

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
CP. No. D-3585 of 2022

Date Order with Signature(s) of Judge(s)

Priority

- 1.For orders on office objection
- 2.For hearing of CMA No.15796/2022 (Stay)
- 3.For hearing of CMA No.15797/2022 (151)
- 4.For hearing of main case

12.01.2023

Mr. M. Tariq Mansoor, advocate for the petitioners alongwith M/S Naeem Siddiqui, Ahmed Zameer, Irshad Ali and Saeed Akhter, advocates.
Mr. Hassan Akbar, Advocate General Sindh
Mr. Yasir Ahmed Shah, Assistant Attorney General
Mr. Abdullah Hanjrah, Senior Law Officer and Mr. Sarmad Sarwar, Law Officer, Election Commission of Pakistan.
Dr.Liaquat Ali Abro, Consultant Law to Chief Secretary, Government of Sindh.

ORDER

Mr. M. Tariq Mansoor learned counsel for the petitioners has shown urgency in the matter and prayed for suspension of impugned notifications dated 13.4.2022, 29.4.2022, and 11.05.2022 issued by respondent No.3, on the ground that the impugned notifications are arbitrary, unconstitutional and are ultra vires to Articles 218, 2019, 140A,137,32 of the Constitution of the Islamic Republic of Pakistan, 1973 and other enabling provisions of the Election Act, 2017, Sindh Local Government Act, 2013 as amended up to date, Sindh Local Government Council Election Rules, 2015 as well as against the dicta laid down by the Hon'ble Supreme Court of Pakistan in its various pronouncements.

2. It is inter-alia contended that by virtue of section 34(2) of the Sindh Local Government Act, 2013 read with Rules 3 and 4 of the Sindh Local Councils (Election) Rules, 2015 and Section 219(1) of the Election Act, 2017, the Government of Sindh is a competent authority within the territorial jurisdiction of the Province of Sindh to announce the date or dates after consultation with the Election Commission of Pakistan, to announce election Schedule and respondent No.3, is not authorized to act all alone and if do so, it would tantamount to an act in excess of jurisdiction and arbitrarily exercise and abuse of powers, hence the same is null and void as such the impugned Notifications are without lawful authority. He emphasized that the Election Commission of Pakistan (ECP) is empowered to conduct Local bodies elections subject to the Local Government

Laws, and rules framed there under; therefore, the impugned Notifications dated 13.04.2022, 29.04.2022 and 11.05.2022 respectively are without any lawful authority and in excess of jurisdiction by way of arbitrary and capricious exercise of powers. Learned counsel for the petitioners placed reliance in the case of Syed Qaim Ali Shah through Attorney v. Election Commission of Pakistan through Secretary and 03 others, **PLD 2015 Sindh 408**, and argued that after the 18th amendment in the Constitution, the powers of the election commissioner vests in the election commission, therefore three-member commission at the relevant point in time was not empowered to take decision all alone as only full commission is authorized to order for issuance of the impugned notifications. He emphasized that local government elections after the 18th Constitutional Amendment were/are to be organized under Article 219(b) of the Constitution of the Islamic Republic of Pakistan 1973 by the Election Commission. According to Article 218(2) of the Constitution, the Election Commission shall consist of (a) Commissioner who shall be the Chairman of the Commission, and (b) four Members, each of whom has been a Judge of a High Court from each Province; that the above election was /is not organized by the Full Commission. He further stated that since the Commission had not so far been constituted properly and there were only two members one from Sindh and one from Baluchistan besides the Chief Election Commissioner, the notifications issued by such forum are coram non iudice, as such the subject local Government election (Phase-1 and Phase II) were/are not held by the full Commission. He next argued that participation in elections is a constitutional right, and determination of the jurisdiction is one of the important elements, if election is conducted on Coram non-judice orders, it would have no legal sanction behind it. He further submitted that errors in understanding the law, in applying it, or in laying down the law are to be corrected in the constitutional jurisdiction otherwise it will result in subverting the rule of law. He asserted by narrating that nobody is above the Constitution and cannot act in violation of the Constitution and rule of law. He lastly prayed for setting aside the impugned notifications. Learned counsel also relied upon the order dated 26.10.2020 passed by the Hon'ble Supreme Court of Pakistan in Constitution Petition No.24 of 2017 and submitted that the aforesaid decision is to be implemented in its letter and spirit.

3. We have heard the learned counsel for the parties on the listed application bearing (CMA No.15796/2022) and perused the record with their assistance.

4. The main thrust of the contentions of the petitioners is that at the time of issuance of the impugned notifications the Election Commission of Pakistan was

not properly constituted, in terms of Article 218 of the constitution thus the impugned notifications are a nullity in the eyes of law.

5. The Election Commission of Pakistan (ECP) is the constitutional body responsible for organizing and conducting elections in Pakistan. The ECP enjoys administrative and financial autonomy and all state institutions are required to support it in the discharge of its functions.

6. ECP is neutral and independent as it consists of the Commissioner, who is or has been a judge of the Supreme Court of Pakistan or has been a Judge of the High Court, and four members each of whom has been a judge of the High Court from each Province. Collective reading of Articles 140A, 218, 219, 220, 221, and 222 of the Constitution brings out importance of the constitutional role of ECP. Article 140A(2) provides that elections to the local government shall be "held" by the Election Commission of Pakistan. Article 219(d) provides that ECP shall be charged with the duty of "holding" elections for the local governments. Article 220 provides that it shall be the duty of all executive authorities in the Federation and the Province to assist the Commissioner and the Election Commission in the discharge of his or their functions. Article 222 provides for the nature and scope of electoral laws. Holding of elections under Article 140A (2) mandates ECP to perform its constitutional obligation under Article 218(3) of the Constitution. Holding, therefore, means organizing, conducting, and making arrangements for elections and spans the entire electoral process. By the 22nd Amendment (2016) para (b) of clause (2) of Article 218 was substituted again, to take the shape that it holds today.

