IN THE HIGH COURT OF SINDH AT KARACHI

C.P.No.D-2462 of 2008

Present: **Mr. Justice Anwar Zaheer Jamali, CJ.,**
Mr. Justice Muhammad Karim Khan Agha

Date of hearing: 26.3.2009

Petitioner: Through Mr. Abdul Mujeeb Pirzada along with Mr. Syed Khalid Shah, Advocates.

Respondents: Through Mr. Muhammad Yousaf Leghari, Advocate General Sindh along with Mr. Miran Muhammad Shah, AAG.
Mr. Ataur Rehman, Assistant Election Commissioner, on behalf of Election Commission of Pakistan

JUDGMENT

MUHAMMAD KARIM KHAN AGHA, J., The Petitioner, elected Taluka Nazim of Taluka Municipal Administration, Larkana, (hereinafter referred to as Taluka Nazim) has preferred this Constitutional Petition to call into question the Notification No.SO-IV/LG/1-187/2008 dated 25th November 2008 (the Impugned Notification) issued by the Local Government, Government of Sindh, which reads as under:-

"GOVERNMENT OF SINDH
LOCAL GOVERNMENT DEPARTMENT

Karachi, dated the 25th November, 2008

NOTIFICATION

No. SO-IV/LG/1-187/2008:- On the recommendation of Provincial Local Government Commission and with the approval of Competent Authority i.e. Chief Minister Sindh, Mr. Qurban Ali Abbasi, Taluka Nazim, Taluka Municipal Administration, Larkana, District Larkana, is hereby removed from the office of Taluka Nazim, Taluka Municipal Administration, Larkana, District Larkana, with immediate effect.

GHULAM ALI SHAH PASHA
ADDITIONAL CHIEF SECRETARY (LG)"

2. The case of the Petitioner is that since taking over his office as Taluka Nazim of Taluka Municipal Administration Larkana, he has been effectively and very sincerely performing his functions and exercising his powers under the Sindh Local Government Ordinance, 2001 (hereinafter referred to as the

"**Ordinance**"). According to the Petitioner in his capacity as Taluka Nazim, he had always stood for the cause of rights of the people of the locality and protected their rights and interests. That he has not committed any illegality during his tenure as Nazim.

3. The Petitioner contends that after the formation of the present Government by the ruling party in the province of Sindh, it has started a campaign to destabilize the local administration/government headed by those who belong to the rival political party/group (including the Petitioner) by leveling false, frivolous and unfounded allegations with the sole intent to sideline/oust the said elected representatives and to induct their own favorites to the said posts for malafide reasons and ulterior motives.

4. The Petitioner alleges that he has been subjected to political victimization by his rivals because he refused to accept the illegal orders and directions given to him from time to time by the high ups in the current Government.

5. Initially the Petitioner was suspended under section 132(3) of the Ordinance for 90 days vide order dated 27.8.2008. The said suspension order was challenged by him through C.P.No.D-588/2008, before the Larkana Bench of this Hon'ble Court, which was subsequently transferred to the principal seat at Karachi for hearing.

6. The case was fully argued by both the parties and was reserved for judgment but unfortunately, the judgment could not be announced as one of the Additional Judges who had heard his case ceased to be a Judge of this Hon'ble Court after completing his tenure. The said petition, as such, was ordered to be heard afresh.

7. The Petitioner contends that the malafide on the part of the Respondents is apparent from the fact that just before his 90 day suspension from office expired, a Summary dated 22.11.2008, from the Local Government Department Government of Sindh was forwarded to the Chief Minister Sindh, (hereinafter referred to as the "**Summary**"), containing absolutely false, frivolous and

baseless allegations against the Petitioner seeking his approval for the removal of the Taluka Nazim under section 132(4) of the Ordinance. Thereafter, without any delay the Impugned Notification removing the Taluka Nazim from office was issued on 25.11.2008.

8. The Petitioner contends that the Summary which gave rise to the issuance of the Impugned Notification contains absolutely false and fabricated allegations, which are based on malafide and ulterior motives and therefore, the Impugned Notification is not sustainable in law. Furthermore, the Petitioner contends that he was not associated with the inquiry mentioned in the Summary upon which the Impugned Notification was based and as such it cannot be relied upon for use against him especially as he was denied the right to be heard.

9. The Petitioner further contends that there has been an infringement of various provisions of the Ordinance and in particular that the Provincial Local Government Commission (hereinafter referred to as the "**Commission**") (Respondent No.2) has not been constituted in accordance with the provisions of section 131 of the Ordinance.

