

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE MUSHIR ALAM
MR. JUSTICE FAISAL ARAB
MR. JUSTICE SAJJAD ALI SHAH

CIVIL PETITION NOS. 731-K & 732-K OF 2018

(On appeal against the judgment dated 11.6.2018 passed by the High Court of Sindh, 44 Circuit Court, Hyderabad in CPs No.D-644 & 1093 of 2018)

Muhammad Umar Panhwar, etc.

(In both cases)
... Petitioners

VERSUS

Province of Sindh and others

(In both cases)
... Respondents

For the Petitioners: Mr. Farooq H. Naek Sr. ASC
(in both cases)

For Respondent No.5: Mr. Khalid Javed ASC,
Mr. Ghulam Rasool Mangi, AOR

For Province of Sindh: Mr. Sibtain Mehmood, AAG a/w
Najab Bhatti, Advocate.

For ECP: Mr. Khalid Haider Shah, Secy. Local Govt.
Abdullah, Law Officer.

Date of Hearing: 07.09.2018

JUDGMENT

MUSHIR ALAM, J.- Present Petitioner-Muhammad Umar Panhwar, Member of Municipal Committee, Dadu has impugned common order dated 11.6.2018 passed by learned High Court of Sindh, Circuit Court, Hyderabad in CPs No.D-644 and 1093 of 2018 whereby through Notification dated 7.3.2018 earlier Notification recalling dated 5.3.2018 entrusting function of Chairman M.C. Dadu to Ahmed Nawaz Solangi vice Chairman (Respondent No.5 herein) was kept in abeyance and Notification through another dated 12.4.2018 assigned the functions of the Chairman, Municipal Committee, Dadu to respondent No.5 Muhammad Umar Panhwar were set aside and directed that Ahmad Nawaz, Vice Chairman is entitled to perform function and discharge the power of the Chairman, Municipal Committee in terms of sub-section (2) section 80 of the Sindh Local Government Act, 2013.

2. Brief facts in nutshell appear to be that Gul Hassan Qambrani, one of the Members of the Municipal Committee, Dadu was elected as a Chairman Municipal Committee, Dadu unfortunately Mr. Qambrani passed away on 7.2.2017. It appears to be that pursuant to the Notification dated 5.3.2018 in purported exercise of power under sub-section (2) of section 80 of the Act, 2013 functions were assigned to the Vice Chairman of the Municipal Committee, Dadu till election to the seat of the Chairman of the Municipal Committee. It seems that in a quick succession after two days on 7.3.2018 another Notification was issued by the Secretary to the Government of Sindh while the Notification noted above was ordered to be kept in abeyance.

3. Again on 12.4.2018 with the approval of the competent Authority, the Chief Minister, Sindh assigned the function of the Chairman Municipal Committee, Dadu to Muhammad Usman Kanwar till the election of the Chairman, who it was claimed has assumed charge forcibly from the Vice Chairman appointed earlier.

4. Mr. Khalid Javed, learned counsel appearing for the respondent No.5 heavily relying on sub-section (2) of section 80 of the Act, 2013 urged that the petitioner who is the Vice Chairman is mandated to exercise of powers and functions of the Mayor or as the case may be the Chairman of the Municipal Committee for the ease of convenience sub-section (2) of section 80 of the Act, 2013 is reproduced as follows:

"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."

5. It was further urged that since the vacancy in the office has occurred which is to be filled in by election to be held by the Election Commission for Pakistan as provided under section 24 of the Act, 2013. Section 24 reads as follows:

"Casual vacancy.- (1) *If the office of a Mayor, Deputy Mayor, Chairman or a Vice Chairman or member of the Council, other than the office of Chairman or Vice Chairman or member of a Union Council or Union Committee, for any reason, falls vacant during the terms of office of a Council, the new Mayor, Deputy Mayor, Chairman or Vice Chairman or the member shall be elected or nominated, as the case may be in the prescribed manner within thirty days from the date when such vacancy is notified and he or she shall, subject to this Act, hold office for the remaining term of the Council.*

(2) *If the office of a Chairman of a Union Council or Union Committee or its members or member of ward for any reason, falls vacant during the term of office of the Council, the new Chairman or Vice Chairman of the Union Council or its member or a member of a ward shall be elected in the prescribed manner within sixty days from the date such vacancy is notified and he or she shall, subject to this Act, hold office for the remaining term of the Council.*

