

IN THE HIGH COURT OF SINDH AT KARACHI

Before: **Munib Akhtar and Agha Faisal, JJ.**

Constitution Petition No.D-326 of 2017

*Azizullah Khan Afridi S/o Malik Inayatullah Khan
Versus
The Province of Sindh through Chief Secretary,
Government of Sindh and 4 others*

Constitution Petition No.D-550 of 2017

*Muhammad Asif Khan S/o Mir Hassan
Versus
Chief Election Commissioner, Election Commission of Pakistan,
Constitution Avenue, Islamabad and 3 others*

Constitution Petition No.D-7166 of 2016

*Abdul Aziz S/o Muhammad Qasim
Versus
Chief Election Commissioner, Election Commission of Pakistan,
Constitution Avenue, Islamabad and 3 others*

Petitioner in C.P. No.D-326/2017	:	Through Mr. Huzaifa Khan, Advocate.
Petitioners in C.P. No.D-55/2017 & C.P. No.D-7166/2016	:	Through Mr. Shaikh Jawaid Mir, Advocate.
Respondents No.4&5 in C.P. No.D-326/2017	:	Through Mr. Ahmed Zubair, Advocate.
Respondent/Province of Sindh	:	Through Mr. Saifullah, Asst. Advocate-General Sindh
Date of Hearing	:	19 th March 2018

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JUDGMENT

AGHA FAISAL, J: The matter pertains to the District Municipal Corporation, West Karachi ("**DMC West**"), the administration whereof has been assumed by the Government of Sindh ("**GOS**") by appointment of an administrator to exercise the administrative and financial powers on behalf of the said council. The basis on which the administrator was appointed to take over the DMC West was that proceedings in furtherance of the notification, declaring a returned candidate against the category of chairman of DMC West, have been restrained vide an interim order passed by the honorable Islamabad High Court and it was deemed by the GOS that in the absence of a chairman the said council was not properly constituted.

2. Three petitions have been filed in respect thereof being C.P. No. D-326 of 2017, C.P. No. D-550 of 2017 and C.P. No. D-7166 of 2016 respectively.

3. In C.P. No.D-326 of 2017, the Petitioner, being the vice chairman of DMC West, has challenged the appointment of the administrator, *inter alia*, on the grounds that such appointment is illegal, unlawful and ultra vires of the Sindh Local Government Act, 2013 ("**SLGA 2013**").

4. In C.P. No.D-550 of 2017, the Petitioner, who was the runner-up in the election for the chairmanship of DMC West, has sought a declaration that since the chairman has not taken oath, therefore, the council remains incomplete and the Respondent, being the vice chairman of DMC West and also the Petitioner in C.P. No.D-326/2017, cannot officiate as chairman, DMC West. The prayer in

C.P. No.D-7166 of 2016 is identical to that of the previous petition and also against the same Respondent and the said petition has been filed by one of the members of DMC West.

5. The facts common to all three petitions are that the election to the positions of Chairman and Vice Chairman of DMC West were held and the Returned Candidates were notified by the Election Commission of Pakistan (“ECP”) vide its Notification dated 05.09.2016 (“**Notification**”).

6. The election to the chairmanship of DMC West became the subject matter of Writ Petition No.3271 of 2016, wherein the Honorable Islamabad High Court was pleased to pass the following interim order on 06.09.2016 (“**IHC Interim Order**”):

“Meanwhile, further proceedings with regard to notification shall remain stayed.”

7. In view of the aforesaid order of the Honorable Islamabad High Court, the chairman of DMC West has not taken oath as of date. This restraint upon the chairman’s assumption of office has been deemed by the GOS to be sufficient grounds for the appointment of an administrator to take over the control of DMC West.

8. The arguments of the learned counsel for the Petitioner in C.P. No.D-326/2017, who is also the Respondent in C.P. No.550/2017 and C.P. No.7166/2016, may be encapsulated as follows:

- i. It was submitted that the Petitioner was duly notified by the ECP as Vice Chairman of DMC West and that he took oath of his office on 05.12.2016.