10. The Petitioner has sought the following reliefs:

a) Declare the Impugned Notification dated 25.11.2008 as arbitrary, ex facie illegal and without jurisdiction having been issued/passed by the concerned Respondents with the motive other than in accordance with law and thus liable to be quashed/set-aside.

b) Declare that the Impugned Notification having been issued/passed by the concerned Respondents without observing/fulfillment of the requirement/formalities as envisaged under the Local Government Ordinance, 2001, is without lawful authority and therefore of no legal effect.

c) Declare that the constitution of Sindh Local Government Commission, Respondent No.2, is without lawful authority and, therefore, of no legal effect.

d) Direct the Respondents to produce the Record & Proceedings of the inquiry conducted by the Respondents in this particular case for the perusal by this Honourable Court.

e) Suspend the operation of the Impugned Notification dated 25.11.2008, allowing the Petitioner to continue to his position and hold and act as Taluka Nazim, Taluka Municipal Administration, Larkana.

f) Any other relief(s) as this Honourable Court may deem fit and proper under the circumstances of the case may also be awarded.

11. During his arguments learned counsel for the Petitioner raised and particularized the following additional grounds. Firstly, he contended that section 131(7) of the Ordinance had not been complied with, secondly, that under section 164 the Impugned Notification ought to have been issued by the Chief Election Commissioner and published in the official gazette, which had not been done and thirdly, that the Inquiry had not been carried out by the Commission which was a requirement under section 132(1) (b) of the Ordinance. Learned Counsel for the Petitioner placed reliance on the following authorities in support of his various contentions.

i) BOMBAY DYEING & MFG. CO. LTD., v. BOMBAY ENVIRONMENTAL ACTION GROUP (AIR 2006 SC 1489)
ii) YUSUF HAJI ISMAIL v. HUSSAIN MUMTAZ (PLD 1989 Karachi 299).
iii) GHULAM MUHAMMAD LALI v. IMTIAZ AHMED LALI (PLD 2006 Lahore 661)
iv) ABDUL KARIM v. KARIM NABI (PLD 1979 SC (AJK) 74)
v) NASIMUL HAQUE MALIK v. CHIEF SECRETARY TO GOVERNMENT OF SINDH (1996 SCMR 1264)
vi) GHAZI KHAN v. STATE (1985 SCMR 1856)
vii) ATLAS AUTOS LIMITED v. NATIONAL INDUSTRIAL RELATIONS COMMISSION (1990 PLC SC 369)
viii) QASU v. STATE (PLD 1969 Lahore 48)
ix) GHULAM MUSTAFA KHAR v. PAKISTAN (PLD 1988 Lahore 49)
x) TATA IRON AND STEEL CO. LTD. V. STATE OF JHARKHAND (AIR 2005 SC 2871)
xi) KOTUMAL v. THE STATE (PLD 1960 (W.P.) Karachi 15)
xii) RANGAL SHAH v. MULA JADAL (PLD 1960 (W.P.) Karachi 512)
xiii) SHAHID MEHMOOD v. NASREEN MASOOD (PLD 2007 Karachi 178)

12. Respondent No3 in his counter-affidavit contends that the Petitioner has filed this petition with ulterior motives and all the adverse allegations in it

regarding malafide etc. are denied. He further contends that the Commission was legally constituted and has been notified in accordance with the Ordinance. That the Commission fully provided the Petitioner with an opportunity to be heard during the course of the inquiry and that the Petitioner was served with a notice to attend the hearing but failed to do so. At a minimum the Petitioner had knowledge of the Inquiry proceedings and deliberately failed to associate himself with the same. That after finding that the allegations against the Petitioner had been proved during the inquiry, the Commission had quite properly in accordance with the law recommended the removal of the Taluka Nazim. Accordingly the Taluka Nazim was removed in full compliance with the procedures laid down in the Ordinance. In support of his contentions, the learned Advocate General referred to numerous documents placed on file along with the counter-affidavit of Respondent No 3.

13. During arguments, the learned Advocate General in order to justify that there had been no breaches of the procedure laid down in the Ordinance, which warranted interference by this Hon'ble Court, relied almost exclusively on a judgment of a Divisional Bench of this Hon'ble Court dated 21.2.2009 in C.P.No.D-2406/2008 (hereinafter referred to as the "**Judgment**"). In the Judgment the Petitioner was the Taluka Nazim of Dadu and the Respondents were the same as in the present case. The learned Advocate General submitted that the case as contained in the Judgment was identical to the current case and that it had found against the Petitioner in all of the matters, which had been raised by the Petitioner during the current petition. As such this case stood on an equal footing and was liable to be dismissed based on the findings in the Judgment.

14. With regard to the constitution of the Commission, the learned Advocate General submitted that the Commission had been properly constituted in accordance with section 131 of the Ordinance and even if there was a vacancy in or a defect in the constitution of the Commission no act or proceedings of the

Commission could be held to be invalid on this account pursuant to section 131(5) of the Ordinance.

15. He rejected the Petitioner's contention that the Impugned Notification needed to be issued by the Chief Election Commissioner and published in the official gazette under section 164 and that in the instance case of removal under section 132(4) of the Ordinance only a simple notification was required.