(3) *If the vacancy in the office of a member of a Council occurs within six months of the expiry of the term of a Council, the vacancy shall not be filled."*

6. Mr. Farooq H. Nack, learned Sr. ASC appearing for the petitioners and representative of Election Commission for Pakistan are in attendance were inquired as to why the election of the vote to which the Chairman belongs to has not been held yet and the vacancy of the

Chairman has not been filled up. It was stated that though the Secretary Local Government, Sindh had intimated about the demise of the Chairman but on account of over engagement in the election of National and provincial assembly, this matter escaped the attention. We thought the explanation offered is not satisfactory, yet instead of entering into such controversy as to the cause of delay.

7. We have heard the learned counsel for the parties as well as AAG, Sindh with their able assistance and perused the record.

8. Mr. Farooq H. Naek, learned Sr. ASC for the petitioners contends that section 24 of the Act, 2013 does not cater to the eventuality that is occurred in the instant case, according to him it is not a causal vacancy as the title section shows it is in fact absence of the office of the Chairman, Municipal Committee on account of death of the Chairman. He however, concedes that the vacancy that has occurred on account of a death of the Chairman in any case is to be filled up by-election.

9. Mr. Khalid Javed, learned ASC for the respondent No.5 contended that the vacancy of the Chairman cannot be filled up unless the election to the vote to which the Chairman himself belongs is held and filled up, only then the quorum to elect the Chairman, Municipal Committee would be available, therefore, according to him first the election of the vote is to be held, followed by the election of the Chairman which argument was controverted by Mr. Farooq H. Naek, learned Sr. ASC.

10. Mr. Farooq H. Naek, learned Sr. ASC has drawn our attention to Article-67 of the Constitution which postulates that, notwithstanding any vacancy in National or Provincial Assembly, the proceedings continue and cannot be called in question and so also similar provision

is contained in section 83 (9) of the Sindh Local Government Act, 2013 to urge that no proceeding of a counsel shall be invalid by reasons only of the existence of any vacancy in or defect in the Constitution of the counsel. Similar provision is contained in section 130 of the Election Act, 2017. He has also relied upon the case of **Al. Jihad Trust and another versus Federation of Pakistan and others (PLD 2011 Supreme Court 811).**

11. Having heard the arguments and perused the record. It may be observed that the power of a Chairman can in his absence from Pakistan or for any other cause that preclude him to exercise his powers of functions in such eventuality the Deputy Mayor or as the case may be Vice Chairman could exercise such powers. Such powers as delegated under mandate of the provision of sub-section (2) of section 80 of the Act, 2013 reproduced above is by operation of law for which no Notification is required to be issued by the Government. However, that is elapsed in the Act, 2013 which does not cater for a situation when a vacancy has fallen vacant on account of a demise of the Mayor, Chairman or a Vice Chairman or Member of the Union Council or Union Committee. Law only mandates if such office has fallen vacant in terms of section 24 of the Act, 2013, the new Mayor, Deputy Mayor, Chairman or a Vice Chairman, or member of the Union Council shall be elected or nominated, as the case may be in the prescribed manner within thirty days when such vacancy is notified.

12. Learned AAG, Sindh and so also Mr. Farooq H. Naek, learned Sr. ASC for the petitioners candidly conceded that no manner is provided for nomination in case of a vacancy resulting out of the demise persons noted above. Resort to sub-section (2) of section 80 of the Act, 2013, under the circumstances of the case, cannot be taken. Only possibility open to court here is to direct the Election Commissioner for Pakistan to hold free and fair election to the office of the Chairman and

at the same time to take measures to hold the election to the seat of Chairman Municipal Committee, Dadu, that has fallen vacant within thirty days for which process has already commenced by Mr. Justice (R) Sardar Muhammad Raza Khan, the Chief Election Commissioner for Pakistan, District Returning Officer, Returning Officer and Assistant Returning Officer have already been appointed on 6th September, 2018 as per a letter placed on record. Secretary Local Government in attendance assures that in the meantime, the Election Commissioner may nominate any Member of the Municipal Committee to conduct day-to-day affairs till the election of the Chairman, Municipal Committee, Dadu.

13. Thus for the foregoing reasons, both these petitions are converted into appeal and allowed in the terms noted above.

JUDGE

JUDGE

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Karachi, the
7th of September, 2018
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Approved For Reporting