such a vacancy shall be in the manner described above.
- (iii) The appointment of the Chief Executive of the NTDCL is to be made pursuant to the powers vested in the Board of Directors under sections 199, 200 and 196

read with the Corporate Governance Rules. The respondent no. 1 is, therefore, not vested with any legal authority to circumvent the mandatory provisions of law by purportedly making a direct appointment. No such power vests in the Federal Government.

- (iv) The NTDCL, as a juridical person, is to be governed under the provisions of the Companies Ordinance 1984, read with the Companies Governance Rules. The provisions, when read together, unambiguously shows that the management and administration of the NTDCL as a juridical person is independent and autonomous. The Board of Directors formulates the policies and is not vested with the power or authority to interfere or micromanage the affairs of the management. Likewise, by no stretch of the imagination does such a power vest in the respondent no. 1 or any other juridical person such as PEPCO. The learned counsel for the respondent no. 1 could not point out any provision of law which even remotely confers such powers, so as to justify interference in the management of the NTDCL by either respondent no. 1 or any other entity.

- (v) The Federal Government is not the only shareholder and, therefore, does not wholly own the NTDCL. As already noted, 12% are owned by the employees and, therefore, the Board is under an obligation to safeguard their rights as well.

12. The learned counsel for respondent No. 1, as well as the learned Additional Attorney General unequivocally stated that the Corporate Governance Rules have been validly made and notified. The *vires* of the said Rules, or the fact that they are subsisting and applicable in the case of the NTDCL is not in dispute. The former stressed on the powers vested in respondent No. 1 under section 183 of the Companies Ordinance 1984, while the latter argued that the Rules were directory and not mandatory. In a nutshell, it was argued that notwithstanding the Corporate Governance Rules being valid and subsisting, the Federal Government is conferred with absolute and unfettered powers under section 183 of the Companies Ordinance 1984 to nominate or remove a Member of the Board of the NTDCL.

13. Section 183 of the Companies Ordinance 1984 provides that in the case of companies enumerated therein, the Federal Government has the power to nominate Directors on the Board of Directors. The second proviso provides that 'a director nominated under this section shall hold office during the pleasure of the corporation, company, Government or Commission which nominates them'. The Federal Government construes these provisions as conferring absolute, unbridled

and unfettered power to nominate or remove Directors in the case of the NTDC. The exercise of discretion by organs of the State, particularly governments, is by now circumscribed by well settled principles enunciated by the superior Courts. The doctrine of pleasure has almost become redundant and the concept of absolute, unfettered or unguided exercise of discretion by public authorities is treated as alien to the essence of rule of law. It would therefore be beneficial to examine the precedent law in this regard.

14. In the case of *'Aman Ullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others'* [PLD 1990 Sc 1093] the august Supreme Court, in the context of the provisions conferring wide discretion, quoted with approval from the 'Administrative Law Text by Kenneth Culp Davis' and observed as follows.-

"Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularising it, organizing it, producing order in it so that decision will achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement

of the power and it gives that impression in the first instance but where the authorities fail to rationalise it and regulate it by Rules, or Policy statements or precedents, the Courts have to intervene more often, than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times."

The above stated principles have been reaffirmed and reiterated in the cases of '*Chairman Regional Transport Authority, Rawalpindi v. Pakistan Mutual Insurance Company Limited, Rawalpindi*' [PLD 1991 SC 14], '*Government of N.-W.F.P. through Secretary and 3 others v. Mejee Flour and General Mills (Pvt.) Ltd. Mardan and others*' [1997 SCMR 1804], '*Abid Hussain and others v. P.I.A.C. and others*' [2005 SCMR 25], '*Messrs Gadoon Textile Mills and 814 others v. WAPDA and others*' [1997 SCMR 641].

15. In the case of '*Abu Bakar Siddique and others v. Collector of Customs, Lahore and others*' [2006 SCMR 705], the august Supreme Court held as follows.-

"It is fundamental principle that an authority enjoying the discretionary powers, exercises the same without any guideline but at the same time such authority must not exercise the discretion in an arbitrary and capricious manner."