16. Since the learned Advocate General has pinned virtually his entire case on the aforesaid Judgment of the Sindh High Court, the most pertinent part of the findings in the Judgment as they relate to the Petitioner's contentions are reproduced below as under:-

> "12. Be that as it may, when the applicability of section 132(3) is seen in the facts and circumstances of the present case, indeed in the Impugned Notification few things i.e. reference of opinion and recommendation from the PLGC; relevant provision of the Ordinance and; reasons for such action and time frame are lacking. In this context, the moot point for consideration is that whether such procedural defects in the Impugned Notification have caused any prejudice to the Petitioner or have vitiated the very legality of the Impugned Notification. Leaving apart the explanations offered in this regard by the Respondents which are not altogether devoid of force, learned counsel for the Petitioner has failed to show us that what prejudice has been caused to the Petitioner due to lack of such short comings in the Impugned Notification which can be easily termed as badly drafted one. Besides a comparative reading of the two provisions of Ordinance 2001 i.e. empowering the Chief Executive to suspend the Nazim for a period not exceeding ninety days i.e. Sections 129(1) and 132(3), show that in case of exercise of powers under section 129 (1) of the Ordinance, 2001, the Chief Executive while suspending the Nazim has to record reasons for this purpose, which are to be conveyed to the Nazim, but under section 132(3) such requirement has been done away, and substituted by the recommendations of PLGC, when the Chief Executive is exercising his authority for suspension of Nazim for a maximum period of ninety days, as in the instant case. This position further weakens the submissions of Mr. Pirzada as regards the Impugned Notification, as the requirement of opinion and recommendation by the PLGC seems to have been fully met from the contents of the Minutes of Item No.3 of the Second Extraordinary Meeting of PLGC dated 30.08.2008
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> 13. Mere fact that no reference of such recommendation is available in the Impugned Notification will not vitiate its validity. This view also finds support from the Judgment of the apex Court in the case of SAGHIR AHMED THROUGH LEGAL HEIRS VS. PROVINCE OF PUNJAB THROUGH SECRETARY, HOUSING AND PHYSICAL PLANNING LAHORE AND OTHERS (PLD 2004 S.C. 261), wherein taking into account number of judgments of the superior Courts about the validity of Notification not published in the official gazette or otherwise, it was held that no hard and fast rule of universal application can be laid down on the legal effect of non-publication of a Notification in the official gazette, which may be in some cases mandatory in nature and not

in the other case. Based on such observations, the Impugned Notification was held to be valid despite non-publication in the official gazette.

14. The submission of Mr. Abdul Mujeeb Pirzada, referring to section 164 of the Ordinance, 2001, seems to be entirely misdirected as this provision of law relating to the issuance of Notification by the Chief election Commissioner finds place under Chapter XVII of the Ordinance, which deals with the Local Government Elections. Even from the plain reading of this section one can see that issuance of Notification by the Chief election Commissioner is only for the purpose of notifying every election, by-election and result of such election and resignation, removal or re-call of a member, Nazim or Naib Nazim and therefore, it has nothing to do with the Notification issued in terms of section 132(3) of the Ordinance, 2001.

15. The grievance of the Petitioner as regards violation of principles of natural justice or violation of section 24-A of the General Clauses Act, have also no force as from the side of Respondents sufficient material has been placed on record to show that there were number of complaints of mal-practice and corruption against the Petitioner; holding of inquiry in consequence thereof; non-cooperation of the Petitioner in connection with such inquiry proceedings and ultimate decision of the PLGC in its Second Extraordinary Meeting dated 20th August 2008. As a matter of fact the decision on item No.3 of this meeting relating to the case of the Petitioner speaks about the fairness of proceedings conducted by the PLGC that instead of relying upon the complaints and the inquiry report available before it, they had decided to afford an opportunity of hearing to the Petitioner and even for this purpose before unanimously recommending action of his suspension under Section 132(3) of Ordinance, 2001, they had written letters and reminders to the Petitioner, but he did not respond.

16. We are in full agreement with the submission of Mr. Fateh Malik that this Court in exercise of its jurisdiction under Article 199 of the Constitution, is not expected to enforce observance of the technicalities of procedural laws, particularly in a situation when no prejudice seems to have been caused to the party and the purported action is otherwise in accordance with law, as in the instant case."

17. Apart from the authorities mentioned in the Judgment the learned Advocate General also placed reliance on the case of Ghulam Sarwar Verses Additional District Judge Daska District Sialkot. (YLR 2005 (Lahore) page 257)

18. We have considered, in detail, the documents filed on record and the submissions made by the learned counsel.

19. In our view the question of the Impugned Notification cannot be viewed in isolation but must be seen in the context of the total circumstances leading up to the suspension and then later removal of the Taluka Nazim. As the Taluka Nazim had already challenged his suspension under the Ordinance before this Court, which regrettably could not be ruled upon and now in the present situation appears to be infructuous, this case can be seen as dealing with the second part of

the process under the Ordinance which after suspension may lead to either the lifting of the suspension or the removal of the Taluka Nazim.

20. In essence the case revolves around the interpretation of various sections of the Ordinance and whether these sections have been properly complied with taking into account the particular facts and circumstances of the present case and the opportunity of the Petitioner to be heard in person by the Commission/Inquiry Team.

