

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.07 of 2022 A/w
Suit No.2923 of 2021 & Suit No.185 of 2022

Date Order with signature of Judge

Suit No.07/2022

Shahab Ahmed & another Fazal Vs. Federation of Pakistan & Others.

1. For hearing of CMA No. 22829/2021.
 2. For hearing of CMA No. 705/2022.
 3. For hearing of CMA No. 1683/2022.
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Date of Hearings: 14.02.2022, 15.02.2022, 16.02.2022 and 21.02.2022

M/s. Abid S. Zuberi, Ayan Mustafa Memon and Ali Abid Zuberi
Advocates for the Plaintiffs.

M/s. Khawaja Shumsul Islam, Shahzad Mehmood and Imran Taj
Advocates for Defendants No.15, 16 and 19

Mr. Ali Nawaz Kharal Advocate for FPCCI

Mr. Salman Jamil Deputy Director, Trade Organization Islamabad

Mr. Ghulam Mohiuddin, Assistant Attorney General.

Arshad Hussain Khan, J.- This order will dispose of three Applications viz: (1) CMA No. 22829/2021, under Order XXXIX Rules 1 & 2, filed by the Plaintiffs seeking interim injunction to restrain defendants No. 5 to 34 from voting and Defendants No. 1 to 4 from allowing the defendants No. 5 to 34 to vote in the upcoming election of FPCCI for the year 2022 scheduled for 30.12.2021 and /or suspend the names of Defendants No 5 to 34 in the Final List of Voters for the FPCCI election 2022, (2) CMA No.705/2022, under Order XXXIX Rule 4 R/w Section 151 CPC, filed by Defendant No. 19 seeking vacation of ad-interim order dated 29.12.2021 and (3) CMA No.1683/2022, under Section 94 R/w Section 151, CPC filed by Defendant No.19 seeking directions to defendant No.3 to announce the result of the elections held on 30.12.2021.

2. Briefly, the facts essential for disposal of the above applications, as narrated in the plaint, are that the plaintiffs are the contesting candidates for the post of Vice President in the elections of office bearers for the Federation of Pakistan Chamber of Commerce and Industry [FPCCI] for the year 2022 scheduled for 30.12.2021. On 15.10.2021, defendant No.1 [FPCCI] published its

election schedule for the year 2022 and in pursuance of the said schedule last date for receiving nominations of voters was 28.10.2021. The provisional list was to be issued by 04.11.2021 whereas last date for filing objections to the provisional list of voters was fixed as 10.11.2021. After hearing the objections, the Secretary General of defendant No.3 [Election Commission of Federation of Pakistan Chamber of Commerce and Industry] was required to issue final list of voters by 06.12.2021. Notwithstanding the mandate of the election schedule, the nominees of Defendants No.5 to 14, i.e., Defendants No. 15 to 34, were included in the final list of voters without any scrutiny as they were never included in the provisional list of voters resultantly they did not go through the mandatory procedure of calling Objections. On 21.12.2021, Plaintiff No.1, against the said inclusion of defendants 15 to 34 in the voter list, preferred the complaint before defendants No. 1 to 4, however, said complaint was disposed of without considering the objections of Plaintiff No.1. It has been stated that although the appeals preferred by defendants No. 5 to 14, against the cancellation of their trade licenses, were allowed by learned Baluchistan High Court, yet defendants 15 to 34 could not have been included in the final list as firstly, the Court did not allow them to be included in the list and secondly, they were not part of the provisional list and no objection could be heard against their nomination as voters. It has also been stated that in order to manipulate the result of FPCCI elections 2022, defendants No. 15 to 34 have been shown as voters in the final list of voters. It has been stated that inclusion of defendants No. 15 to 34 in the final list is illegal, arbitrary malafide and without jurisdiction as it is beyond the election schedule. The Plaintiffs having no other alternative and/or efficacious remedy against such inclusion directly in the final list, filed the present suit. Along with the Suit an application [CMA No. 22829 of 2021] was filed whereupon this Court passed an ad-interim order whereby though defendants No. 15 to 34 were allowed to cast their vote, however, announcement of result of the election was restrained. Upon notice of the application, defendant No. 19 filed CMA No. 705/2022 for vacation of ad-interim orders and also filed CMA No. 1683/2022 seeking announcement of result of the elections.

