

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE TASSADUQ HUSSAIN JILLANI, HCJ
MR. JUSTICE KHILJI ARIF HUSSAIN
MR. JUSTICE SH. AZMAT SAEED

CIVIL APPEAL NO. 297 OF 2014

(On appeal from the judgments dated 3.2.2014
passed by the Lahore High Court, Lahore in WP
No. 31986/2013 etc)

Election Commission of Pakistan through its Secretary
... Appellant

VERSUS

Province of Punjab through its Chief Secretary and others
... Respondents

For the Appellant: Mr. Muhammad Akram Sh, Sr. ASC
assisted by Mr. Moazzam Habib, Advocate
Mr. Faraz Raza, Advocate and Mr.
Mehmood A. Sheikh, AOR
Mr. Sher Afghan, D.G, ECP
Mr. Abdur Rehman, Law Officer

For the Respondents: Mr. Mustafa Ramday, Advocate General
Ch. Muhammad Hanif Khattana, Addl. AG
Punjab
Mr. Razzaq A Mirza, Addl. AG Punjab
Barrister Waseem Qureshi, Addl. A.G.
Mr. Muhammad Azhar Siddique, ASC
Mr. Muhammad Saleem, Asstt. Director,
Local Government Bhakkar
Mr. Haq Nawaz, in person
Mr. Muhammad Khan, Narowal, in person
Mr. Muhammad Fakhar-uz-Zaman, in
person
Mr. Muhammad Sarwar, in person

On Court Call: Mr. Salman Aslam Butt, Attorney General
Mr. S.M. Attique Shah, Addl. Attorney
General
Mr. Sajid Ilyas Bhatti, Deputy Attorney
General

Dates of Hearing: 17 to 21st February 2014 & 3,4,12,13 &
19th March, 2014

JUDGMENT

Tassaduq Hussain Jillani, CJ.-----Through this appeal, by leave of the Court, the Election Commission of Pakistan has challenged a judgment of the Full Bench of the Lahore High Court dated 3.2.2014 whereby the learned High Court allowed constitution petition (bearing No. 31986 of 2013) filed by the respondents and held and declared as under:-

63. For the above reasons we, inter alia, unanimously hold as under:-

- i. The Ouster Clause under Section 10A of the Punjab Local Government Act, 2013 cannot impose fetters on the Constitutional jurisdiction of this Court or the Constitutional role of Election Commission of Pakistan and is therefore, read down, to this extent.*
- ii. The administrative branch of this Court cannot be directed through a judicial order not to entertain and fix cases of any particular nature without providing the litigant the right to access to justice and the right to place the case before a forum exercising judicial power.*
- iii. The view taken by the learned Single Bench in W.P. No. 15033/2013 and by the learned Division Benches in ICA Nos. 346/2013 and 1029/2013 of this Court on the ouster clause under Section 10A of the Act is against Articles 4, 9 and 10A of the Constitution and shall not be treated as a precedent.*
- iv. Sections 8 to 10 of the Punjab Local Government Act, 2013 and Rules 3 to 8 of the Punjab Local Governments (Delimitation) Rules, 2013 are inconsistent with Article 218(3) read with Article 222(b) of the Constitution as they abridge and take away the Constitutional role and obligation of ECP besides offending Articles 3, 4, 9, 14, 17, 19 and 25 of the Constitution. As a consequence the aforesaid provisions of the Act are declared to be unconstitutional and, therefore, struck down.*

- v. For the reasons given in this judgment, all these petitions are allowed and the impugned orders of Delimitation Authority and the impugned final Notifications issued by the Delimitation Officers are set aside.

Direction to ECP

64. It is now settled that ECP being a Constitutional body has powers under the Constitution to issue directions in order to hold fair elections (see: Sheikh Rashid Ahmed V. Government of Punjab and others (PLD 2010 SC 573). This power is not dependent on a sub-constitutional legislation. The Constitutional dictate is that Election Commission of Pakistan shall hold elections to the local governments.

We, therefore, direct ECP to perform its Constitutional role without further ado and hold elections to the local governments in Punjab forthwith. ECP need not to await for the legislative amendments to the act in the light of this judgment.