21. The Petitioner was initially suspended under section 132(3) of the Ordinance. It is instructive, therefore, to set out the relevant parts of the sections in the Ordinance dealing with the suspension of the Nazim under S.129, together with section 131 dealing with the establishment of the Commission and section 132 dealing with the functions of the Commission. In the present case the interpretation and interplay of these three sections will be of great assistance in resolving the issues arising out of the petition. Such relevant parts of these sections are set out as under:-

> ***"129. Suspension of a Nazim, etc.*** – (1) Where, in the opinion of the Chief Executive of the Province, a Nazim is deliberately avoiding or abstaining willfully or failing to comply with the directions given by the Chief Executive under section 128, he may suspend the Nazim for a period not exceeding ninety days for the reasons to be recorded and conveyed to the Nazim.
>
> (2) During the period of suspension, the Government shall cause to be conducted an inquiry by the Provincial Local Government Commission which shall provide an opportunity of personal hearing to the suspended Nazim.
>
> (3) The Provincial Local Government Commission shall submit its report of the inquiry along with its recommendations, which may include removal of the Nazim to the Chief Executive of the Province for appropriate action in the light of such recommendations, as he may deem appropriate.
>
> (4) In case no decision is taken within ninety days from the date of suspension of the Nazim, he shall stand re-instated to his office.
>
> (5) During the period of suspension of the Nazim, the Naib Nazim shall act as Nazim."
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> ***"131. Provincial Local Government Commission.*** – (I) The Government shall appoint a Provincial Local Government Commission, which shall consist of persons of integrity and good track record of public service –

(a) the Minister for Local Government who shall be the Chairman;

(b) two members from the civil society, one each nominated by the leader of the House and leader of the Opposition of the Provincial Assembly;

(c) two eminently qualified and experienced technocrat members selected by the Government; and

(d) Secretary, Local Government and Rural Development Department, shall be ex-officio member and secretary of the Commission.

Provided that in case of equality of vote, the Chairman shall have a casting vote.

(2) The Provincial Local Government Commission may, for the performance of its functions, co-opt any official of the Government for any specific assignment.

(3) .....

(4) .....

(5) No act or proceedings of the Provincial Local Government Commission shall be invalid by reason or existence of any vacancy in, or defect in, the constitution of the Commission.

(6) .....

(7) The Government shall notify the organogram and schedule of establishment of the Provincial Local Government Commission.

(8) The Secretary of the Provincial Local Government Commission shall be Principal Accounting Officer and the Commission shall have its own Drawing and Disbursing Officer.

(9) ....."

"132. Functions of the Provincial Local Government Commission. – (1) The functions of the Provincial Local Government Commission shall be as, otherwise, provided in this Ordinance and, in particular, it shall –

(a) .....

(b) Conduct, on its own initiative or, whenever, so directed by the Chief Executive of the Province, an inquiry by itself or through District Government into any matter concerning a local government.

(c) .....
(d) .....
(e) .....
(f) .....
(g) .....
(h) .....

(i) .....
(ii).....
(iii).....
(iv).....

(2) .....

(3) Where the Provincial Local Government Commission is of opinion that suspension of a Nazim is necessary

for the fair conduct of the inquiry under clause (b) of sub-section (1) or preventing the Nazim from continuing with any unlawful activity during the pendency of inquiry, it may recommend to the Chief Executive of the Province for making appropriate order for suspension of such Nazim for a maximum period of ninety days.

(4) Where, on an inquiry under clause (b) of sub-section (1), a Nazim, Naib Nazim or a member of a Council is found guilty of misconduct by the Provincial Local Government Commission, it shall recommend appropriate action, including his removal, to the Chief Executive of the Province.

(5) The Provincial Local Government Commission shall have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (Act V of 1908), in respect of the following matters, namely:-

(a) Summoning and enforcing the attendance of any person and examining him on oath.
(b) Compelling the production of documents;
(c) Receiving evidence on affidavit; and
(d) Issuing Commission for the examination of witnesses.

Suspension of the Taluka Nazim.

22. According to the Petitioner the Taluka Nazim was suspended under S.132 (3) of the Ordinance as it was deemed necessary for the fair conduct of the inquiry under clause (b) of sub-section (1) of section 132 or preventing the Nazim from continuing with any unlawful activity during the pendency of inquiry. It will be seen that suspension of a Nazim is also dealt with under S.129 of the Ordinance. S.129 (1) however only provides for suspension in cases where a Nazim is deliberately avoiding or abstaining willfully or failing to comply with the directions given by the Chief Executive under section 128. Since the Nazim in this case was accused of criminal misconduct as opposed to not complying with directions it was appropriate for the Commission to invoke S.132 (3) for his suspension as opposed to S.129 (1).

23. It is significant to note that although both S.129 and S.132 (3) enable the suspension of a Nazim albeit on different grounds the procedure and consequences to be followed thereafter in both sections is quite similar. For instance, in both sections the maximum period of suspension is 90 days, in both sections an Inquiry is to be carried out by the Commission into the allegations, in both sections, the Commission can recommend the removal of a Nazim.

