

**IN THE SUPREME COURT OF PAKISTAN**

(Original Jurisdiction)

Present:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ

Mr. Justice Gulzar Ahmed

Mr. Justice Sh. Azmat Saeed

**Constitution Petitions No.39 & 90 of 2011**

Ch. Nasir Iqbal & others

(in Const.P.39)

Imran Khan, Chairman, PTI etc

(in Const.P.90)

**Petitioner(s)**

**VERSUS**

Federation of Pakistan, thr. Secretary Law &  
others

(in Const.P.39)

Federation of Pakistan

(in Const.P.90)

**Respondent(s)**

For the Petitioner(s)

:

(In Const.P.39/2011)

Mian Abdul Rauf, ASC

(In Const.P.90/2011)

Nemo

On Court's Notice

: Mr. Ifran Qadir, Attorney General for Pakistan  
Mr. Dil Muhammad Khan Alizai, DAG

For the ECP

: Mr. Muhammad Munir Paracha, ASC  
Syed Sher Afghan, DG (Elections)

For M/O Overseas & OPF

: Raja Muhammad Farooq, ASC  
Dr. M. Sarwar Zahid, Chief  
Mr. Fayyaz Ahmed Malik, Deputy Chief  
Mr. Khurram Shiraz, L.O. OPF

For the NADRA

: Mr. Afnan Karim Kundi, ASC  
Mr. Tariq Malik, Chairman  
Mr. Saqib Jamal, Sr. LO

For M/O Foreign Affairs

: Mr. Iftikhar Anjum, DG, Overseas Pakistanis

For M/O Finance

: Mr. Sadaqat Ahmed, SO (L)

Dates of Hearing

: 26 & 29.04.2013

**ORDER**

**IFTIKHAR MUHAMMAD CHAUDHRY, CJ.** — These Constitution

Petitions have been filed under Article 184(3) of the Constitution

of the Islamic Republic of Pakistan, 1973, on behalf of Ch. Nasir

Iqbal and other Expatriate Pakistanis and by Mr. Imran Khan,

Chairman, PTI and others, instituted as back as on 21.04.2011

and 19.12.2011. The relief claimed in both the mentioned Constitution Petitions is somehow an identical, therefore, from one of the Constitution Petition bearing No.39 of 2011, the same has been reproduced herein below: -

"It is therefore most humbly prayed that the instant petition may kindly be accepted and respondents be directed to take all those steps which are necessary for implementation of the fundamental right of vote to all overseas Pakistanis including arrangements in Consulates and Embassies of Pakistan all over the world before the next General Election for National and Provincial Assemblies and an opportunity be provided to overseas Pakistanis of casting their votes."

2. Both the said petitions came up for hearing before this Court on different dates commencing from 21.12.2011 when an order in the Constitution Petition No.90 of 2011, was passed. As we intend to dispose of both these Constitution Petitions for the reasons to be recorded later but consider it appropriate to reproduce the order noted hereinbefore *in extenso* for the sake of comprehending the background of the issues involved in the matters: -

"This petition has been filed under Article 184(3) of the Constitution of Islamic Republic of Pakistan. The issue being raised herein is about declaring that the citizens of Pakistan in terms of Article 51 of the Constitution but living outside the country, have the fundamental right of franchise, therefore, denying such right to the citizens, who are reportedly about eight millions living outside the country, raises the question of public importance.

2. It may be noted that the citizens may be within or outside the country have a right to elect their representatives for the Parliament and any such person who is not residing in the country at the time when the

polling takes place, cannot be denied the right of franchise solely for the reason that he is not available in the country.

3. Learned counsel appearing for the petitioner states that there are three categories of the citizens residing outside the country and are being deprived of their right of franchise. He has explained the three categories as follows: -

a) Those who are citizens of Pakistan but living outside the country or born outside the country being national of Pakistan and the passport is issued to them by the Government of Pakistan, and they are earning their livelihood outside the country and making remittances to support their dependants in the country;

b) The Officers/Officials of the Diplomatic service;

c) Those citizens, who were originally Pakistanis but have acquired the nationality of the other country and maintaining/ holding both the nationalities.

4. He has also pointed out that as back as in the year 1993, Constitution Petition No.26 of 1993 was filed before this Court claiming the same relief as it has been prayed for by him and in that matter, a larger Bench of this Court vide judgment dated 15.11.1993 had forwarded the matter to the Government of Pakistan for consideration. According to him till date there had been correspondence between different Ministries but so far no final decision in this regard has taken place. He has read before us paras 8, 9 and 10 of the judgment. For the sake of convenience, the same are reproduced herein below: -

"8. The leaned counsel for the petitioner finally suggested that this matter which has already been brought to the notice of the Chief Election Commissioner and the Government should in the first instance be examined in depth by the Chief Election Commissioner and finally by the Government with a view to facilitate the exercise of franchise by the eligible Pakistanis living abroad. In this context the provisions on the subject contained in the other comparable Federal Constitutions may also be examined and appropriate steps taken depending upon the extent of resources of the Government.

9. We consider that this is a reasonable suggestion and before dealing with the question in the abstract on the legal and constitutional plane, it would be proper that this exercise is undertaken in the first instance by the authorities constitutionally entrusted with the task.

10. As regards the extra territoriality of the laws, we may point out that the Constitution already provides that "obedience to the Constitution and the Laws is the obligation of every citizen wherever he may be". This suggests the Pakistanis living abroad to the laws of the land even those which do not have extra territoriality. With these observations, the Petition is disposed of."