16. In the case of Messrs Gadoon Textile Mills (*supra*), besides reaffirming the principles of structuring discretionary powers through the seven instruments, it was further held as follows.-

"It may be observed that it is by now a well-settled proposition of law that even where there is no guideline or guiding rules provided for exercise of discretion, it is not unbridled or unfettered but the same is to be exercised reasonably, fairly and justly without giving any cause of complain to any person who may be interested in the exercise of such discretion"

17. In the case of 'Muhammad Yasin v. Federation of Pakistan through Secretary Establishment Division Islamabad and others' [PLD 2012 SC 132] the august Supreme Court examined the scope of powers attributed on the basis of doctrine of pleasure and the relevant portion is reproduced as below.-

*"That was a time when almost all important State functionaries including not just the Prime Minister and the Cabinet but also judges and civil servants, were appointed and removed by the British monarch in this absolute unfettered discretion. It is for this reason they were said to **"hold office during the King's pleasure"**. While this vestige of an absolute monarchy receded in Britain on account of emerging democratic conventions, in the colonies it survived. Even after several years of independence, this practice continued, as was manifested by the imperious dissolution of the Constituent Assembly in 1954, by the representative of the British Crown.*

29. *Much has changed since then. Pakistan now has a democratic Constitution which provides for the government of laws and not of men. It is for this reason that in our **Constitution there remain few positions where the incumbents "hold office during the pleasure"** of someone else based on broad discretion. In its undiluted form this convention exists only in Article 100(2), Article 101(3) and Article 140(3) which relate to the appointments of a Governor, the Attorney General and the Advocates General respectively. Similarly, such discretionary powers do not exist in those statutes which relate to autonomous regulatory bodies like OGRA."*

18. The learned counsel for respondent No. 1 has relied on judgments of the Supreme Court of India in support of the contention that the doctrine of pleasure and absolute and unfettered exercise of discretion is recognised. I am afraid that the Supreme Court of India has consistently held otherwise as is evident from the following judgments.

In the case of *Som Raj and others etc., v. State of Haryana and others*'[AIR 1990 SC 1176] it was noted as follows.-

"Normally the order of appointment would be in the order of merit of candidates from the list and must be in accordance with rules. His exercise of power should not be arbitrary. The absence arbitrary power is the first postulate of rule of law upon which our whole constitutional edifice is based. In a system governed by Rule of Law, discretion when conferred upon an executive authority must be confined within clearly defined limits. The rules provide the guidance

for exercise of the discretion in making appointment from out of selection lists which was prepared on the basis of the performance and position obtained at the selection."

"If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of Rule of Law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority."

In the case of '*Mahesh Chandra v. Regional Manager, U.P. Financial Corporation and others*' [AIR 1993 SC 935], it was observed as follows.-

"Every wide power, the exercise of which has far-reaching repercussion, has inherent limitation on it. It should be exercised to effectuate the purpose of the Act. In legislations enacted for general benefit and common good the responsibility is far graver. It demands purposeful approach. The exercise of discretion should be objective. Test of reasonableness is more strict. The public functionaries should be duty conscious rather than power charged. Its actions and decisions which touch the common man have to be tested on the touchstone of fairness and justice. That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no person gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof

of motive of dishonesty, if the authority is found to have acted contrary to reason."

In the case of '*Aeltemesh Rein, Advocate Supreme Court of India v. Union of India and others*' [AIR 1988 SC 1768], it was elucidated as follows.-

"Every discretionary power vested in the Executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law."