65. It is an admitted position that the existing National Census in the country was last held in the year 1998 and since then an inchoate exercise was held in the year 2008 but the Census was not completed. On the other hand electoral rolls for the local government elections, prepared in the year 2013 are based on the census blocks of the incomplete Census of the year 2008. Population is a fundamental parameter for carrying out fair and equitable delimitation of the constituencies. This is a serious challenge for ECP. We are confident that ECP, will steer through it with success, ensuring that the elections to the local governments are organized and conducted honestly, justly, fairly and in accordance with law.

66. *Direction to the Provincial Government.*

The Provincial Government under Article 140A of the Constitution shall take necessary steps for carrying out amendments in the Punjab Local Government Act, 2013 in the light of the Constitutional role and obligations of ECP provided under Part VII of the Constitution, as laid down in this judgment, as soon as possible, so that democracy in the country is further strengthened."

2. The Government of Punjab has not challenged the impugned judgment and the learned Advocate General, Punjab candidly submitted that he had instructions to state that the Government would comply with the impugned judgment subject to what this court decides. Only Election Commission of Pakistan has challenged the impugned judgment.

3. Learned counsel for the appellant Mr. Muhammad Akram Sheikh, Sr. ASC while impugning the judgment of the Lahore High Court submitted that right to franchise is a fundamental right because the Constitution of Islamic Republic of Pakistan in its very Preamble mandates that the sovereignty over the entire universe belongs to ALLAH alone but it is to be exercised by the people of Pakistan and *"the State shall exercise its powers and authority through the chosen representatives of the people"*; that the representatives can be chosen through elections, therefore, the right to vote in an election to chose / represent is a fundamental right. Even otherwise, he added that Article 17 & 19 of the Constitution confers freedom of speech (Article 19) and freedom of association (Article 17(1) and the expression of opinion through vote does constitute a right within the meaning of Article 19 of the Constitution; that the Local Government Act in Punjab is flawed because the Election Commission of Pakistan cannot carry out its mandate to hold free and fair elections in terms of Article 140A and 218 of the Constitution. In this regard, he added that three laws have to be brought in conformity with the Constitutional command reflected in Articles 140A, 218(3), 219 and 222; that the Election Commission is a body created under the Constitution to

dispense political justice and ensure that chosen representatives are elected to position of authority; that Article 140A has two dimensions i.e. in terms of Article 140A(1) mandate is given to the Provincial Government to frame laws regarding the local government system whereas sub clause (2) of the said Article mandates that the elections are to be held by the Election Commission. He added that in the absence of appropriate laws the Election Commission of Pakistan cannot carry out its mandate of holding fair elections for the Local Government. He further added that in the face of this flawed legal position, this Court can direct the Government to initiate appropriate legislation. This according to him is in accord with the judgments of this Court reported in Government of Baluchistan Vs. Azizullah Memon (PLD 1993 SC 341 at page 374 para 17), which reads as follows:-

“17. In these circumstances, as Ordinance 11 of 1968 is declared to be void being in conflict with Articles 9, 25, 175 and 203 of the Constitution, the question arises what further relief should be granted as in the absence of Ordinance II of 1968 there should be some valid law to hold the field. It has been admitted that District Judges and Civil Judges are functioning in every district. In cases of violation of fundamental rights the Superior Courts are empowered to issue direction to the Federal Government or the Provincial Governments to bring the law in conformity with fundamental rights and/or enforce law and issue notification, in that regard. The State as defined in Article 7 is bound to discharge its Constitutional obligations. In case of failure even the legislature and executive can be directed to initiate Legislative measures to bring law in conformity with the fundamental rights. In these circumstances while maintaining the impugned judgments, we dismiss the appeals, declare Ordinance 11 of 1968 as void being in conflict with Articles 9, 25, 175 and 203 of the Constitution and direct the appellant—

(i) to issue necessary notification in terms of subsection (2) of section 1 of Ordinance XII of 1972 for enforcing the aforesaid Ordinance by creating posts of and separately appointing Judicial Magistrates and Executive Magistrates and to

place Judicial Magistrates under the administrative control of the High Court within a period of three months;

(ii) to take necessary steps as required by the Constitution to amend and implement laws and rules relating to Courts, judiciary and its officers and lower staff to bring them in conformity with Articles 9, 25 175 and 203 of the Constitution within a period of six months."