3. Learned counsel for the plaintiffs during his arguments while reiterating the contents of the plaint has contended that defendants No. 15 to 34 have been unlawfully included as voters (defendants No. 15 to 24 in corporate class and defendants No. 25 to 34 in the associate class) being nominees of defendants No. 5 to 14 whose trade licenses were cancelled by defendant No.3. It is further contended that though the appeals preferred by Defendants No.5 to 14 against cancellation of their trade licenses were allowed by the short orders of learned Baluchistan High Court, however, the Court did not allow them to participate in the FPCCI Election 2022 and as such defendants 15 to 34 being the nominees of defendants No. 5 to 14 do not automatically become eligible to cast vote in the election merely their trade licenses were restored by the Court. It is also contended that merely on the strength that the appeals of defendants No. 5 to 14 were allowed, the names of their nominees should not have included in the final list as they were not part of the provisional list and as such did not go through the mandatory procedure of calling Objections, prescribed under Rule 18 of the Trade Organization Rules 2013. Learned counsel further contended that plaintiff No.2, as an abundant caution, filed an appeal against the said inclusion in the final voter list before defendant No.2 under the general provisions of Section 14 (3) (e) of the Trade Organization Act, 2013, however, the said appeal was disposed of without considering the stance of the plaintiffs, hence the plaintiffs are aggrieved by the inclusion of defendants No. 15 to 34 in the final list as well as the order dated 28.12.2021, passed by defendant No.2 (DGTO) and as such have separate cause of action thus the plaintiffs are entitled to be heard and their respective pleas may be decided in the present suit. It is also contended that the said inclusion in the final voter list was challenged before a Divisional Bench of Baluchistan High Court by a third party who have no nexus with present plaintiffs, which case was disposed of on 24.12.2021. Per learned counsel the said order of learned Divisional Bench of Baluchistan High Court is *per incuriam* as the learned Bench has failed to acknowledge that restoration of license did not in any way mean that they could be included in the final voter list as the defendants cannot circumvent the mandatory procedure prescribed

under Rule 18 of Trade Organization Rules 2013. It is contended that Section 21 of the Trade Organization Act 2013 is not applicable in the instant suit since the issue in instant suit relates to pre-election dispute for which relevant provision is Section 14 (3) of the Trade Organization Act 2013 whereby the Regulator/DGTO is the final Forum of appeal. Learned counsel further contended that FCCPI, a federal body, which is deemed to have function all over the country, if passes an order or initiate an action in Islamabad but if affects an aggrieved party at the place other than Federal Capital, such party shall have the cause of action to agitate the grievance within the territorial jurisdiction of the High Court in which the said order has affected him. Since plaintiff No.1, a candidate for Vice President for association of the FPCCI, resides in Karachi and cause of action accrued at Karachi due to the impugned DGTO order 28.12.2021 as the same directly affects the election of plaintiff No.1, as such this Court has territorial jurisdiction to decide the instant suit. Learned counsel lastly contended that the plaintiffs have setup a prima facie case and the balance of inconvenience also lies in their favour for grant of injunction and they will be gravely prejudiced and shall be suffered irreparable harm unless their application is granted. Learned counsel in support of his arguments has relied upon the cases of *Shah Wali and 6 others v. Quetta Chamber of Commerce and Industry and 17 others* [2012 CLD 802], *Abbasia Cooperative Bank (Now Punjab Provincial Cooperative Bank Ltd.) through Manager and another v. Hakeem Hafiz Muhammad Ghaus and 5 others* [PLD 1997 SC 3], *Searle IV Solution (Pvt.) Ltd. and others v. Federation of Pakistan of Pakistan and others* [2018 SCMR 1444], *Clifton Block-7 Residents' Association through V.P. Amir and 6 others v. Zubair Ahmed and 5 others* [2015 CLC 1090], *Commissioner Income Tax v. Habib Bank Limited and Grindlays Bank PLC* [2015 PTD 619], *Commissioner Inland Revenue Zone -1, Regional Tax Office, Karachi v. Messrs Lakhani Securities (Pvt.) Ltd.* [2015 PTD 401], *Hassan Shahjehan v. FPSC through Chairman and others* [PLD 2017 Lahore 665], *The Federal Government through Secretary Interior, Government of Pakistan v. Ms. Ayyan Ali and others* [2017 SCMR 1179], *Messrs Pakarab Fertilizers Limited through duly authorized Representative v. Director General of Trade*

Organization [DGTO] and 4 others [2020 CLD 430] and *Anees-ur-Rehman v. Messrs Faysal Bank Limited through Manager* [2020 CLD 473].