19. It is evident from the above precedent law and the principles elucidated by the august Supreme Court that the 'doctrine of pleasure' virtually stands discarded. The discretion conferred is circumscribed by the well settled principle of structuring of the discretion and the seven instruments embedded therein. It is further noted that the Federal Government, while acting in its capacity as a shareholder of a public sector company, is not doing so in its own interest but in the interest of the general public i.e the people of Pakistan. The Federal Government acts as an agent on behalf of the people of Pakistan and, therefore, it essentially assumes the role of a trustee. Thus an onerous duty is imposed on the Federal Government and State functionaries to regulate the exercise of powers conferred under the law. Such regulation would require adhering to the highest standards of probity, transparency and process of careful scrutiny. Compliance with such high standards is not to protect the interests of the Federal Government but the people of Pakistan. The duty imposed on the Federal Government is, therefore, of a nature which falls within the realm of 'fiduciary duty'. In the instant case,

the argument that under section 183 of the Companies Ordinance 1984 the Federal Government has absolute and unfettered powers, and that the same can be exercised without being circumscribed by the Corporate Governance Rules is misconceived and in violation of the settled principles enunciated by the august Supreme Court, and as discussed above. In other words, it is argued that the Federal Government is empowered to circumvent and ignore the process of scrutiny, and the mechanism and process for identifying the most suitable candidates on the touch stone of the 'fit and proper criteria'. Such an argument, besides being in violation of settled principles, is in breach of the fiduciary duty it owes to the people of Pakistan as custodian of their welfare and fundamental rights. The Corporate Governance Rules have surely been framed by the Federal Government itself for regulating its powers vested under the law qua public sector companies. The Rules ensure transparency, accountability, fair and meticulous processes for determining the most suitable persons who would qualify the test of 'fit and proper criteria'. The Federal Government takes credit for framing the said Rules. The Rules provide for the prescribed standards, mechanism and processes for the Federal Government to exercise its powers under section 183 of the Companies Ordinance 1984. These are guidelines formulated and enacted as Rules in pursuance of powers vested under the statute. The Corporate Governance Rules are, therefore, to be read with section 183, and compliance therewith is a mandatory obligation of the Federal Government when exercising powers vested under the statute. There is, therefore, no force in the argument advanced by the learned counsel for the respondent no. 1 that the powers under section 183 of the Companies Ordinance 1984

can be exercised without compliance with the Corporate Governance Rules. This argument defies the provisions of the Companies Ordinance 1984 and the Rules besides the legislative intent in promulgating the Act of 1997. Such an argument is indeed alien to the principles of rule of law.

20. The learned Additional Attorney General's contention that the Corporate Governance Rules are directory rather than mandatory also tantamount to raising an argument that the Federal Government, while exercising its powers under section 183, can ignore the principles of transparency, fair processes and exhaustive scrutiny so as to ensure achieving the most favourable results by taking informed and reasonable decisions in the interest of the people of Pakistan. However, Rule 25 of the Corporate Governance Rules provides for a fine against a person who refuses to comply with, or contravenes any provision of the Rules, or knowingly or willingly authorises or permits such failure. Refusal to comply with the Rules or contravention thereof exposes the person to a fine. The said Rule is pursuant to powers vested under section 506 of the Companies Ordinance 1984.

21. There is no cavil that provisions can be treated as directory rather mandatory. The test laid down for determining whether a provision is mandatory or directory has been eloquently explained in the case of '*Niaz Muhammad Khan v. Mian Fazal Raqib*' [PLD 1974 SC 134] as follows.-

"It is true that no universal rule can be laid down for the construction of statutes as to whether mandatory enactments shall be considered directory only or obligatory, with an implied nullification for disobedience. It is the duty of the Courts to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed. As a general rule however, a statute is understood to be directory when it contains matter merely of direction, but not when those directions are followed up by an express provision that, in default of following them, the facts shall be null and void. To put it differently, if the Act is directory, its disobedience does not entail any invalidity; if the Act is mandatory disobedience contains serious legal consequences amounting to the invalidity of the act done in disobedience to the provision."

In the case of '*Ghulam Hassan v. Jamshaid Ali and others*' [2001 SCMR 1001] the Hon'ble Supreme Court has observed as follows.-

"It is an established principle of law that where the Legislature has provided a penalty/consequences for the non-compliance, the said provision should be mandatory in nature and where such consequences are not provided it would be termed as directory."