He placed on record a handbook on International Electoral Standards.

4. Mr. Azhar Nadeem, learned counsel for the respondent in endorsed the arguments of Mr. Makhdoom Ali Khan and Kh. Haris Ahmed, *Amicus curie* (in Civil Appeal Nos. 38 to 45 of 2014 filed by Government of Sindh). He contended that Sections 8, 9 & 10 of the Punjab Local Government Act are *ultra vires* of the Constitution.

5. We have considered the submissions made and have gone through the impugned judgment as also the judgment of the High Court of Sindh dated 26.12.2013 which we upheld while dismissing Civil Appeal Nos. 38 to 45 of 2014 & Civil Petition Nos. 26-K to 34-K, 163 & 164 of 2014.

6. The upshot of the submissions made by learned counsel for the appellant is that the appellant-Election Commission of Pakistan is prepared to carry out its constitutional mandate to organize and conduct elections of the local government. However, in the absence of appropriate laws it cannot carry out the delimitation of constituencies of local government. Although in the impugned judgment the learned Lahore High Court has unequivocally directed the Election Commission of Pakistan to hold elections, yet the fact remains that it cannot conduct elections honestly, justly and fairly (Article 218(3) if the

delimitation of constituencies is tainted with irregularities and does not inspire confidence. That is why in Civil Appeal Nos. 38 to 45 of 2014, while dismissing the appeals of the Province of Sindh, we had *inter alia* held that delimitation of constituencies is part of the election process and it should be done by the Election Commission of Pakistan. The Government of Sindh and the Federal Government were directed to bring in the requisite legislation to enable the Election Commission in this regard. The Punjab Local Government Ordinance is *pari materia* to the Sindh Local Government Ordinance in several ways including the process of delimitation. In the said case, one of the three issues framed was as follows:-

"whether the process of delimitation of constituencies is part of the election process and in view of Article 140A of the Constitution has to be undertaken by the Election Commission of Pakistan and not by the Government of Sindh?"

7. The Court while dilating on the issue held as under:-

"55. The process of delimitation of constituencies for an election is one of the important steps to organize and conduct elections because it is only with reference to a constituency that a candidate would exercise his right/option to contest and a voter would exercise his right to vote.

56. Although in terms of Article 140A(2) of the Constitution, the Election Commission has been entrusted with the task of holding elections to the local government, but apparently there is no specific corresponding provision in the Constitution regarding laws relating to delimitation of constituencies for the Local Government. Some may argue that this is a constitutional void. However, a close reading of Article 222(b) would indicate that it does not relate to delimitation of constituencies of National and Provincial Assemblies alone rather it is open-ended and construed harmoniously with the other relevant provisions of the Constitution, would include the making of appropriate laws by the

Parliament for delimitation of constituencies for the local governments. Law making with regard to other steps required to conduct elections "honestly, justly, fairly" are already catered for i.e. preparation of electoral rolls (Article 222(c), conduct of elections and election petitions (222(d) and relating to corrupt practices (212(e).

57. The constitutional command that "it shall be the duty of the Election Commission to organize and conduct the election....." (Article 218(3) is rather comprehensive and encompasses all the steps necessary to conduct elections "honestly, justly and fairly". It appears, the Constitution makers were aware of the earlier judgments of this Court whereby it had been held that the election process commences from the issue of notification of election schedule Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396). That is why Article 218(3) has been so worded. But facts in the Javaid Hashmi (Supra) were distinct and the expression "election" has been interpreted in the context of those facts. In the said case, the judgment was delivered with reference to Article 225 of the Constitution and the Representation of the People Act, 1976. The said Article of the Constitution excluded the jurisdiction of all courts in so far as the election disputes were concerned and the jurisdiction instead was conferred on the Tribunal and the appeal lay before the Supreme Court. The Constitutional intent in this Article is not to distract a candidate from the election process and if there is allegation of rigging / complaint, the remedy was provided in the shape of a petition before the Tribunal, after the election is over.