24. One of the main differences between the two sections is that S.129 (2) specifically provides that during the period of suspension, the Commission during the course of its inquiry shall provide an opportunity of personal hearing to the suspended Nazim. This is fully in line with the principles of natural justice and in the view of the court would be equally applicable to inquiries on account of suspensions under S.132 (3) especially if those inquiries involved criminal misconduct.

25. It is surprising that for a suspension under S.129 (1) the Chief Executive of a Province on suspending a Nazim needs to record reasons for the suspension and convey them to the Nazim whilst suspension under S.132 (3) is only based on the recommendation of the Commission with no reasons being given to the effected Nazim at the time of his suspension. There seems to be no obvious reason why this distinction has been made in the two sections and seems to put a Nazim at a disadvantage if he is suspended under S.132 (3) as there is no requirement for the Nazim to be informed about the reasons for his suspension. It follows therefore that in cases where a Nazim has been suspended under S.132 (3) (as in the instant case) that the procedural requirements following his suspension must be more meticulously complied with.

26. On a suspension under S.132 (3) the inquiry referred to is under S.132 (1) (b). In this case the Commission had decided to conduct the Inquiry by itself as it was entitled to do under the Ordinance.

Constitution of the Commission

27. Before turning to the inquiry itself it is necessary to see whether the Commission was properly constituted under Section 131.

28. Section 131 sets out in some detail the manner of appointment of those entitled to be appointed to the Commission and in some cases the qualifications, which such members should hold. By doing this the drafters of the Ordinance have attempted to ensure that the Commission consists, as far as possible, of an impartial body of competent people of good standing. Thus, when the

Commission becomes involved in local Government affairs on the few occasions envisaged by the Ordinance the people whose rights they may be interfering with at the grass roots level can have full confidence in their impartiality, integrity and competence. The idea behind the section seems to be to ensure that the Government cannot simply appoint anyone it chooses to the Commission at its whim.

29. In this regard according to section 131 the Commission shall consist of persons of integrity who have a good track record of public service. Apart from the Minister For Local Government who shall be its chairman the Commission should consist of:

1. Two members from the civil society, one each nominated by the leader of the House and leader of the Opposition of the Provincial Assembly;

2. Two eminently qualified and experienced technocrat members selected by the Government; and

3. Secretary.

30. Having one member nominated by the leader of the House and one member nominated by the leader of the opposition seems to strike a fair balance between the potential competing interests. In this case, however, only a nominee from the leader of the House has become a member of the Commission. There is no member who has been nominated by the leader of the Opposition because according to the learned Advocate General when the Commission was formed there was no leader of the Opposition. This situation would seem to properly fall within the saving clause of S.131 (5). However once a leader of the Opposition is appointed his nomination should be entertained.

31. Having perused the record it would seem that the Chairman has been properly appointed. However, whether the Notification appointing Mr. Haji Munawar Ali Abbasi, MPA as a Member on behalf of Government is proper is questionable. This is because it is doubtful whether Mr. Abbasi as an MPA of the ruling party, who will be subject to his party discipline, can be regarded as a member from the civil society bearing in mind the impartial role that the

Commission ought to play in terms of inquiries. Members from the civil society for the purposes of such Commissions should exclude sitting politicians due to the nature of their work and the perception that they may not be impartial. Such exclusion however has not been specifically provided for in S.131.

32. Under section 131 (c) two eminent qualified and experienced technocrat Members selected by the Government are to be Members of the Commission. The Notifications on the file, however, reveal that Mr. Abbas Muhammad Junejo and Mr. Ahmed Ali Halepota have been appointed as Member Technical. Both of these officers have been appointed at PS-20 and on contract. The question arises whether they are qualified to be technocrats and therefore fulfill the preconditions for appointment to the Commission. The word "technocrat" is not defined in the Ordinance however for the purpose of fulfilling the requirements of a technocrat seat in the Senate of Pakistan the definition is found in the Conduct of General Elections Order 2002 at section 2 (d) and reads as under:-

> "Technocrat means a person who is the holder of a degree requiring conclusion of at least 16 years of education, recognized by the University Grants Commission or a recognized statutory body, as well as at least twenty years of experience, including a record of achievement at the national or international level."

33. The court considers that the above definition would be a useful definition to be adopted for the purposes of appointing technocrat members under the Ordinance. It is unclear whether the two Members appointed as technocrats meet the requirement of being technocrats under the Ordinance. The Notification appointing them should have clearly mentioned that the two individuals were appointed as Technocrat Members rather than simply stating Member Technical. The definition of technical does not equate with the definition of technocrat. In addition a separate form should have been completed by the Government setting out on what basis they were qualified to be regarded as technocrats for the purpose of being appointed to the Commission.

34. Appointing two technical members on contract basis is also not a preferred way of ensuring that the Commission will be impartial as a contract

employee may fulfill his duties in fear that his services will be terminated by the Government if he does not give decisions to their liking. The situation would of course be different if the contract could only be terminated by the Government on stipulated grounds such as misconduct. There is however no evidence on record to show that these two members Technical do not fulfill the requirements of being Technocrats according to the senate definition.