4. Learned counsel for defendants No. 15, 16 and 19 in his arguments while referring to orders passed by Lahore High Court in writ Petition No. 79145 of 2021, and Baluchistan High Court Quetta in C.P. No. 1891 of 2021 has contended that the plaintiffs have approached this Court with unclean hands and by misleading this Court have obtained ad-interim orders, which is causing serious hardship to the defendants. It is contended that instant suit has been filed with malafide intentions to keep the defendants-Trade Organization away from participating in the FPCCI Election 2022. It is further contended that in the previous year, i.e. 2021 also the defendants-Trade Organizations were kept away from the FPCCI Election 2022, under the ad interim court's order, however, after the election was over, the petition was withdrawn. It is further contended that malafide on part of the plaintiffs can be gauged from the fact that plaintiff No.1-Mr. Shahbab Ahmed has never filed any complaint or appeal before the DGTO in respect of inclusion of the defendants Trade Organizations in the final voter list whereas the plaintiffs in order to divest jurisdiction to this Court has been falsely mentioned in the Plaint that Mr. Shahbab Ahmed preferred an appeal or complaint before the Regulator (DGTO). Such acts constitutes forum shopping, which is untenable. It is further contended that although Mr. Malik Sohail Hussain (Plaintiff No.2) filed a complaint against inclusion of defendants in the final voter list, however, said complaint was dismissed, vide order in Original No. 160/2021 but no appeal under the law has been preferred against the said order. It is further contended that inclusion of defendants-Trade Organizations in the final voter list of FCCPI Election 2022 was challenged before the Baluchistan High Court, Quetta, in Constitutional Petition No. 1891 of 2021, which declined to direct exclusion/deletion the defendants-trade organization from the final voter list of FCCPI 2022. It is also contended that had the plaintiffs aggrieved by the order of learned Divisional Bench of Baluchistan High Quetta, they would have challenged the said order before the

Honourable Supreme Court, however, by not filing any appeal the said order has attained finality and as such the same subject matter cannot be raised again by way of indirect resort through instant proceedings, which is tantamount to challenging the short order date 28.10.2021, passed by the Baluchistan High Court in the Appeal and judgment dated 24.12.2021 passed in CP No. 1891 of 2021. Lastly, it is contended that the plaintiffs have neither prima facie case nor the balance of convenience or inconvenience lies in their favour, on the contrary, the balance of inconvenience lies in favour of the defendants and unless their applications are allowed and the application of the Plaintiffs is dismissed, the defendants shall be seriously prejudiced and shall be suffered irreparable loss and injury. Learned counsel in support of his contentions has relied upon the cases of *Muhammad Ashraf and others v. Union Bank of Middle East Ltd. and another* [1991 MLD 2037] *Zulfikar Ali Bhutto v. The Federation of Pakistan through Secretary Ministry of Interior , Government of Pakistan, Islamabad and 4 others* [PLD 1980 Karachi 113], *Gohar Aman Khan v. Malik Aman and 3 others* [1989 CLC 2032], *Gulzar Firoz v. Director General of Trade Organizations and other* [2021 CLD 778], *Muhammad Yaqoob v. Mst. Sardaran Bibi and others* [PLD 2020 SC 338], *Muhammad Wali Khan and another v. Gul Sarwar Khan and another* [PLD 2020 SC 965], *Abrar Ahmed and another v. Irshad Ahmed* [PLD 2014 SC 331], *Abdul Haque and others v. Shaukat Ali Khan and 2 others* [2003 SCMR 74], *Sardar Muhammad Naseem Khan v. Returning Officer PP-12 and others* [2015 SCMR 1698], *Muhammad Iqbal v. Mehboob Alam* [2015 SCMR 21], *Hyder Ali Bhimji v. Vith Additional District Judge Karachi (South) and another* [2012 SCMR 254], *Mir Akbar v. Sher Bahadur and others* [2006 SCMR 315], *Ms. Saba Gul v. Government of Pakistan through Secretary Commerce and 3 others* [2020 CLD 251], *Mian Nasser Hayat Maggo through attorney v. Federation of Pakistan through Secretary Ministry of Commerce and others* [2019 CLD 267], *Gulistan Textile Mills Ltd. v. Askari Bank Ltd. and others* [PLD 2013 Lahore 716], and *Muhammad Tariq and others v. Mst. Shamsa Tanveer and others* [PLD 2011 SC 151].