58. We have considered the argument of appellant's learned counsel that the Majlis-e-Shoora can make laws only as mandated under the Constitution and qua the subjects enumerated in Item No. 41 of the Fourth Schedule Part-I of the Constitution, which reads as follows:-

"41. Elections to the office of President, to the National Assembly, the Senate and the Provincial Assemblies; Chief Election Commissioner and Election Commissions."

59. However, the constitutional intent has to be gathered from the body of the Constitution as well. Article 222 provides that "subject to the Constitution, [Majlis-e-Shoora (Parliament) may by law provide for "(a)..... (b) the delimitation of

constituencies by the Election Commission." The delimitation of constituencies is one of the foundational steps towards that end. This has to be interpreted in proper perspective so as to include law making with reference to Article 140A(2) of the Constitution. It is significant to note that Article 222(b) stipulates that an Act of the Federal Legislature shall provide for the delimitation of constituencies by Election Commission of Pakistan and it does not exclude the local government from its ambit.

60. The Constitution of a country is a living organism and a particular provision, a term or word has to be interpreted dynamically and purposively with a view to achieve the Constitutional intent.

61. In Hanrietta Muir Edwards and others Vs. Attorney General for Canada and others (J.C. 1929, 1930 Appeal Cases), the question arose whether the expression 'qualified persons' used in Section 24 of the British North America Act, 1867 would include a woman because it was not gender specific. The Court of Appeal gave a wider meaning to the expression "qualified person" and held that it would include members of both the male and female sex. It observed as follows:-

"A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration, but having regard: (1) To the object of the Act namely, to provide a Constitution for Canada, a responsible and developing State; (2) that the word 'person' is ambiguous, and may include members of either sex; (3) that there are sections in the Act above referred to which show that in some cases the word 'person' must include females; (4) that in some sections the words 'male persons' are expressly used when it is desired to confine the matter in issue to males; and (5) to the provisions of the Interpretation Act; their Lordships have come to the conclusion that the word "persons" in s.24 includes members both of the male and female sex, and that, therefore, the question propounded by the Governor General should be answered in the affirmative, and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly."

62. Since Article 222(b) does not exclude the delimitation of constituencies for local government, and as the body of the Constitution specifies the appropriate legislature which should pass the law, any reference to the provisions of the legislative entries contained in Item 4 of the Fourth Schedule are of no consequence. There are similar provisions in the Constitution qua which there is no corresponding entry in the Federal Legislative List. For example, Article 6 clearly provides that the Majlis-e-Shoora (Parliament) will pass the law for high treason. But there is no corresponding entry in the 4th Schedule prescribing the subject of high treason in the Federal Legislative List. Article 142(c) could not be pressed into service to say that since the 4th Schedule is silent, in terms of Article 142 (c), the Provincial Legislature would legislate in respect of high treason. When the main body of the Constitution provides for the competent legislature it is not necessary to look into the legislative list. Under Article 87(2), the Majlis-e-Shoora (Parliament) may enact law for conditions of service of secretarial staff, whereas in this regard there is no corresponding entry in the Federal Legislative List; that Article 237 empowers the Majlis-e-Shoora (Parliament) to make laws for indemnity; again there is no entry to that effect in the Federal Legislative List; that under Article 253 the Majlis-e-Shoora (Parliament) may make laws pertaining to maximum limits as to property etc; however, there is no corresponding entry in the Federal Legislative List; Article 146(2) states that the Majlis-e-Shoora (Parliament) may enact laws to confer powers on Provinces or their officers, but there is no entry in this regard in the Federal Legislative List; that under proviso to clause (2) of Article 212, the Majlis-e-Shoora (Parliament) may make laws in relation to administrative tribunals, however, there is no corresponding entry in the Federal Legislative List; that even though "electricity" falls under entry 4 of the Part II of the Federal Legislative List, under Article 157(2)(b) the Provincial Government is empowered to levy tax on consumption of electricity within the Province and that entry 58 of the Part I of the Federal Legislative List, clearly provides that the matters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation, would fall under the domain of the Federal Legislature. In the instant case, as explained above, under the relevant Articles of the Constitution, the subject matters of delimitation and conduct of Local

Government Elections fall under the domain of Parliament/Federal Legislature.

