

2020 C L D 1207

[Lahore]

Before Ayesha A. Malik, J

WASEEM MAJID MALIK---Petitioner

Versus

**FEDERATION OF PAKISTAN through Cabinet Secretary and 23 others---
Respondents**

Writ Petition No. 27842 of 2020, heard on 26th June, 2020.

(a) Companies Act (XIX of 2017)---

---Ss. 159, 160, 164 & 165---Election of Board of Directors of Company Federal Government members of the Company---Judicial review---Scope---Petitioner intended to contest election of Board of Directors of Company and assailed decision of Federal Government to be represented on Board through contesting of elections---Plea raised by authorities was that Constitutional petition was not maintainable as remedy before Company Judge was available---Validity---Entire dispute was with respect to the decision of Federal Government to participate in elections---Decision and actions of Federal Government was assailed before High Court, therefore, Constitutional petition was maintainable---High Court, in exercise of Constitutional jurisdiction, could determine whether or not Federal Government had acted in accordance with law or whether it had abused its authority---Powers under S. 160 of Companies Act, 2017 vesting with Company Bench of High Court was the power to determine whether or not the elections were conducted under Companies Act, 2017 and did not deal with judicial review of actions or decision of Federal Government challenging as interference in election process---Shareholder had a statutory right under S. 160 of Companies Act, 2017, to ensure that elections of directors were conducted under Companies Act, 2017 as required--Such provision was not available to petitioner to challenge actions of Federal Government---Federal Government was a member of the Company and enjoyed all rights of a member under Companies Act, 2017--- Federal Government could exercise all rights as a member under Companies Act, 2017, which included the right to appoint and remove directors under Companies Act, 2017---Federal Government could either appoint a director on Board of Directors through election under S. 159 of Companies Act, 2017 or through nomination under Ss. 164 & 165 of Companies Act, 2017---Constitutional petition was dismissed in circumstances.

Mian Misbah-ur-Rehman v. Sui Northern Gas Pipelines Limited through Secretary and others Writ Petition No. 21451 of 2019; Mian Misbah-ur-Rehman v. SNGPL and others I.C.A. No.14622/2020; Muhammad Shafique Khan Sawati v. Federation of Pakistan and others 2015 SCMR 851; Mian Javed Amir v. United Foam Industries (Pvt.) Ltd. and others 2016 SCMR 213; M. Fuwad A. Mughal v. Federation of Pakistan and others 2018 YLR 26; Allied Bank of Pakistan Ltd. v. Khalid Farooq 1991 SCMR 599; Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another PLD 2011 SC 407 and Arshad Mehmood v. Commissioner/Delimitation Authority, Gujranwala and others PLD 2014 Lah. 221 ref.

(b) Companies Act (XIX of 2017)---

---Ss. 159, 164 & 165---"Nominee" and "elected directors"---Distinction---Fundamental difference between a nominee director and elected director is that a nominee holds office at the pleasure of the nominator whereas 'elected director' is given a three years tenure under Companies Act, 2017---'Nominee director' has to safeguard interests of its nominator first and foremost whereas 'elected director' has a fiduciary duty to company and all its shareholders---'Nominee director' participates in proceedings of Board of Directors as per terms of its arrangement with nominator to ensure that nominators' investment or interest is safeguarded, to act as a liaison between nominator and company and also consider overall policies and working of company.

Saad Amir for Petitioner along with Petitioner in person.

Ms. Ambreen Moin, DAG along with Umer Saeed Khan, Section Officer (Gas) in the office of Respondent No.2.

Muhammad Raza Qureshi, Asad Raza and Syed Shahid Hussain, for Respondent No. 3, SNGPL with Ahmed Arslan, Chief Law Officer, SNGPL and Imtiaz Mehmood, Company Secretary, SNGPL.

Ruman Bilal and Hafiz Talha for Respondent No. 4 SECP.

Anwaar Hussain, Imran Khan Klair and Mian Saad Ali for Respondent No. 16.

Muhammad Ahmad Qayyum for Respondent No. 21.

Fahad Malik for Respondent No. 22.

Mirza Nasar Ahmad for Respondent No. 24.

Date of hearing: 26th June, 2020.