35. Section 131(5) to an extent acts as a saving provision for the Commission not being properly constituted. For example as mentioned earlier in this case, the lack of a Member appointed by the opposition would fall properly within the perview of S.131 (5). Section 131 (5) reads as under:-

> "No act or proceedings of the Provincial Local Government Commission shall be invalid by reason or existence of any vacancy in, or defect in, the constitution of the Commission."

36. A broad interpretation of this subsection would indicate that even if all the Members of the Commission had been wrongly appointed in breach of the requirements for appointment under section 131 the Commission could still continue to function validly. We are of the view that this could not have been the intention of the legislature.

37. We consider that sub-clause-5 was inserted to ensure that the Commission would not be impeded in carrying out its work simply because, for example, one Member was absent due to illness or had bona fide been invalidly appointed. It cannot be used as a carte blanche to give legal cover to appointments of most or all of the members of the Commission, which are not in conformity with S.131

38. Bearing in mind the above discussion, we have doubts as to whether the Commission has been constituted in accordance with section 131(1) and its ability to perform its functions impartially. However since there is no bar on politicians being members of the Commission and no evidence has been brought on record to show that the two technical members do not fulfill the definition of technocrat prima facie the Commission has been legally constituted.

39. The formation of the Commission is however defective because the Government has failed to comply with 131(7) whereby the Government was required to notify the organogram and schedule establishment of the Commission. No evidence is on record that this provision has been complied with.

Publication of the Notification by the Chief Election Commissioner in the official Gazette.

40. With regard to notification, learned counsel for the Petitioner pointed out that under section 164 of the Ordinance the Impugned Notification had not been published by the Chief Election Commissioner as required. Section 164 reads as under:-

> "***164. Notifications to be issued.*** – The Chief Election Commissioner shall notify every election, by-election and result of such elections and resignation , removal or recall of a member , Nazim or Naib Nazim, as the case may be."

41. We do not subscribe to the view that a notification regarding removal of the Taluka Nazim needs to be made by the Chief Election Commissioner pursuant to a recommendation of the Commission under under S.132 (4). This is because Section 164 falls within Chapter XVII of the Ordinance, which deals with Local Government Elections.

42. In our view section 164 applies to a removal of a Nazim as envisaged under section 161 (1), which specifically deals with removals in connection with the proceedings of disqualification under section 152. Section 152 (2) specifically relates to circumstances where the removal is on account of disqualification. In the instant case removal of the Nazim has been affected under Chapter XIV of the Ordinance which is concerned with the Government and Local Government relations. This section does not envisage the involvement of the Chief Election Commissioner nor does it concern disqualification. We therefore hold that notifications under S. 132 (3) or (4) do not have to be made by the Chief Election Commissioner.

43. With regard to whether the notification needed to be published in the official gazette we rely on para 13 of the Judgment, which was reproduced earlier and provides in part in para 13 as under:-

> "it was held that no hard and fast rule of universal application can be laid down on the legal effect of non-publication of a Notification in the official gazette, which may be in some cases mandatory in nature and not in the other case."

44. On the facts and circumstances of this case the Petitioner was aware of the notification suspending him as he had already filed a Constitutional Petition challenging the same. As such, the Petitioner would therefore have known either that he would be reinstated within 90 days or disqualified through a notification. His precise knowledge of the date when the Impugned Notification removing him, on the facts of this case, is, therefore, largely irrelevant as this could have even been worked out from the date of the suspension order. We, therefore, consider that a simple notification in this case was required for removal under section 132(4).

Constitution of the Inquiry Team.

45. The next issue is whether the inquiry team has been properly constituted. Under section 132(1)(b) the Commission shall conduct, on its own initiative or, whenever, so directed by the Chief Executive of the Province, an inquiry by itself or through District Government into any matter concerning a local government.

46. As mentioned above, in this case the Commission has opted to carry out the inquiry itself. In our opinion this means that the Commission or at least one of its members with others co-opted if necessary under S.131 (2) should carry out such inquiries. The preferred approach would of course be that the Commission or a majority of its members carry out the inquiry due to the seriousness of the consequences, which may flow from such inquiry.

47. A perusal of the record reveals that by an order dated 1st September 2008 Dr. Irfan Ahmed Memon (Director General IM & EC) on behalf of the Commission constituted an Inquiry Team under S.132 to probe into the matters

of serious irregularities and malafide practices conducted by the Petitioner as Taluka Nazim Larkana. Dr Baz Mohammed Junejo, member Technical 1 was to head the Inquiry Team which was to comprise Mr Nayyar Iqbal Siddiqui, Syed Ahmed Shah and Mr Sibghutullah Bhutto being officers of the Commission. A direction was contained in the order that the Inquiry should be completed in a week's time.

48. Dr. Baz Mohammed Junejo admittedly has been notified as a member of the Commission. None of the other 3 Inquiry officers mentioned in the aforesaid order are members of the Commission neither has it been specifically stated in the order that they have been co-opted to assist the Commission in its inquiry pursuant to S.131 (2). Instead the Inquiry has been ordered under S.132, which by implication means that it is an Inquiry to be carried out as contemplated under S.132 (1) (b) by the Commission itself. No mention of co-option has been made in the order neither is there any document on record to show that the 3 officers appointed to be part of the Inquiry Team headed by Mr Baz Mohammed Junejo had been co-opted for that purpose unless one assumes that the order was a co-option order for the investigation and simply failed to specify the relevant sections due to an administrative oversight. This seems to be a possibility.