- ii. The chairman of DMC West, although also notified as having been elected vide the same Notification, could not take oath of his office in view of the restraint placed vide the IHC Interim Order.
- iii. It was contended by the learned counsel for the said Petitioner that notwithstanding the fact that the office of chairman, DMC West, remains vacant, that does not mean that the council is not duly constituted.
- iv. The learned counsel relied on the provisions of section 80(2) of the SLGA 2013 and stated that the vice chairman was duly empowered to act in place of the chairman and that the absence of the chairman would not render the council non-functional. It may be pertinent to reproduce the content of the cited provision herein below:

“80(2)When the Mayor or Chairman by reason of absence from Pakistan or any other cause, is unable to exercise his powers and perform his functions, the Deputy Mayor or, as the case may be, Vice Chairman, shall exercise powers and perform functions of the Mayor or, as the case may be, Chairman.

Provided that in the absence of Mayor, Deputy Mayor, Chairman or Vice Chairman, the Government may by Notification entrust the duties of the Mayor, Deputy Mayor, Chairman or Vice Chairman as the case may be to some other member.”

(Underline added for emphasis.)

- v. The learned counsel referred to the letter No.MC/DMC(W)/PS/12/2016, dated 13.12.2016 issued by the Municipal Commissioner, District Municipal Corporation, West Karachi, to the Secretary Local

Government Department, GOS, the contents whereof is reproduced herein below:

“The matter to decide the Chairman of DMC West has been challenged in a petition in Islamabad High Court and yet not been decided.

As such in view of the above non presence of Chairman/Council, GOS in exercising of powers under Section 21(3) of Sindh Local Government Act, 2013 appointed an Administrator in DMC West who is exercising the Administrative & Financial Powers on behalf of the Council.

On the other hand, Mr. Azizullah Afridi elected Vice Chairman has now taken Oath on 05/12/2016 and wants to exercise Powers of Chairman DMC West whereas the matter of election of Chairman is still sub judice and pending in the Honorable Islamabad High Court.

In this connection your kind attention is brought to sub Section (2) of Section 80 of Sindh Local Government Act 2013 which is reproduced as under:-

“When the Mayor or Chairman by reason of absence from Pakistan or any other cause, is unable to exercise his powers and perform his functions, the Deputy Mayor or, as the case may be, Vice Chairman, shall exercise powers and perform functions of the Mayor of, as the case may be, Chairman.”

Under the above sub. Section it has been mentioned that in absence of Chairman from Pakistan or any other cause, is unable to exercise his powers and perform his function, the Vice Chairman shall exercise powers and perform functions of Chairman but in this case the Chairman has not so far been elected as such matter of performing functions of Chairman by the Vice Chairman is not clear.

It is therefore brought in your kind knowledge with the request to kindly issue further guidelines as to whether in this case the Vice Chairman can perform the functions of Chairman or otherwise so that further necessary action may be taken in the matter accordingly.”

vi. It was demonstrated that the aforesaid letter was responded to by the Local Government Department, GOS, vide its letter dated 14.12.2016, wherein it was stated as follows:

“I am directed to refer your letter No.MC/DMC(W)/PS/12/2016, dated 13th December-2016, on the subject noted above and to state that you have already mentioned the issue in your reference letter that when the Chairman has not been notified as such performance of functions of Chairman by the Vice

Chairman is not clear. In this connection, it is to be clarified that sub section (2) of Section-80 of Sindh Local Government Act- 2013, empowers the Vice Chairman to exercise the powers and perform functions of the Chairman when Chairman is in position but is absent from his office, otherwise the Vice Chairman cannot exercise the powers of Chairman.

In this case, the Chairman has not been elected / notified by the Election Commission of Pakistan, therefore, the position of Chairman is legally vacant ab-initio, thus the Vice Chairman cannot exercise his powers as Chairman of the Corporation.”

- vii. It was contended by the learned counsel for the said Petitioner that the assumption of the affairs of DMC West by the GOS, through appointment of an administrator, was in due dissonance with the law and specifically ultra vires of the SLGA 2013.

9. The learned counsel for the Petitioners in C.P. No.D-550/2017 and C.P. No.7166/2016 supported the action of the GOS and submitted that the appointment of the administrator under the present circumstances was not only permissible but was also a requirement of the law.

10. The learned counsel cited section 22(2) of SLGA 2013 and stated that the assumption of office by the chairman of a council was predicated *inter alia* upon the said person taking the requisite oath of office. The cited provision reads as follows:

“(2) The Mayor, Deputy Mayor, Chairman and Vice Chairman, shall assume office by making and subscribing to an oath in such form as may be prescribed.”