JUDGMENT

AYESHA A. MALIK, J.---Through this Petition, the Petitioner seeks a declaration that Election Notice dated 2.5.2020 issued by Respondent No.3, SNGPL be declared illegal and without lawful authority; that the Federal Government be permitted representation on the Board of Directors ("BOD") of Respondent No.3 only through directors nominated under section 165 of the Companies Act, 2017 ("Act") in proportion to its shareholding in Respondent No.3; that the Federal Government is not eligible to contest elections under section 159 of the Act, hence be restrained from participating in the elections scheduled for 23.6.2020.

The case of the Petitioner

2. The Petitioner is an advocate by profession and a shareholder in Respondent No.3, SNGPL holding 3000 shares. The Petitioner intends to contest the election for the BOD of the Company for which he filed his nomination papers and consent forms as required under the Act. Learned counsel for the Petitioner argued that the Company has set a total strength of eleven directors for its BOD and thereafter invited interested candidates to take part in the election. Learned counsel further argued that in this context the Federal Government proposed some names of members and non-members who will contest the elections on its behalf. Learned counsel argued that the Federal Government through letter dated 9.6.2020 addressed to Respondent No.3 nominated eleven persons to contest the election for the BOD of Respondent No.3 under section 159 of the Act. Out of these eleven persons only three are members of SNGPL, in their own right, being Roohi Raees Khan, Rizwan Ullah Khan and Dr. Sohail Razi Khan. The remaining eight persons are not

members of SNGPL, hence not eligible to contest the election. Learned counsel further argued that Section 159 of the Act makes it clear that a person contesting the election of directors must be a member in his own right and cannot be construed to be representing anyone other than himself. He stated that section 159 of the Act is a complete code which regulates the conduct of elections, such that only a member of the Company can contest the election for the director of the Company. He further stated that so far as the Federal Government is concerned, they can only nominate directors under section 165 of the Act and cannot put up directors for election under section 159 of the Act. He argued that elected directors are totally separate and distinct from nominated directors and the Federal Government is trying to blur this distinction by appointing directors through elections, which the law does not permit. Learned counsel stated that this issue has already been decided by this Court through judgment dated 27.2.2020 passed in W.P. No.21451/2019 titled Mian Misbah-ur-Rehman v. Sui Northern Gas Pipelines Limited through its Secretary etc. and the Federal Government is acting in contravention to the law laid down by this Court. Therefore the Petitioner prays that the persons mentioned in the letter dated 9.6.2020 issued by the Federal Government should be barred from contesting the election as they are not members of the company in their own right and as such they cannot represent the Federal Government as an elected director. Learned counsel argued that the same will apply to the nominees of State Life Insurance Corporation and National Investment Trust Limited who are also not members of the Respondent No.3 Company.

3. Effectively the case of the Petitioner is that the Federal Government being member of SNGPL cannot contest elections in terms of section 159 of the Act and that it can only nominate directors under sections 164 and 165 of the Act. The Petitioner consequently argues that the Federal Government can only nominate three persons to the BOD under section 165 of the Act.

Arguments of Respondents' counsel

4. On behalf of the Federal Government report and parawise comments have been filed. Learned DAG stated that the Petitioner's reference to W.P. No.21451/2019 (supra) is totally misconceived. In fact the Federal Government based on the findings in the said case decided to propose candidates to contest the election under section 159 of the Act. She argued that the Petitioner has no locus standi before this Court and in fact the instant Petition raises a company dispute for which remedy is available under section 160 of the Act. She stated that the Federal Government is exercising its rights as a shareholder strictly in accordance with law and that section 153(i)(i) of the Act read with its proviso is self-explanatory wherein the Federal Government can appoint directors who are non-members to represent it in the election of the BOD. She explained that the Ministry of Energy, Petroleum Division proposed the names of candidates to contest the election for the BOD. Eleven names were provided which are duly mentioned in the election notice and the advertisement. Since the Federal Government is a shareholder of Respondent No.3, it is merely exercising its right as a shareholder and has opted to appoint directors by election being distinct from nominee directors.