In the case of '*Syed Zia Haider Rizvi and others v. Deputy Commissioner of Wealth Tax, Lahore and others*' [2011 SCMR 420] the Hon'ble Supreme Court has held as follows.-

"There is no absolute test by which, it may be determined whether a Statute is mandatory or directory, the primary

rule is to ascertain the Legislative intent as revealed by an examination of the whole Act."

The above test for determining whether a provision is directory or mandatory has been consistently followed and reference may be made to the cases of '*Maulana Nur-ul-Haq v. Ibrahim Khalil*' [2000 SCMR 1305], '*Malik Umar Aslam v. Sumera Malik and another*' [PLD 2007 SC 362] & *Human Rights Case Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010 decided on 4th June, 2010* [PLD 2010 SC 759].

22. The above test for determining whether the Corporate Governance Rules are mandatory or directory in nature is satisfied when the said Rules are read as a whole along with the provisions of the Companies Ordinance, 1984 and the legislative intent in promulgating the Act of 1997. Rule 25 of the Corporate Governance Rules unambiguously makes the Rules mandatory on the touchstone of the test laid down in this regard. The role of the NTDCL, the fiduciary duty which the Federal Government owes to the people of Pakistan for achieving highest standards are factors which may also be relevant in this context.

23. It is admitted that the Corporate Governance Rules are valid and subsistent. It is also admitted that the said Rules have been framed with the approval of the Federal Government pursuant to the powers under Section 506 of the Companies Ordinance 1984. The Corporate Governance Rules, being valid and subsistent and notified under the empowering provisions of the Companies Ordinance 1984, are binding on

the Federal Government. The said Rules can neither be ignored nor circumvented while exercising powers under section 183 of the Companies Ordinance 1984. This Court is fortified in its view in the light of a recent judgment of the august Supreme Court dated 30-10-2014 passed in Civil Petition No.2124 of 2013 titled '*Ghulam Rasool v. Government of Pakistan through Secretary Establishment Division, Islamabad and others*' and the relevant portion is as follow.-

"In case of companies incorporated in the public sector under the Companies Ordinance, 1984, the appointment and removal of Directors is comprehensively dealt with under the said Ordinance and the memorandums, rules / regulations framed there under. However, it is also made clear that the Court's deference to the Executive Authority lasts for only as long as the Executive makes a manifest and demonstrable effort to comply with and remain within the legal limits which circumscribe its power. Even where appointments are to be made in exercise of discretionary powers, such powers are to be employed in a reasonable manner. Even otherwise, the policy adopted by the Federal Government in making appointments is open to judicial review on the touchstone of the Constitution and the laws made there under i.e. in case of any illegality in the ordinary process of appointment, this Court as well as the High Courts have sufficient powers under Articles 184 & 199 of the Constitution to exercise judicial review"

24. The above leaves no doubt whatsoever that the appointment or removal of a Director on the Board of the NTDCL or its Chief Executive Officer shall be governed under the provisions of the Companies

Ordinance 1984 and the rules made there under, particularly the Corporate Governance Rules 1984. It is also settled law that when the law prescribes doing a certain thing in a particular manner then it has to be done in that manner alone. Reliance is placed on Reliance is placed on the case of '*Muhammad Anwar and others v. Mst. Ilyas Begum and others*' [PLD 2013 SC 255].

25. It is noted that the Federal Government is a shareholder owning 88% of the shares, and it is not the only stake holder of the NTDCL. The Board of Directors, employees of the NTDCL, and the minority shareholders are equally important stake holders. The most important stake holder in the context of the NTDCL are obviously the people of Pakistan, as their fundamental rights are dependent on the effective performance and service delivery of the NTDCL. Fairness, transparency, accountability, integrity and openness are pivotal for managing and controlling any public sector company, so as to ensure that the object is to solely act in public interest. The Corporate Governance Rules have been framed and indeed contain all the essential characteristics required for governing the NTDCL and other public sector companies in the public interest.