11. It was submitted that since the chairman, DMC West, could not be deemed to have assumed office as of date, hence the elected body, being the council, had not yet come into existence.

12. The learned AAG also supported the appointment of the administrator in DMC West and submitted that the said council

remained frozen in the election phase *inter alia* in view of the IHC Interim Order.

13. It was further submitted that until the chairman of a council assumes office, the said council could not be deemed to have become functional.

14. It was also submitted by the learned AAG that the GOS was duly empowered to take over the affairs of the said council, and appoint an administrator in respect thereof, by virtue of section 21(3) of the SLGA 2013. The said provision reads as follows:

“(3) On expiry of the term of office of the Council, Government shall immediately send a request to the Election Commission for holding fresh election within 120 days. Provided that Government may appoint an Administrator to perform the functions of the Council until the elected Council assumes the office.”

15. This Court has considered the arguments of the respective learned counsel and has also perused the record and it appears that the primary issue before this Court is whether the appointment of an administrator in respect of DMC West, in place of the elected council, by the GOS was in consonance with the law or otherwise.

16. It may be appropriate to initiate this discourse by referring to Article 140A of the Constitution of Islamic Republic of Pakistan, 1973, clause (1) of which reads as follows:

“140A. *Local Government.* (1) Each Province shall, by law, establish a local Government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local government.”

17. The term “local government system” was considered by a full bench judgment of the Lahore High Court in the case of *Arshad Mehmood v. Commissioner / Delimitation Authority, Gujranwala and Others* PLD 2014 Lahore 221, and it was maintained as follows:

“52. "Local Government System" has not been defined. It is, therefore, useful to shed some light on the meaning of Local Government System. "The existence of local government has always been defended on the basis that it is a crucial aspect of the process of democratization and intensification of mass participation in the decision-making process. No political system is considered complete and democratic if it does not have a system of local government. Local government serves a two-fold purpose. The first purpose is the administrative purpose of supplying goods and services; the other purpose is to represent and involve citizens in determining specific local public needs and how these local needs can be met. Local representative government is a process that spans and connects representation and administration at local levels within local government structures....Local government is that part of the whole government of a nation or State which is administered by authorities subordinate to the State authority, but elected independently of control by the State authority, by qualified persons resident, or having property in certain localities, which localities have been formed by communities having common interests and common history. Local government is the third level of government deliberately created to bring government to the grass-roots population and gives the grass-roots population a sense of involvement in the political processes that control their daily lives. Democracy denotes a political system in which the eligible people participate actively not only in determining who governs them, but also in shaping the policy output of their government. A number of reasons have been advanced as to why a system of local government is essential. These reasons are that it is:--

- (a) training ground for mass political education;
- (b) training ground for political leadership; and
- (c) that it facilitates government accountability.

The aforementioned forms a crucial part of the need for the existence of local government.⁹⁹

53. The Punjab Local Government Act, 2013 provides various components of local government system including "elections."¹⁰⁰ The preamble describes the Act to establish an elected Local Government System to devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments as envisaged under Article 140A of the Constitution. The preamble further states that the Act promotes good governance and effective delivery of services and transparent decision-making through institutionalized participation of the people at the local level. Section 2(v) defines "local government to mean a Union Council, a Municipal

Committee, a Municipal Corporation, the Metropolitan Corporation, a district council or an Authority (which under section 2(a) means a District Education Authority and District Health Authority). Seats in a Union Council and the Municipal Committee are filled through direct election from the electoral area in the manner specified in sections 13 and 15 of the Act while the seats in the other local governments are filled indirectly through the directly elected Chairmen of the Union Councils. Union Council is one ward for the direct election of the Chairman and Vice-Chairman as joint candidates and also for one reserved seat each for a peasant, a youth member and one non-Muslim member. Union Council is divided into two wards (consisting adjoining three wards) for the two reserved seats for women, while the Union Council is divided into six wards for the election to six general seats. Similarly, Municipal Committee is divided into Wards for direct election of general members determined on the basis of population of a Municipal Committee but which shall not be less than eleven members or more than fifty members.”