5. On behalf of the SECP, report and parawise comments have been filed. Learned counsel has clarified that if a person holding shares in a company is not a natural person then such person can nominate any person to contest the election for director on its behalf in terms of section 153(i)(i) of the Act and that such person need not be a member of the company. It is their case that as per the provisions of the Act, there is no restriction on the

number of persons who can contest the election of directors as the election shall be conducted as per the procedure laid down in section 159 of the Act. Further that an artificial person can participate in the election through its nomination of a natural person, who is not a member of the company.

6. Report and parawise comments have also been filed on behalf of Respondent SNGPL. Learned counsel argued that while proceeding with the process for carrying out election for the BOD of SNGPL, the Federal Government being a member of SNGPL has proposed candidates to contest the election in terms of section 159 of the Act. There are eleven names proposed out of which some are members holding proxy on behalf of the Federal Government while others are not members but eligible in terms of section 153 of the Act. He stated that SNGPL has acted as per law and duly advertised the election date. He has also raised objections on the maintainability of this Petition and the locus standi of the Petitioner. Learned counsel explained that the shareholders of SNGPL comprises of 634,216,665 shares and the required threshold for a member to participate in the election is the holding of 9.09% shares. The Petitioner does not meet this threshold, hence cannot allege any grievance or breach of any right. The Federal Government is a member holding 31.68% shares directly and 57.68% shares through government owned entities, corporations and companies bringing its total shareholding to over 70%. Hence the Federal Government can contest elections in its own right as a member of SNGPL and can name non-members as its candidates to contest the election in terms of section 153 of the Act.

7. Learned counsel for Respondent No.22 clarified that Respondent No.22 has withdrawn from the election process, hence he is no longer contesting the election. Learned counsel for Respondent No.21 provided a copy of order dated 16.3.2020 passed by this Court in I.C.A. No.14622/2020 titled Mian Misbah-ur-Rehman v. SNGPL and others wherein he raised an objection with respect to the election of the BOD wherein a status quo order has been passed, hence prays that this Court should not proceed with the case until a decision is made in the aforementioned I.C.A. Learned counsel for Respondent No.24 essentially argued that there is no concept of non-natural person contesting election of the BOD in terms of section 154 of the Act. Learned counsel further argued that there is nothing in the law which bars a non-natural person from directing a natural person to offer himself for election and then vote for such person in the election to be conducted, meaning that it can give its proxy to a member. In fact, it appears to be common practice for non-natural persons to transfer the requisite shareholding in favour of persons it desires to contest election so that the requirement of section 159(3) and section 153 may be met as any such person who offers himself for election would have to be a member in his own right. Learned counsel also argued that a person offering himself for elections has to be a member and there can be no exception to the same, therefore it is clear that there is no concept of a non-natural person contesting elections under the applicable law. Learned counsel argued that there is no concept of a "nominee" contesting elections. The only reference to nominees in relation to a BOD of a company under the Act is persons being nominated to a BOD directly without going through the process of elections under sections 164 and 165 of the Act.

Preliminary Objections

8. Learned counsel for Respondents raised three preliminary objections. Firstly that the Petitioner has appropriate, efficacious and alternate remedy available to him under section 160 of the Act; Secondly that the Petitioner has no locus standi to file the instant Petition as no fundamental right of the Petitioner has been infringed; Thirdly, section 5(2)

of the Act is an ouster clause which ousts the jurisdiction of this Court specifically on matters related to election of directors which are to be dealt with exclusively by the Company Bench of the High Court having jurisdiction. Reliance is placed on Muhammad Shafique Khan Sawati v. Federation of Pakistan and others (2015 SCMR 851), Mian Javed Amir v. United Foam Industries (Pvt.) Ltd. and others (2016 SCMR 213) and M. Fuwad A. Mughal v. Federation of Pakistan and others (2018 YLR 26).