49. The Inquiry Report at its signature page shows that the Inquiry has been carried out by the 3 officers mentioned in the aforesaid order. Mr Baz Mohammed Junejo, despite according to the order being nominated as the Chairman of the Inquiry Team, has not signed the Report. Nor is there any indication from the Report that Mr. Baz Mohammed Junejo played any meaningful role in the inquiry. The real position is therefore that the inquiry had little if any input from the Commission, which was supposed to conduct it.

50. On account of all the other tasks, which each member of the Commission may be involved in, it may be that as a matter of practicality and efficiency that it is unreasonable to expect all the members of the Commission to be associated with an inquiry. However due to the serious consequences which may flow from the Inquiry the Court expects at least one member of the Commission to play an

active and meaningful role in the Inquiry. The other members may be co-opted, as may have been the intention of the Commission in this case.

51. The court however would like to make it clear that although co-option may be necessary for the Commission to smoothly carry out its work in some cases it does not mean that the Commission can sub delegate (as it seems in reality to have done in this case) its entire responsibilities under the Ordinance to co-optees especially in important assignments such as inquiries into the removal of a Nazim who has been suspended without being given any reasons under S.132 (3).

52. Accordingly based on the facts of this case, where the one member of the Commission who was a part of the Inquiry team seems to have played no meaningful role whatsoever and only appears to be a part of the inquiry team on paper, we hold that the Commission had no power to sub delegate its entire function of carrying out the Inquiry in the manner which it did under section 132(1) (b) to 3 officers who were not even a part of the Commission. The Inquiry was, therefore, coram non judice.

The right to be heard.

53. Having already found the proceedings of the Inquiry team to be coram non judice and therefore not maintainable in law it is not strictly necessary for the court to address the question of whether the Petitioner was given the right to be heard before the inquiry team. However as a matter of completeness and for guidance in future cases of this nature the court deems it appropriate to do so.

54. The petitioner's case is that he was not given notice of the inquiry against him and that he was denied the right to be heard.

55. Audi alteram partem namely that no one should be condemned unheard is a well settled principle of law. In the case of NAZIR AHMAD PANHWAR v. GOVERNMENT OF SINDH (2005 SCMR 1814) the following observation was made by the Supreme Court.

> "There can be no denial that right to personal hearing to a person against whom an adverse order is to be made to be equated with fundamental right and an adverse order made without affording him an opportunity of personal hearing is to be treated as a void order."

56. There can be no cavil with this proposition of law. This proposition however should not be abused by those who seek to rely on it. For example, a person in full knowledge of proceedings against him should not deliberately avoid appearing before those proceedings with a view to unreasonably delaying or frustrating those proceedings.

57. It is to be noted that under the said proposition the person against whom an adverse order is made must be "afforded an opportunity" to be heard. This means that he is given notice of the proceedings against him or is otherwise aware of the proceedings against him and he is given an opportunity to associate himself with those proceedings.

58. The right to be heard is not absolute. In RUKSANA SOOMRO v. BOARD OF INTERMEDIATE AND SECONDAY EDUCATION (MLD 2000 page 145) a distinction has been made between cases where the right was statutory and cases where the right was based on principles of natural justice. In cases where the right was statutory it was almost absolute whilst in the cases of natural justice it could be excluded expressly or by implication

59. Each case will turn on its own distinctive facts. In this case the Commission was aware that the Petitioner should be given an opportunity of being heard. This is reflected in both the Summary dated 22.11.08 and the advice of the Attorney General dated 18.11.08 which was given to the Commission and is repeated verbatim in the Summary dated 22.11.08.

60. What the Commission had to satisfy itself of was whether by 22.11.2008 sufficient steps had been taken to afford the Petitioner an opportunity of being heard.

61. According to the Inquiry Report "the team contacted through phone the Petitioner for his statement in this matter but he did not appear before the Inquiry team on the plea that this matter is in the Honourable court." It should be noted that although the issue of the Petitioner's suspension was before the Honourable court there was no stay in conducting the Inquiry against him.

62. According to the Summary dated 22.11.08 the Petitioner was approached by the inquiry team to be heard in person by the team as well as by the Commission in addition to being informed of his right by letter but he did not respond.

63. The Court file shows that there is also a statement dated 11.9.2008 under oath by the Taluka Municipal Officer Mr Imdad Hussain Tunio that the Petitioner was served through dispatch rider/Naib Qasid of the TMA and that he also personally informed the Petitioner about his opportunity to record a statement before the Inquiry Team. This is corroborated by another statement under oath of Mr Yasir Hussain Junejo given to the Inquiry team and stating that he also had personally informed the Petitioner about the Inquiry but that the Petitioner had declined to participate in the proceedings based upon his counsel's advice.