63. Fair elections would mean fair representation and delimitation of constituencies is a foundational step towards that end. In State of Madhya Pradesh & others v. Devilal (AIR 1986 SC 434), the Court commenting on the significance of this step held:

“The whole purpose of delimitation of a block into constituencies under sub-s.(1) of s. 106 of the Act is to ensure that every citizen should get a fair representation to the Gram Panchayat and in turn to the Janapada Panchayat and the Zila Panchayat. The result of any election under a majority system depends in fact not only on the way people vote but on the way their votes are distributed among the constituencies.” (Emphasis is supplied).

64. In terms of section 3 of the Sindh Local Government Act, the Provincial Government has been empowered to delimit the constituencies of the Local Government in Sindh. Being one of the fundamental steps to hold fair elections, it has to be carried out by a body which is neutral and credible. That is why the task of delimitation of constituencies for National and Provincial Assemblies has been entrusted to the Election Commission of Pakistan (Delimitation of Constituencies Act 1974). Now that the task of holding elections to local governments has been entrusted to Election Commission of Pakistan by a constitutional amendment (Article 140A), the constitutional provision relating to delimitation of constituencies has to be accorded purposive construction. In these circumstances we are persuaded to hold that the power of Majlis-e-Shoora to provide by law for “the delimitation of constituencies by the Election Commission” would include the delimitation of constituencies of local government.

79. For what has been discussed above, while dismissing the appeals/petitions filed by the Government of Sindh, we are persuaded to direct the Federal Government to make necessary enactments to empower the Election Commission of Pakistan to carry out the delimitation of

constituencies of local governments. The Government of Sindh is also directed to make necessary corresponding amendments in the Sindh Local Government Act, 2013."

8. Following the same view as in Province of Sindh through Chief Secretary etc v. MQM through its Deputy Convener (Civil Appeal Nos. 38 to 45 of 2014 & Civil Petition Nos. 26-K to 34-K, 163 & 164 of 2014), referred to above, we partly allow this appeal, modify the impugned judgment and direct the Federal Government to make necessary enactments to empower the Election Commission of Pakistan to carry out the delimitation of constituencies of Local Government. The Government of Punjab is also directed to make corresponding amendments in the Punjab Local Government Act, 2013. The Election Commission shall thereafter proceed to carry out the delimitation of constituencies in Punjab afresh. These are the detailed reasons for our short order dated 19.3.2014 which is reproduced hereinbelow:-

"We have heard learned counsel for the appellant, for the respondents, learned Advocate General Punjab and learned Attorney General for Pakistan.

2. For reasons to be recorded later in the detailed judgment, we hold, declare and direct as under:-

- i) that the power to hold elections of the Local Government stand vested in the Election Commission of Pakistan in terms of Article 140A of the Constitution of Islamic Republic of Pakistan. The Election Commission of Pakistan has been mandated to "organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against" (Article 218(3) of the Constitution);*
- ii) that Sections 8 to 10 of the Punjab Local Government Act, 2013 and the relevant Rules framed there-under are ultra vires of*

the Constitution in so far as they empower the Provincial Government to carry out the delimitation of the constituencies for the Local Government;

iii) that since the delimitation of constituencies of the Local Government is part of the process of organizing and holding elections honestly, justly and fairly which is the Constitutional mandate of the Election Commission of Pakistan, the power to carry out such delimitation should vest with the Election Commission of Pakistan;

iv) that since the holding of election of Local Government has been delayed for more than nine years, which is violative of the Constitutional command, we are persuaded to direct the Governments, Federal and Provincial (of Punjab) to carry out appropriate amendments / legislation to empower the Election Commission of Pakistan to initiate and carry out the process of delimitation of constituencies for the Local Government Elections. This exercise should be completed within a period of five months from today and the Election Commission of Pakistan shall thereafter take requisite measures to carry out the process of delimitation of constituencies for the Local Government expeditiously so as to complete the same within a period of 45 days of the enactment/amendments in laws in terms of this order. The Election Commission of Pakistan shall further ensure that the announcement of election schedule and the process of holding it is complete by or before 15th of November, 2014.

The appeal stands disposed of in terms noted above."

CHIEF JUSTICE

JUDGE

JUDGE

Islamabad, the
19th of March, 2014
Approved For Reporting
Khurram