9. With respect to the first objection that remedy under section 160 of the Act is available to the Petitioner who seeks to challenge the eligibility of eleven candidates named by the Federal Government for the purposes of election to the BOD. Section 160 of the Act provides that the Company Bench of the relevant High Court can declare the election of directors invalid on an application of a member holding 10% of the voting power in the company filed within the thirty days from the date of election, if there is material irregularity in the holding of the elections and matters incidental or related thereto. The contention is that the Petitioner does not have locus standi under section 160 of the Act as he does not have the requisite 10% of the voting power. Since he does not qualify for the remedy under section 160 of the Act, he cannot bypass the mandatory provisions of the Act and challenge the elections through this Petition. In this regard, it is noted that the Petitioner's challenge is specifically with the decision of the Federal Government to put up eleven candidates for the election to the BOD of SNGPL on the ground that the Federal Government cannot put up any candidates to participate in the election of directors and that by doing so they are abusing their authority and acting in error of law. In this regard, it is noted that the entire dispute is with respect to the decision of the Federal Government to participate in the elections. Since the decision and actions of the Federal Government have been impugned before this Court, the instant Petition is maintainable and this Court in constitutional jurisdiction can determine whether or not Federal Government has acted in accordance with law or whether it has abused its authority. In this regard, it is noted that the powers under Section 160 vesting with the Company Bench of the relevant High Court is the power to determine whether or not the elections have been conducted under the Act and does not deal with the judicial review of actions or decisions of the Federal Government challenged as interference in the election process. Section 160 of the Act is a statutory right of a shareholder to ensure that elections of directors are conducted under the Act as required and this provision is not available to the Petitioner to challenge the actions of the Federal Government. Hence there is no merit in this objection. So far as the issue of locus standi is concerned, for the purposes of constitutional jurisdiction the Petitioner claims to be aggrieved as he is a member of SNGPL and does not want the Federal Government to usurp his rights as a member who wants to contest elections for the BOD.

10. With respect to the third objection on the ouster of jurisdiction, section 5(2) of the Act provides that Notwithstanding anything contained in any other law no civil court as provided in the Code of Civil Procedure, 1908 or any other court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Court is empowered to determine by or under this Act. In terms of this Section, the jurisdiction of a civil court or any other court has been ousted to entertain any suit or proceeding in respect of any matter which the court is empowered to determine by or under this Act. Consequently section 5(2) of the Act vests jurisdiction with the Company Bench of the relevant High Court to deal with all matters under the Act. While interpreting the ouster clause, the august Supreme Court of Pakistan has in several cases held that the ouster clause has to be interpreted strictly and based on the facts of the case. More specifically that the ouster clause cannot be read or inferred to oust constitutional jurisdiction.

11. In *Allied Bank of Pakistan Ltd. v. Khalid Farooq* (1991 SCMR 599), the august Supreme Court of Pakistan has held as under:

the exclusion of jurisdiction of superior Courts is not to be readily inferred, that there is a strong leaning against any such exclusion, that this rule is deep seated and if it is to be overturned, it must ordinarily be done by a clear, definite or positive provision, not left to mere implication.

In *Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another* (PLD 2011 SC 407), the august Supreme Court of Pakistan has held as under:

There is a vast body of precedent in our legal corpus which has consistently held that the Court's jurisdiction may only be ousted through express words in a legal text. This principle of law is by now well settled.

In *Arshad Mehmood v. Commissioner / Delimitation Authority, Gujranwala and others* (PLD 2014 Lahore 221), it has been held that:

The ouster clause under section 10A of the Act does not, in the slightest, abridge or curtail the constitutional jurisdiction of this Court to judicially review the orders, notifications and the acts of the executive i.e., the Delimitation Authority and Delimitation Officer in this case. It also matters little if the ouster clause is considered to be a time specific clause, as argued by some of the respondents. Courts usually give due weightage to any administrative urgency of the Executive but this does not mean that the doors leading to courts can be shut down as this would result in curtailing and abridging the judicial power. This is opposed to independence of judiciary and the constitutional framework of separation of powers.

As per citations the ouster clause must be read in the context of the language of the statute. So far as constitutional jurisdiction is concerned, this Court will guard its jurisdiction jealously and will not oust its constitutional jurisdiction on inference as section 5(2) of the Act does not explicitly bar this Court's jurisdiction.