7. Primarily, the petitioner's main contention is that the Elections of the Local Government in Karachi and Hyderabad be stopped on the premise that the Election Commission of Pakistan was/is not properly constituted at the time of issuing notifications announcing schedules of elections, is on the face of it contrary to the dicta laid down by the Hon'ble Supreme Court in various judgments.

8. Section 3(2) of the Election Act provides the Commission may exercise its powers and perform its functions even if the office of any member of the Commission is vacant or any of the members is, for any reason, unable to attend the proceedings of the Commission, and the decision of the majority of the members shall have the effect of the decision of the Commission. Therefore, we are of the tentative view that any effort for seeking a restraining order in respect of

the Elections in question on the aforesaid plea of the petitioners would be in direct violation of the above provisions of law.

9. Further, it may be pointed out that prior to this petition, certain members of MQM Pakistan filed CP Nos.883 and 3823 of 2022 praying for postponement of the Local Government Election on the grounds, inter alia, that direction of the Hon'ble Supreme Court of Pakistan regarding devolution were not complied with and such exercise and delimitation and updating electoral rolls had to be completed first. These petitions were dismissed vide order dated 24.06.2022 and in the same judgment passed by a Division Bench of this Court a reference to a judgment of the Hon'ble Supreme Court of Pakistan reported as PLD 2022 SC 439 has also been made and certain excerpts therefrom have been also reproduced. Subsequently, in CP Nos.D-4954 and 5041 of 2022 already filed by, among others, Pakistan Tehreek-e-Insaf and others and Monem Zafar Khan and others, MQM Pakistan filed an application under Order 1 Rule 10(2) CPC with a prayer mainly centered around a challenge to the same impugned notifications. It may be pointed out that said petition was decided by a Division Bench of this Court vide order dated 14.11.2022 giving directions to the Election Commission of Pakistan to notify the polling date preferably within a period of 15 days and in any case conclude overall exercise of elections within a total period of 60 days, and, in effect, dismissed application of the petitioner for becoming party in the said petition. Notwithstanding, when confronted with these hard facts, learned counsel for the petitioners pleaded that in none of the petition decided earlier the question regarding quorum of Election Commission was raised and therefore, the decisions in earlier petitions shall not have any adverse effect over the present petition. We, however, are not persuaded by said argument for the reason that this very question has already been settled by the Hon'ble Supreme Court of Pakistan in the case of Sardar sher Bahadar Khan and others v. Election Commission of Pakistan through Secretary, Election Commission, Islamabad and others, (PLD 2018 SC 97, paragraphs 11 and 12). It is held that as per section 8(2) of the Election Commission Order, 2002 (now Section 3(2) of the Election Commission Act,2017) there is no bar or prohibition that a matter cannot be heard by a lesser number of Members of ECP, if the Chairman/Member(s) either recuses himself from participation or is otherwise on leave. It has further been enunciated that it is desirable to consider the constitutional and legal provisions which deal with the constitution and functioning of the ECP. In this regard, Article 218(2) of the Constitution is relevant which provides, inter alia, that the Election Commission of Pakistan shall consist of the Commissioner, who shall be the Chairman of the

Commission, and four members, each of whom has been a Judge of a High Court from each province. Though Article 219 of the Constitution prescribes the duties of the ECP and Article 220 of the Constitution mandates the executive authorities to assist the ECP in the discharge of its functions; however, mode and procedure to be adopted by the ECP has not been elaborated in the Constitution, which has been prescribed in the Order, 2002. In this regard, section 8 of the Order, 2002 is relevant, subsection (1) whereof provides that all decisions of the ECP shall be expressed in terms of the opinion of the majority of its members, including the Chairman, and subsection (2) thereof provides that no election conducted, or other action taken or thing done, by the ECP shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof. From the perusal of the above provisions, it is clear that the ECP is comprised of five members but at nowhere it has been provided that any decision of the ECP shall be taken by all of its five members. Contrary to it, in section 8(2) of the Order, 2002 any order passed by the ECP by lesser members of its total strength has been protected by specifically providing that no action taken or thing done by the ECP shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof.

10. It may also be noted that the prayer clauses No.1, 4 & 5 have already been decided by this Court vide common Judgment dated 24.06.2022 passed in CP No.D-2718 of 2022 and CP No.D-883 of 2022, an excerpt whereof is reproduced as under:

“13. In view of hereinabove facts and circumstances of the case, in our considered view no case of indulgence was made out, and therefore, after hearing the arguments of all learned Counsel for the Petitioners, learned AAG and the Respondents Counsel we had dismissed both these Petitions by means of a short order on 24.06.2022 and these are the reasons thereof.”

11. We have been informed that the aforesaid Judgment dated 24.06.2022 passed by this Court was assailed before the Honorable Supreme Court of Pakistan by the petitioners in C.P.841-K/2022 (re-Khalid Maqbool Siddiqui & others v. Government of Sindh through Chief Secretary & others) which was turned down vide **Order dated 17.08.2022**.

12. In view of the above discussion, we are of the view that the learned counsel for the petitioner has not been able to *prima facie* point out any inherent illegality, error, flaw, or defect in the impugned notifications issued by the Election Commission of Pakistan that may require interference at the interlocutory stage,

therefore no restraining order is required to be issued on the listed application at this stage, CMA No.15796/2022 being misconceived is hereby dismissed.

13. The matter is adjourned to be fixed by the office next month.

JUDGE

JUDGE