64. Additionally there are two letters on file addressed to the Taluka Nazim dated 22nd and 28th October 2008 giving him the opportunity of a personal hearing. These letters are significant, as they have been written after the submission of the Inquiry Report. These letters show that the Commission was aware that the Inquiry Team had been unable to hear the Petitioner despite affording him the opportunity of doing so and therefore by way of abundant caution again gave him the opportunity of being heard. The Petitioner did not respond to these letters.

65. It is true that the Respondents have failed to provide proof of receipt for any of its correspondence with the Petitioner informing him of his right to be heard.

66. The abundance of correspondence, as mentioned above on the Court's record, however leads us to the conclusion that the Petitioner had full knowledge of the Inquiry and that he deliberately chose not to appear before it and defend the allegations leveled against him. As such his plea of being denied the opportunity of being heard is now no longer open to him.

Distinguishing the Judgment.

67. It is true that the Judgment relied upon by the learned Advocate General is similar to this case, however, it is not identical. Each case turns on its own distinctive facts and circumstances. The main point of distinction is that the Judgment relied upon related to *suspension rather than removal from office.* (italics added). The Judgment itself states in paragraphs 11,12 and 17 respectively as follows:-

i) "The jurisdiction of this Court under Article 199 of the Constitution is discretionary in nature and is not meant for seeking enforcement or observance of such procedural technicalities *unless* it is shown that some serious prejudice has been caused to the interest of the Petitioner due to such procedural lapse." (italics added)

ii) "In this context, the moot point for consideration is that whether such procedural defects in the Impugned Notification *have caused any prejudice* to the Petitioner or have vitiated the very legality of the Impugned Notification."(italics added)

iii) We may add here that there is no cavil to the principles of law propounded in the cases referred to by Mr. Abdul Mujeeb Pirzada, *but in the facts and circumstances of the present Petition*, as discussed above, the same are of no help to the case of the Petitioner. (italics added)

68. In the Judgment the Court correctly held that the breach of procedural irregularities and technicalities would not vitiate the suspension *unless* (italics added) it could be shown that some serious prejudice had been caused to the interest of the Petitioner due to such procedural lapses. Equally in this case the technical procedural breach of Section 131(7) alone did not cause the Petitioner serious prejudice

69. In the Judgment the issue was of suspension and it could not be said that such suspension pending an inquiry caused the Petitioner serious prejudice. This

was because he would have a chance to put his case before a properly constituted Inquiry Team and attempt to persuade the Inquiry team that the charges against him were without substance and that he should be reinstated.

70. In the instant case, however, the Petitioner is not being suspended but is being removed from office. Such removal, largely on account of the breach of procedural technicalities, has caused serious prejudice to the Petitioner. Indeed, the fact that the Impugned Notification was issued pursuant to recommendations from the Inquiry Team, which, in our view, was coram non judice makes the defects of a serious nature, which cannot be overlooked as a mere case of non performance of a minor technicality which made little difference to the outcome of his case. The recommendations of the Inquiry Team had serious implications for the Petitioner as they lead to him suffering the major punishment of removal from office.

71. The findings in this judgment, in no way, exonerate the Petitioner from the allegations made against him which will need to be decided on their merits before the proper forum in accordance with law.

72. Pursuant to the above findings we:

(a) hold that the Impugned Notification, having been issued/passed by the concerned Respondents, based upon a report of an Inquiry Team, which was coram non judice, is without lawful authority and, therefore, of no legal effect.

(b) set aside the Inquiry Report, which led to the Impugned Notification.

(c) direct the Commission to constitute a new Inquiry Team, being mindful of the observations and findings contained in this judgment and thereafter hold a fresh inquiry against the Petitioner strictly in accordance with law.

(d) direct the Petitioner to appear before and assist any inquiry, which may be initiated against him by the Commission if he so chooses.

Const. Petition No.D-2462/2008 is disposed of in the above terms.

Karachi,
Dated: 17.04.2009

Announced in Court today.
21/4/09

Judge

Chief Justice

(1) For Katcha Peshi
(2) For Hg on Misc 11273/08
(3) For Hg on Misc 11274/08

(C/A filed / R/A filed)

18/03/09. Mr. Arshad Tanoli, advocate & Mr. Abdul Mujib Pirzada, advocate for the petitioner.

Mr. Miran Muhammad Shah, ~~advocate~~ AAG.

Mr. Arshad Tanoli requests for adjournment due to non-availability of Mr. Pirzada, who is reported to be busy before Circuit Bench of this Court at Hyderabad.

Adjourned to 26/03/09 as suggested.

Chief Justice

Judge

(1) For Katcha Peshi
(2) For Hg on Misc 11273/08
(3) For Hg on Misc 11274/08

(C/A filed / R/A filed)

PTO

26-3-09

Mr. Abdul Majeed Rajpoot, for the petitioner.

Mr. Mohammad Yousuf Leghari, Advocate General Sindh, for the respondents.

Both the learned counsel have concluded their arguments. Judgment is reserved.

Chief Justice

Judge