12. In the instant case, the ouster clause specifically mentions civil courts or any other court to entertain suits or proceedings in respect of matters which the Company Bench of the High Court has jurisdiction by or under the Act, meaning thereby that no other court can interfere in matters for which jurisdiction has been specifically vested with the Company Bench of the relevant High Court. Section 5 as the ouster clause does not protect unlawful actions and decisions of the government which are otherwise amenable to judicial review under constitutional jurisdiction. The ouster clause protects the jurisdiction of the Company Bench of the relevant High Court to ensure that no other court impedes on its jurisdiction. The Company Bench of the relevant High Court under Section 160 of the Act can consider irregularities in the election of directors wherein the requirements of the Act have not been followed or considered by it but cannot consider issues which go beyond irregularities under the Act. The ouster clause therefore does not cover decisions and actions taken by the executive being the Federal Government in this case. More importantly the application of section 5 of the Act will not in any manner curb the jurisdiction vested in this Court under Article 199 of the Constitution as has been held in PLD 2014 Lahore 22 (supra). Hence if an authority has acted in contravention to the law or its authority or contrary to the principles of natural justice, the same will be amenable to writ jurisdiction and it cannot be argued that such decisions will fall within the mandate of section 5(2) of the Act. Importantly, the objective of the ouster clause is to

ensure that no other court will carry out parallel proceedings with respect to claims and complaints and issues specifically arising under the scheme of the Act. However, when an action is taken by the Federal Government which is stated to be without jurisdiction or authority or is termed as misuse of power, tainted with mala fide, the same will not fall within the scope of the ouster clause being section 5(2) of the Act or within the scope of section 160 of the Act.

13. Respondent No.21, Mian Misbah-ur-Rehman relied upon order dated 16.3.2020 passed in I.C.A. No.14622/2020 to urge that on account of the status quo order, this Court cannot decide the issue of election for the BOD as a status quo order has been passed by a learned Division Bench of this Court in I.C.A. No.14622/2020. As per the record and copy of the order produced before this Court, the matter in issue in I.C.A. No.14622/2020 is specifically with respect to the status of Mian Misbah-ur-Rehman in the outgoing BOD, which Board's tenure ended on 22.6.2020. The order relied upon does not prevent future elections with respect to the BOD of SNGPL as any determination made in the said I.C.A. is with respect to the status of Mian Misbah-ur-Rehman in the previous BOD but not with respect to the BOD that is to be elected, pursuant to the notice dated 2.5.2020, hence there is no merit in this objection.

Opinion of the Court

14. On 2.5.2020 in terms of Section 159 of the Act, the BOD of SNGPL fixed the number of directors to be elected as eleven and notified the election to be held on 23.6.2020. On 1.6.2020 notice for extraordinary general meeting was issued to SECP and Pakistan Stock Exchange that eleven directors were to be elected for SNGPL and the names of the retired directors who are eligible for re-election. This notice was also issued in the newspaper on 16.6.2020. On 9.6.2020 the Government of Pakistan, Ministry of Energy, Petroleum Division informed SNGPL of its proposed candidates for appointment of directors by election to the BOD. These names are as follows:

Sr. No.	Name	Member's Status as on 9.6.2020
1	Ms. Roohi Raees Khan	Member
2	Mr. Rizwan Ullah Khan	Member
3	Dr. Sohail Razi Khan	Member
4	Mr. Mohammad Haroon	Non-Member
5	Mr. Muhammad Ayub Chaudhry, Additional Secretary (P) Petroleum Division	Non-Member
6	Mr. Sajid Mehmood Qazi, Joint Secretary (A/CA) Petroleum Division	Non-Member
7	Mr. Naveed Kamran Baloch	Non-Member
8	Mr. Yousaf Naseem Khokhar	Non-Member Name proposed by State Life Insurance Company
9	Mr. Manzoor Ahmed	Non-Member Name proposed by NIT
10	Mr. Afan Aziz	Non-Member
11	Syed Akhtar Ali	Non-Member

All candidates were required to submit their intention to contest the election by 9.6.2020. On 16.6.2020 after scrutinizing the names of the candidates an advertisement was

published wherein 20 names were declared as a final list of candidates to contest in the election to the BOD of SNGPL. The dispute before the Court is with respect to the proposed names of the Federal Government being the candidates who will contest the election on its behalf. Out of the eleven names, three candidates are members where the dispute is limited to whether they can represent the Federal Government on the BOD as elected directors and eight names are of non-members where the dispute is whether a non-member can contest the election while representing the Federal Government. This includes the nominee of State Life Insurance Corporation and National Investment Trust Limited who are also non-members. The issue, before the Court is whether the Federal Government can appoint directors through election under section 159 of the Act and whether it can propose the names of non-members to contest the election on its behalf. The second issue is whether the Federal Government is restricted to appoint nominee director under sections 164 and 165 of the Act, thereby prohibited from proposing names of candidates who will contest the election for the BOD on its behalf.