5. Learned counsel appearing for FPCCI in his arguments while referring to the various provisions of Trade Organization Act 2013 and Trade Organization Rules 2013 has contended that the suit as framed is not maintainable since it discloses no cause of action and also barred by law under Section 30 of Trade Organization Act, 2013. He has further contended that the plaintiffs through instant suit, in a way, have challenged the short order date 28.10.2021 passed by the Baluchistan High Court in Appeals filed by the defendants trade bodies as well as the judgment dated 24.12.2021, passed by the Division Bench in CP No. 1891 of 2021, whereby learned Baluchistan High Court had disallowed the exclusion /deletion of the defendants trade bodies from the voter list of FCCPI Election 2022. The same subject matter cannot be raised by way of indirect resort and further since no appeal was filed against the said judgment passed by Baluchistan High Court, Quetta, it has attained finality for all intents and purposes. It is contended that the case put forth by the plaintiffs is that complaint was filed before the Regulator, which was decided, vide Order in Original No. 160/2021 dated 28.12.2021, since it was complaint, the remedy available to the plaintiff No.2 was by way of filing an appeal under Section 21 of Trade Organization Act 2013. Learned counsel while referring to the provisions of TOA and TOR 2013 has contended that every order passed by the Regulator is appealable to the Federal Government /Secretary Ministry of Commerce who have powers of interim relief and suspension of operation of the orders appealed against and as such the remedy is adequate. Learned counsel further contended that any person who is aggrieved of any entry in the provisional list or the final voter list can file an appeal to the Secretary General, then to the Election Commission and thereafter to the Regulator. It is also contended that pendency of the suit by assuming jurisdiction, which is essentially vested in the Federal Government to hear appeals against the order passed by DGTO and grant of an interim order restraining the elected office bearers from assuming the office is in violation of various mandatory provisions of the Statue. Learned counsel further contended that FPCCI is Apex Trade Body of the Country and represents trade bodies i.e. chambers and associations from all over Pakistan and is playing a pivotal role

in safeguarding their interests. Since the FPCCI Election 2022 has been held and as such the office bearers are to undertake various functions and to liaison with the government in the matter of preparation of trade policies and budget etc., however, due to ad-interim orders newly elected office bearers could not perform their duties and obligations, which is causing serious hardship not only to the members of FPCCI but also to the business community at large. It is further contended that the plaintiffs do not have any prima facie case and no interim relief can be granted in violation of the provisions of the Statue. It is further contended that no interim relief /injunction can be granted to restrain an elected person from assuming the office. Learned counsel further contended that the Courts have went to the extent of saying that even if a plaintiff has good prima facie case even then no interim relief can be granted as it would be tantamount to depriving the elected persons from representing his electoral college and the question of irreparable loss would lean in favour of the elected person in such a case. Learned counsel in support of his arguments has relied upon the cases of *Muhammad Javaid Iqbal v. The Government of Pakistan* [1974 SCMR 481], *Reverend Eric Sarfraz through his General Attorney Solomen v. The Rev. Smart K. Dass and 9 others* [2000 CLC 800], *Syed Masroor Ahsan v. Muhammad Tariq Chaudhary and others* [1991 SCMR 668], *Kunwar Khalid Younus v. Federation of Pakistan and others* [PLD 2002 Karachi 2009] and unreported judgment dated 19.05.2021, passed by this Court in the case of *Mian Nasser Hyatt Maggo v. Federation of Pakistan and others*.