18. The intersection of powers of the local government vis-à-vis a provincial government, on the touchstone of Article 140A read in conjunction with Article 137 of the Constitution of Pakistan, came under detailed scrutiny before the Honorable Supreme Court of Pakistan in the case of *LDA and others vs. Imrana Tiwana and others* 2015 SCMR 1739. It may be pertinent to reproduce the relevant passage therefrom herein below:

“33. With the introduction of Article 140A in the Constitution, the establishment of a system of Local Government is no longer a Principle of Policy. The Constitution mandates that each Province shall, by law, establish a Local Government System and devolve political, administrative and financial responsibility and authority to the elected representatives of the Local Government. Following this command of the Constitution, the Provincial Assembly of Punjab has enacted PLGA 2013. In like manner the Provincial Assemblies of Balochistan, KPK and Sindh have also enacted the Balochistan Local Government Act, 2010, Khyber Pakhtunkhwa Local Government Act, 2012 and Sindh Local Government Act, 2013, respectively.

35. At the same time if Article 140A is not to be a merely hollow constitutional promise the Provincial Government is obliged to devolve, by law, some political, administrative and financial responsibility on the Local Government. This much is

beyond doubt. This Court is not inclined to hold that Article 140A is an exercise in futility and the Provincial Government continues to retain the same wide legislative and executive authority that it did before its insertion. The question is where to draw the line.

36. Article 137 and 140A have to be read in harmony. Neither overrides the other. These provisions provide a scheme for a representative government and participatory democracy in the country. These provide a scheme to establish Local Government and articulate a framework within which the Provincial Government must function. The authority conferred on the Province and the responsibilities devolved on the Local Government form part of a common scheme. These are not to be used as trumps. One cannot cancel the other. These are co-equal norms. They weave the constitutional fabric.”

19. The foregoing discussion underscores the importance of the local government system within the constitutional framework. It follows that any sub-constitutional legislation or the interpretation of such legislation must conform to the letter and spirit of the aforesaid.

20. In terms of the SLGA 2013, the composition of a district council has been stipulated in section 18(6) thereof and the same reads as follows:

“(6) *District Council.*- There shall be a district council which shall comprise of the following members –

[(a) [one member from each Union Council of the district to be directly elected on the basis of adult franchise by electors falling within the respective Union Council];

(b) reserved seats to be extent of 33% for women members, 5% for youth members, 5% for non-Muslim members and 5% for labourer or peasant members elected in the manner provided in section 18-A.

(c) the District Council so constituted shall elect a Chairman and a Vice Chairman as joint candidates from amongst its members by show of hands.”

21. It may be pertinent to note the last paragraph of the aforesaid provision, which clearly stipulates that the election of the chairman and vice chairman shall follow once district council has been constituted.

22. Therefore, the election to the post of chairman and vice chairman is only possible once the council is duly constituted.

23. The proceedings of a council take place at its meetings and the law stipulates the timeframe within which the first meeting is to take place. The relevant provision is section 20(2) of the SLGA 2013 and it stipulates as follows:

“(2) The first meeting of a Council shall be held not later than thirty days from the day on which the names of its members are notified.”

24. A plain reading of the aforesaid section would demonstrate that a district council would have to have been constituted to have held a meeting, as the election of the chairman and vice chairman could only take place from amongst the members of a council at a meeting thereof.

25. Therefore, it would follow that the council, being DMC West, was constituted prior to the election of its chairman and vice chairman.

26. It remains a matter of record that the proceedings further to the Notification of the election of the chairman of DMC West were stayed, on the very next day following the issuance of the said Notification, therefore, the office of chairman, DMC West, remains vacant.

27. However, a vacancy in one of the offices of a district council could not render the entire district council as non-functional. The constitution of the District Council is mentioned in section 18(6) of SLGA 2013 and it would follow that the absence/non-election of one or more of the members cited therein could not render the entire district council non-functional.

28. A plain reading of section 80(1)(a) of the SLGA 2013 shows that a mayor or chairman shall preside over the meetings of the council and regulate the conduct of business, unless prevented by reasonable cause. Therefore, it is apparent that SLGA 2013 envisages that a district council could function even in the absence of its chairman.

29. Further that section 80(2) of the SLGA 2013 clearly prescribes that the duties of a chairman could be assumed by a vice chairman when the chairman is absent from Pakistan or for any other reason.