15. The entire dispute before this Court revolves around interpretation of section 153(i)(i) of the Act and section 159 of the Act which are reproduced hereunder: (Emphasis in bold added for convenience)

Section 153. Ineligibility of certain persons to become director. A person shall not be eligible for appointment as a director of a company, if he:

- (a) is a minor
- (b) is of unsound mind;
- (c) has applied to be adjudicated as an insolvent and his application is pending
- (d) is an undischarged insolvent;
- (e) has been convicted by a court of law for an offence involving moral turpitude;
- (f) has been debarred from holding such office under any provision of this Act;
- (g) is lacking fiduciary behaviour and a declaration to this effect has been made by the Court under section 212 at any time during the preceding five years;
- (h) does not hold National Tax Number as per the provisions of Income Tax Ordinance, 2001

Provided that the Commission may grant exemption from the requirement of this clause as may be notified

- (i) It is not a member

Provided that clause (i) shall not apply in the case of

- (i) a person representing a member which is not a natural person
 - (ii) a whole-time director who is an employee of the company
 - (iii) a chief executive; or
 - (iv) a person representing a creditor or other special interests by virtue of contractual arrangement.
- (j) has been declared by a court of competent jurisdiction as defaulter in repayment of loan to a financial institution.

- (k) is engaged in the business of brokerage or is a spouse of such person or is a sponsor, director or officer of a corporate brokerage house:

Provided that clauses (j) and (k) shall be applicable only in case of listed companies.

Section 159. Procedure for election of directors. (1) Subject to the provision of section 154, the existing directors of a company shall fix the number of directors to be elected in the general meeting, not later than thirty five days before convening of such meeting and the number of directors so fixed shall not be changed except with the prior approval of the general meeting in which election is to be held.

(2) The notice of the meeting at which directors are proposed to be elected shall among other matters, expressly state:

- (a) the number of directors fixed under subsection (1); and
- (b) the names of the retiring directors

(3) Any member who seeks to contest an election to the office of director, shall, whether he is a retiring director or otherwise, file with the company, not later than fourteen days before the date of the meeting at which elections are to be held, a notice of his intension to offer himself for election as a director

Provided that any such person may, at any time before the holding of election, withdraw such notice.

(4) All notices received by the company in pursuance of subsection (3) shall be transmitted to the members not late than seven days before the date of the meeting, in the same manner as provided under this Act for sending of a notice of general meeting. In the case of a listed company such notice shall be published in English and Urdu languages at least in one issue each of a daily newspaper of respective language having wide circulation.

(5) The directors of a company having a share capital shall, unless the number of persons who offer themselves to be elected is not more than the number of directors fixed under subsection (1), be elected by the members of the company in general meeting in the following manner, namely:

- (a) a member shall have such number of votes as is equal to the product of the number of voting shares or securities held by him and the number of directors to be elected;
- (b) a member may give all his votes to a single candidate or divide them between more than one of the candidates in such manner as he may choose; and
- (c) the candidates who gets the highest number of votes shall be declared elected as director and then the candidate who gets the next highest number of votes shall be so declared and so on until the total number of directors to be elected has been so elected.

(6) The directors of a company limited by guarantee and not having share capital shall be elected by members of the company in general meeting in the manner as provided in articles of association of the company.