6. Learned Assistant Attorney General has adopted the arguments of learned counsel representing FPCCI.

7. I have heard the arguments, perused the record and the case law cited at the Bar.

Since, at this stage, the interlocutory applications are to be decided as such, only those facts, which are not disputed would be considered. From the record, it appears, inter alia, that the defendants trade bodies against the cancellation of their trade licenses had preferred civil appeals bearing No. 16 of 2020 and others before the learned Baluchistan High Court, Quetta, and at the

time of admission of the said civil appeals, the orders impugned in the said appeals were suspended and pursuant thereto the names of the trade bodies were included in the voter list of the FPCCI election 2021. Against the said inclusion in the voter list, one Jamal Uddin and another preferred constitutional petitions bearing Nos. 1480 to 1489 of 2020 before the High Court of Baluchistan, Quetta. During pendency of the said constitutional petition on 29.12.2020, learned Divisional Bench of Baluchistan High Court, restrained defendants from casting their votes in the FPCCI Election 2021. For the sake of ready reference, relevant portions of the said order are reproduced as under:-

“7. The admission/interim orders passed by SB of this Court in the appeals of the above Trade Organizations cannot be made a basis to include their names in the voters list of the forthcoming Election of FPCCI 2021 by the Election Commission FPCCI.

8. For the above reasons, the application is accepted. The names of the following nine Trade Organization stand excluded from the voters list of the forthcoming FPCCI Election 2021 and they are restrained from casting their votes in the forthcoming FPCCI Election 2021 to be held on 30th December, 2020.”

On 06.04. 2021, after the FPCCI Election-2021, the above said petitions were withdrawn under the instruction of the petitioners. Thereafter, on 28.10.2021 Baluchistan High Court, vide short order, allowed the Civil Appeals bearing No. 16 of 2020 and others as prayed. Upon restoration of the trade licenses of the defendants trade bodies by virtue of the order passed in the Civil Appeals, the names of the defendants trade bodies were included in the voter list of FPCCI Election-2022, issued on 06.12.2021. Against the said inclusion Plaintiff No.2, on 21.12.2021 filed a complaint before the Election Commission FPCCI and Secretary General, which was disposed of on 28.12.2021. In the meantime, once again Jamal ud Din and Daroo Khan challenged the inclusion of defendants trade bodies in the voter list of FPCCI Election-2022 by filing Constitutional Petition No. 1891 of 2021 before the Baluchistan High Court, Quetta, with the following prayers:

- “i. Direct the respondents No. 1 to 5 to ensure free, fair and transparent election of Office Bearers of FPCCI for the year 2022.
- ii. Direct the Respondents No. 4 to 5 to delete/exclude the illegal trade organizations/trade bodies (respondent No.6 to

15) whose licenses have been cancelled by the competent authority i.e., respondent No.2 from the Voter list of FPCCI election 2022.

- iii. Direct respondents No.1 to 5 to act in accordance with law and to ensure strict compliance of Trade Organization Act and Rules framed thereunder in the forthcoming election of FPCCI for the year 2022 and they be directed to curb malpractices and ensure that no illegal trade organization without fulfilling the requirements of TOA, 2013 and Rules framed thereunder could cast its vote in the forthcoming elections.
- iv. Any other relief which this Hon'ble Court fit and appropriate may also be awarded, in the interest of justice."

[emphases supplied]

Learned Baluchistan High Court on 24.12.2021, after hearing learned counsel for the parties disposed of the aforesaid petition. Relevant portions of the order for ease of reference are reproduced as under:

"13. During FPCCI Election 2021, the appeals of respondent Nos. 6 to 15 for restoration of their trade licenses were pending before SB of this Court due to which they were restrained from casting vote in FPCCI Election 2021 but presently, the appeals of the respondent Nos. 6 to 15 have been accepted by SB of this Court vide separate short orders dated 28.10.2021 and as such the insertion of the names of respondent Nos. 6 to 15 in the final voter list of FPCCI Election 2022 cannot be termed as illegal and respondent Nos. 6 to 15 cannot be restrained from casting vote/participating in FPCCI Election 2022.

14. In view of the above circumstances, the relief claimed for by the petitioners in prayer clause (ii) of the instant constitution petition cannot be granted.