30. It may be pertinent to state that under SLGA 2013 the proceedings of the Council could not be deemed to invalid, *inter alia*, upon the absence of a person, who would otherwise be entitled to be present. Section 83(9) is reproduced herein below:

“(9) No proceedings of a Council shall be invalid by reason only of the existence of any vacancy in, or any defect in the constitution of the Council, or by reason only that any person who was not entitled to sit or vote or otherwise take part in such proceedings, had sat or voted or otherwise taken part in such proceedings.”

31. The upshot of the aforesaid discussion is that the absence of a chairman or his inability to act as such for any other reason could not be deemed to render the entire DMC West non-functional.

32. The assumption of control of the DMC West by the GOS has admittedly been undertaken by virtue of section 21(3) of the SLGA 2013.

33. The section relates to the functioning of a district council in the intervening period when an elected council has completed its tenure and the subsequent council has yet to assume office.

34. The entire reliance of the GOS, in so far as the appointment of an administrator at DMC West is concerned, is anchored upon the said provision of the law.

35. It is observed that a literal interpretation of the said provision does not confer any authority upon the GOS for doing away with an elected district council and it is only a proviso therein that permits the provincial government to appoint an administrator in a specified interim period.

36. It is well settled law that words and phrases in statutes should be given their plain meaning. One of the many pronouncements of the Honorable Supreme Court in this regard is in the case of *Baz Muhammad Kakar & Others v. Federation of Pakistan & others* PLD 2012 Supreme Court 923 at 966, wherein it has been maintained as follows:

“The literal rule of interpretation of the Constitution and statutes, also known as the golden rule of interpretation, is that the words and phrases used therein should be read keeping in view their plain meaning.”

37. It is also well settled law that a proviso should not be used to enlarge the operation of a statute and this principle is fortified by the pronouncement of the Honorable Supreme Court in the case of *Baksh Elahi v. Qazi Wasif Ali* 1985 SCMR 291 at 300, which reads as follows:

“14. It has been held in some cases, as pointed out by Crawford in his book "Statutory Construction" that three functions are to be ascribed to the proviso, namely, (i) to exempt something from the enacting

4, clause, (ii) to qualify or restrain its generality, and (iii) to exclude some possible misinterpretation of it as extending to cases not intended by the legislature. It is also laid down that the proviso should not be used to enlarge the operation of a statute, although occasionally it has been used for this purpose.”

38. Therefore, it appears that the act of GOS in removing an elected district council and substituting the same with an appointed administrator does not have the sanction of law.

39. The local government system is integral to governance under our Constitution and it cannot be replaced arbitrarily by a provincial government.

40. The Honorable Supreme Court has highlighted the relevance of the local government system time and time again and one such pronouncement was in the case of *President of Balochistan High Court Bar Association vs. Federation of Pakistan and others* 2014 SCMR 1 at 4, wherein it was maintained as follows:

“As it is obligation of the Government to adhere to the Constitution in letter and spirit and no one can be allowed in any manner, to deviate from any of its provisions particularly in view of the fact that the Constitution is a binding document as it has been given by 18 Crore people of this Country to themselves. Therefore, its provisions particularly relating to the general public empowering them politically, administratively and financially through their chosen representatives by establishing the system of the local government in terms of Articles 32 and 140A of the Constitution should be strictly observed.”

41. In view of the reasons set out hereinabove, we hereby declare and hold as follows:

- i. The appointment of an administrator by the GOS in respect of DMC West in the facts and circumstances of the present case is ultra vires of the SLGA 2013 and of no legal effect.

- ii. The appointment of the administrator for DMC West in the manner described above is quashed and set aside and the administrator so appointed, is restrained from performing any function of, for and on behalf of DMC West.
- iii. The vice chairman of DMC West is duly authorized by the SLGA 2013 to act in place of the chairman, till such time as a chairman assumes the said office and it is declared that inability of the chairman-elect to act as such in the circumstances mentioned above amounts, in law, to his absence for any other cause within the meaning of section 80(2).
- iv. For the reasons given in this judgment, CP D-326 of 2017 is allowed in terms as stated herein. Further that CP D-550 of 2017 and CP D-7166 of 2016 are hereby dismissed with no order as to costs.

42. The Provincial Government is hereby directed to take all necessary steps, within 07 days, to ensure that the administration and control of DMC West is returned to the elected representatives thereof in the manner as stated herein above and that the said council and its vice-chairman is and are enabled to act in accordance with SLGA 2013.

JUDGE

JUDGE