16. In terms of section 153 of the Act certain persons are not eligible to be directors of a company, where one disqualification is that a person shall not be eligible to be appointed as director if they are not a member of the company. Section 118 of the Act defines member of a company being the subscribers to the memorandum of association who are allotted shares and whose name is entered in the register of members. Section 154(2) of the Act also requires that only a natural person can be a director. Hence to be a director a person must be a member and must be a natural person. The Proviso to section 153(i) of the Act states that section 153(i) shall not apply in the case of a person representing the member who is not a natural person. As per this Section in order to be eligible as a director of a company, the person must be a natural person and must be a member, however an exception has been created for members, who are not natural persons such as corporate bodies or the Federal or Provincial Governments to appoint a director on their behalf. They can appoint a director who is not a member of the company. So for the purposes of the dispute before this Court, the Federal Government can appoint a non-member as a director of SNGPL. Now the question is does section 153 apply to section 159 of the Act which is argued to be a stand alone provision. Section 159 of the Act lays down the procedure for the election of directors whereby any member who seeks to contest in the elections for the BOD is required to provide his notice of intention to offer himself for election as a director. It has been argued that under section 159 of the Act only members can participate in the election of directors, that too a member, who is a natural person, because such member has to communicate his intention to offer himself for election as director, meaning thereby that only a natural person who is a member can offer himself as a director of the company and cannot offer himself on behalf of anyone else.

17. Under the Act, a director can be appointed under section 159 of the Act being appointment through an election or under sections 164 and 165 being nominated directors of creditors or special interests by virtue of contractual arrangements. Section 165 of the Act provides that special interest directors are those who are nominated by a body corporate or a company or any other entity owned or controlled directly or indirectly by the Federal Government or Provincial Government on the Board of a company on account of any investment made. So for the purposes of section 165 of the Act, the contention of the Petitioner that the Federal Government can only appoint directors through section 165 of the Act as nominee directors is totally misconceived and against the mandate of the Act. A shareholder of a company enjoys certain rights of which the right to elect directors and remove directors; the right to contest in the elections to the BOD and the right to appoint proxy are relevant for the purposes of this case. A member of a company by virtue of holding shares in a company has the right to participate in the decision making process either in their capacity as shareholders or through the BOD based on their shareholding. For the purposes of meetings, section 137 of the Act provides that a member of a company is entitled to attend and vote at meetings of the company through a proxy. Section 138 of the Act provides that a body corporate or corporation which is the member of a company can attend a meeting through an authorized representative and exercise all powers as member through the authorized representatives. Section 139 of the Act provides that the Federal Government as a member of the company can appoint any person it deems fit to act as its representative at any meeting of the company or meeting of class of members of the company. Essentially these sections enable a member to participate in the meetings either through proxy or through an authorized representative. The relevance of these sections for the purposes of a body corporate, corporation or in the context of the Federal or Provincial Government where it is a member of a company is that such members who are not natural persons will act through their proxies or

authorized representatives who are exercising their right, in the meetings, to participate and to vote. In the same context, since a member has the right to participate in the election to the BOD of a company, where that member is not a natural person it can exercise this right through proxy or through its representatives. The Petitioner has essentially argued that the Federal Government cannot appoint elected directors on the BOD and can only appoint nominee directors on account of section 159 of the Act. His understanding of section 159 of the Act when read with section 153 of the Act is totally flawed. If accepted it would mean that the Federal Government is prohibited from exercising the basic right of a member as given under section 159 of the Act to elect directors to the BOD. This is totally against the mandate of the Act. Section 159 of the Act also provides the procedure for holding elections of the BOD. It cannot be read as prohibiting the right of certain members when it comes to appointing directors. In this context section 153(i)(i) clearly provides that a director of a company must be a member of company except when such director is representing a member which is not a natural person. The rationale behind section 153(i)(i) of the Act is that a body corporate or corporation and Federal or Provincial Government, as the case may be, can only be represented on the BOD through a natural person as the body corporate or corporation or the Federal or Provincial Government have to act through their representatives to attend meetings to vote or participate in the decision making process. In fact section 153(i)(i) of the Act gives the body corporate or corporation and the Federal or Provincial Government the additional right to consider appointing a member or a non-member as its elected director under section 159 of the Act. It creates an exception to the rule that a person representing a member which is not a natural person, though not a member themselves qualify to be a director.