26. During the course of arguments it was inquired from the learned counsel for the respondent no. 1 and Mr Omer Rasul, Additional Secretary, Ministry of Water and Power, who was also present in the Court, whether there was any friction between the Federal Government and the Board of Directors of NTDCL. The answer was in the negative.

Rather, it was stated that the Board, as constituted vide notification dated 27-09-2013, including the petitioner, consists of highly reputed professionals known for their competence and integrity in their respective fields/professions. Perusal of the notification dated 27-09-2013 reveals that more than half of the Members are either government officials or hold prominent positions in other public sector companies or statutory organisations controlled by the Federal Government. It was next inquired whether the matter relating to the expansion of the Board and appointment of Directors was formally placed before the Board of Directors of the NTDCL. The answer was again in the negative. It is beyond comprehension as to why the matters were not placed before the Board of Directors, particularly when the Federal Government admits and expresses its confidence in the competence, integrity and neutrality of each of the Director. Moreover, the composition of the Board is such that there could be no possible friction with the Federal Government. It appears that the Federal Government has not understood, in its true spirit, the legislative intent of the Act of 1997. The Federal Government has to appreciate the difference between managing and controlling an attached department under the Rules of Business 1973 and a company incorporated under the Companies Ordinance 1984. The managing of the latter through orders and notifications issued by the respondent no. 1 is alien to the provisions of the Companies Ordinance 1984 and the Corporate Governance Rules made there under. The Federal Government also has to appreciate and recognise the legislative intent in promulgating the Act of 1997 and the pivotal role of the Board of Directors of a public sector company. In the instant case there is no reason why orders and

Executive of the NTDCL through direct intervention.

The appointment or removal of a Director or the Chief Executive shall be strictly in accordance with the manner prescribed under the Companies Ordinance 1984 read with the Corporate Governance Rules. The powers under section 183 of the Companies Ordinance 1984 are regulated by and are to be exercised in the manner as prescribed under the Corporate Governance Rules.

(iv) The administration and management of the NTDCL is within the exclusive domain of its Board of Directors and the Management, as provided under the Companies Ordinance 1984 and the rules made there under. Any interference by the respondent No. 1 or any other public sector company in the administrative matters and management is *ultra vires* the Companies Ordinance 1984 and the rules made there under.

(v) Consequently, the notification dated 29-09-2014, the advertisement dated 03-11-2014 seeking candidates for the appointment of Managing Director NTDCL, the notification dated 15-04-2015 purportedly expanding the Board of Directors and appointing one *Ex-officio* member and four private members, were *ultra vires* the Companies Ordinance 1984 and the Corporate

notifications were being issued by the respondent No. 1 in violation of the mandatory provisions of the Corporate Governance Rules, instead of placing the matters before the Board of Directors and thereafter adopting the process of scrutiny for determination of 'fit and proper criteria'. Avoiding the process unnecessarily raises unfounded and undeserved concerns. It is expected that the Federal Government shall play its effective and pro active role as part of the Board of Directors of the NTDCL. It is noted that the perusal of the comments filed by the respondent no.1 reflects lack of proper appreciation of law, particularly the legislative intent of the Act of 1997.

27. Based on the foregoing, the instant petition is allowed and in addition to paragraph 11 above, it is held and declared as follows;

- (i) The Corporate Governance Rules are mandatory, and strict compliance therewith is an obligation of every stake holder of the NTDCL, particularly the Federal Government.
- (ii) The NTDCL is to be governed and managed under the Companies Ordinance 1984 and the rules made there under.
- (iii) The respondent no. 1 has no discretion, exclusive authority or right to make appointments or remove members of the Board of Directors or the Chief

Governance Rules, and issued by the respondent No.1 without lawful authority and jurisdiction; therefore, the same are set aside.

- (vi) The respondents are directed to strictly comply with the provisions of the Companies Ordinance 1984, the Corporate Governance Rules and the Articles of Association of the NTDCL.

(ATHAR MINALLAH)
JUDGE

Announced in open Court on 09-07-2015.

JUDGE

Approved for reporting.