For the above reasons, to the extent of prayer clause (ii), the constitution petition is dismissed with directions to respondents Nos. 1 to 5 to ensure free, fair and transparent election of FPCCI for the 2022."

There is nothing available on the record, which could show that the above order passed by learned Baluchistan High Court was appealed against.

From perusal of the above order, it appears that the issue, relating to the inclusion of the defendants trade bodies in the voter list of FPCCI Election-2022, majority whereof relating to Baluchistan Province, has been decided by the learned Division Bench of Baluchistan High Court. The plea of learned counsel for the plaintiffs is that the order passed by Division Bench of Baluchistan High Court is per incuriam as such the same is not binding at all and this Court can entertain and adjudicate upon the

said issue separately. In my view, to declare, a decision *per incuriam* is the duty and obligation of the apex court to rectify it. Reliance can be placed in the case of *Sindh High Court Bar Association v. Federation of Pakistan* (PLD SC 2009 879) wherein while dilating upon the definition of *per incuriam*, inter alia, the Hon'ble Supreme Court held that---"*once the Court has come to the conclusion that the judgment was delivered per-incuriam then the Court is not bound to follow such decision on the well-known principle that the judgment itself is without jurisdiction and per-incuriam, therefore, it deserves to be overruled at the earliest opportunity. In such a situation, it is the duty and obligation of the apex Court to rectify it*".

8. Insofar as the question whether the decision rendered by the High Court of another province is binding or not, it may be observed that it is well settled that the decision of one High Court is not binding precedent upon another High Court, however, it can have a persuasive value.

From the facts and circumstances enumerated above, apparently it transpires that the appeals preferred by the defendants trade bodies against the cancellation of their trade licenses have been allowed by the Court having competent jurisdiction and thereafter their names were included in the voter list and subsequently, said inclusion was also endorsed by a learned Divisional Bench of Baluchistan High Court. Thereafter, the Election-2022 has also been held as per schedule, however, the elected persons have not yet assumed the office as the official result of the FPCCI Election-2022 has been withheld owing to ad-interim orders passed in the case.

The order dated 28.12.2021, passed by DGTO, impugned in the present proceedings, appears to have been passed on the basis of the orders of the Court as such, at this stage, nothing adverse can be drawn against defendant No.2 for passing the above order. For ease of reference, relevant portions of the order dated 28.12.2021 are reproduced as under:-

- “(i) The Secretary General and Election Commission, FPCCI are once again directed to comply any and all latest directions of the Honorable High Court on the subject matter.
- (ii) The matter stands disposed of accordingly.”

9. As, prima facie, it appears that the names of the defendants' trade bodies have been included in the voter list of FPCCI Election-2022 in pursuance of the orders of the Court, as such the impugned order, unless declared illegal in the present proceedings, coupled with the above discussion and in the attending circumstances, is not liable to be suspended. Moreover, for granting temporary injunction under Order XXXIX, Rules 1 and 2, C.P.C. the plaintiffs are also required to establish that irreparable loss would be caused to them and they would suffer greater inconvenience than the inconvenience likely to be suffered by defendants if injunction is not granted. In the instant case, the tenure of election of the Office bearers of FPCCI is one year from 1st January till 31st December and the Election-2022 has been held as per its schedule, however, due to none announcement of the election results, the elected persons are being deprived from representing their electoral college, as such, the ingredients of balance of convenience and irreparable loss also leans in favour of defendants, because their rights and interests arising out of the FPCCI Election-2022, are seriously affected, resulting in causing inconvenience to them and they would sustain losses.

10. In view of the above discussion, the ad-interim order dated 29.12.2021, passed in the present matter, is vacated/recalled. CMA No. 22829/2021, under Order XXXIX Rules 1 & 2, filed by the plaintiffs is dismissed and CMA No.705/2022, under Order XXXIX Rule 4 R/w Section 151 CPC and CMA No.1683/2022, under Section 94 R/w Section 151, CPC, filed by Defendant No.19 are disposed of accordingly.

It is clarified that the observations made in this order are tentative in nature and may not influence the final determination of the case.

Karachi;
Dated:18 .03.2022.

JUDGE