18. In this context it was argued that the Federal Government, as a member of SNGPL can only appoint a member as a director, specifically because section 159(3) of the Act requires a director to be a member, who in his own capacity will give his consent to be appointed as a director and gave his intimation to participate in the elections. A plain reading of section 159(3) makes it evident that the provision is procedural in nature which essentially lays down the process to be followed for the purposes of election. Section 159(3) of the Act requires any member, be it a body corporate or the Federal or Provincial Government, as the case may be, give their consent and intimation to offer themselves for election as directors. It goes without saying that since the body corporate or the Federal or Provincial Government will act through their representative who has to be a natural person, they will follow the process under section 159(3) and give their consent and intimation to the election. Consequently section 159(3) of the Act does not prohibit the rights of non-natural persons who are members of a company to appoint directors by election on the BOD. Hence, the Federal Government can appoint a member or non-member as its candidate to participate in the election for the BOD of Respondent No.3. In this regard, I have been informed that the candidates mentioned at Serial Nos.1, 6, 13, 16 and 18 of the advertisement dated 16.6.2020 are non-members. Rest are all admittedly members, out of which three are holding proxy of the Federal Government, hence as such no illegality is made out on this count.

19. The relevance of the right of a shareholder to appoint a director through election is best understood when seen in the context of the difference between a nominee director and an elected director. A nominee director is one who is appointed under sections 164 and 165 of the Act on the basis of a contractual arrangement with the creditors or other special interest holders. Section 164 of the Act provides that in addition to director elected or deemed to have been elected by shareholders, the company may have directors

nominated by its creditors or special interests by virtue of a contractual arrangement. A body corporate or corporation owned or controlled by the Federal or Provincial Government may also nominate directors on the BOD to such corporation or company that it has extended credit facilities. In the same manner section 165 provides for the nomination of directors representing special interests where the Federal or Provincial Government as the case may be to nominate a director in a company in which it has made some investments or on the basis of any special interests. A nominee director therefore is nominated by institutions such as financial institutions or the Federal or Provincial Government on the Board to protect its interests as nominator. The fundamental difference between a nominee director and elected director is that a nominee director holds office at the pleasure of the nominator whereas the elected director is given a three year tenure under the Act and secondly that a nominee director has to safeguard the interests of its nominator first and foremost whereas an elected director has a fiduciary duty to the company and all its shareholders. So the nominee director participates in the proceedings of the BOD as per the terms of its arrangement with the nominator to ensure that nominators' investment or interest is safeguarded, to act as a liaison between the nominator and the company and also in the larger picture consider the overall policies and working of the company. In the instant case, the Petitioner's contention that the Federal Government can only act through nominee directors under Section 165 of the Act, notwithstanding the fact that they are members of SNGPL in their own right, is contrary to the mandate of the Act.

20. The Petitioner has also stated that the Federal Government has violated the law laid down by this Court through judgment dated 27.2.2020 passed in W.P. No.21451/2019. This contention is also totally misconceived. The issue before the Court in that case was that whether Mian Misbah-ur-Rehman was a nominee director of the Federal Government or whether he contested the election in his own capacity as a member of the company, hence the matter in issue is not the same. To the extent of Mian Misbah-ur-Rehman who is Respondent No.21 in this Petition, the court concluded that he was elected as a nominee of the Federal Government. The Court also pointed out that there have been some irregularities in the manner in which nominee directors of the Federal Government have not been distinguished from the elected directors However this lapse does not change the fundamental character of Mian Misbah-ur-Rehman who was appointed as nominee director of the Federal Government. Hence there has been no violation of this judgment. In fact it is the position of the Federal Government that they have been instructed by this judgment and have attempted to remove those irregularities which led to the dispute between the Federal Government, SNGPL and Mian Misbah-ur-Rehman.

21. Therefore the Federal Government is a member of SNGPL and enjoys all rights of a member under the Act and can exercise all rights as a member under the Act which includes the right to appoint and remove directors under the Act. This means that the Federal Government can either appoint a director on the BOD through elections under section 159 of the Act or through nomination under sections 164 and 165 of the Act.

22. In view of the aforesaid, no case for interference is made out. The instant Petition is dismissed and the Respondent SNGPL can carry on with its election process within the stipulated time in accordance with law.