5. The learned counsel has also referred to a write-up, purported to have been issued by the Electronic Government Directorate, Ministry of IT & Telecom, Government of Pakistan and has referred to its different captions which are as under: -

- a) Grant of Right of vote to Overseas Pakistanis;
- b) Representations of Overseas Pakistanis in the National and Provincial Assemblies;
- c) Action taken on the issues.

From the last mentioned caption '**action taken on the issues**' following items being important and relevant to subject are noted for reference: -

- i) Giving a right to vote to citizens residing overseas has precedent in many countries, e.g. France, United States, etc.
- ii) Determination/delimitation of a constituency for each Province (as proposed in the said summary) may not be possible for Overseas Pakistanis citizens.
- iii) Many Overseas Pakistanis especially in the United States are not allowed to keep their Pakistanis citizenship if they become naturalized citizens there, in such a situation, they will not be able to vote for representation in Pakistani legislatures.
- iv) The Election Commission of Pakistan has re-constituted the Special Committee on right of vote to overseas Pakistanis under the Chairmanship of Secretary, Election Commission of Pakistan including the representative from Prime Minister's Secretariat, Ministry of Overseas Pakistanis, M/o Foreign Affairs, M/o Law & Justice, M/o Parliamentary Affairs, M/o Finance, National Database & Registration Authority

(NADRA), Overseas Pakistanis Foundation (OPF) and offices of Election Commission of Pakistan.

6. Learned Attorney General for Pakistan, however, requests that he needs some time to consult Ministry of Law & Justice, Ministry of Foreign Affairs, Ministry of Overseas Pakistanis and the Election Commission of Pakistan and states that after taking instructions from these departments, he would be in a better position to make his submissions.

7. In above view of the matter, the case is adjourned. In the meantime, office is directed to issue notice to the respondents to file their replies/concise statements to the petition within a period of two weeks. Copy of this order along with memo of the petition and its annexures be supplied to the respondents during course of the day. On receipt of replies/concise statements from the respondents, office shall put up the matter in Court for hearing.

3. A perusal of the above order finds mentioned an earlier effort made by the overseas Pakistanis in the case of Miss Yasmin Khan and another v. Election Commission of Pakistan, Islamabad through Secretary an another (1994 SCMR 113) when the said Constitution Petition was admitted to regular hearing on 04.10.1993, and notices were issued to all concerned. Finally, by a Larger Bench of this Court, the above petition was disposed of on 15.11.1993. The relevant para therefrom finds mentioned in the order, reproduced hereinabove.

4. Syed Sher Afgan, Director General (Elections), ECP, stated that according to his knowledge the observations of this Court in the case of Yasmin Khan (*ibid*) were considered by the Cabinet in 1996-1997 but approval was not granted for extending the Right to Expatriate Pakistanis but refused to extend them

Right of Franchise, to be exercised outside the country. However, he had not placed on record any such decision. If, same is available, he may place the same on record so we may incorporate the same in the reasons, which shall be recorded later.

5. It is to be noted that the ECP, following the background of the matter commencing from the judgment in the case of Yasmin Khan (ibid), constituted a Committee in October, 1997, to consider these issues. Unfortunately, the final decision could not be taken, as it is reported that on the part of the Government, no progress could be made.

6. Again on 17.11.2009, a Special Committee was constituted to consider the following two questions:

- "i. Whether right of vote to overseas Pakistanis should be granted to them and if so, what method including personal voting and voting through fax, etc. should be adopted after examining threadbare the feasibility of the method so agreed upon by the Committee;
- ii. Whether granting representation to overseas Pakistanis in the National and Provincial Assemblies by reserving seats therein and electing the representatives of overseas Pakistanis on such seats through proportional representation system is a suitable option."

7. This Committee, headed by the Secretary, ECP, had furnished its report on 20.01.2012, we are not aware regarding the proceedings or implementation of the recommendations of the Committee subsequent thereto, thus, we asked the Director General (Elections), ECP, to place the same on record. In the

meanwhile, from time to time, hearing continued and on 25.04.2013, CMA No.2389 of 2013, was presented under the signature of the learned Attorney General for Pakistan, wherein as many as 27 concerns were shown for consideration of this Court.

8. Notice of the above CMA was issued to the Chairman, NADRA, who had submitted reply. The relevant para therefrom is reproduced hereinbelow:

"6. NADRA has already requested Election Commission of Pakistan through its letter dated 1<sup>st</sup> April 2013 to convey its final decision of opting e-Voting solution or otherwise before 5<sup>th</sup> April 2013. With each passing day, smooth and seamless deployment of proposed solution is becoming an increasingly challenging task. From 1<sup>st</sup> April till date i.e. 26<sup>th</sup> April 2013, NADRA has yet to receive a green signal from ECP. Hence, the resultant loss of time which was the most precious commodity in our hands. However, holding the Honorable Supreme Court in highest esteem and considering it a privilege to be of assistance in enabling overseas Pakistanis to exercise their right of adult franchise, NADRA remains unwavering in its resolve and wholeheartedness to comply with any direction passed by the Honorable Supreme Court of Pakistan."

9. The Ministry of Foreign Affairs in its reply finally gave its reaction in respect of the concerns shown on behalf of the Government, which reads as under: -

"The Ministry of Foreign Affairs reassures the Honorable Court that it will use all of its available resources to implement the decision of the Honourable Supreme Court and the Election Commission of Pakistan (ECP), on granting the right to vote to Overseas Pakistanis.

The Ministry has previously also submitted to the Honourable Supreme Court its position on the subject in CMA No.1973/2013 on 11 April, 2013.

In this regard, in anticipation of the decision of the Honourable Supreme Court and the ECP, the Ministry of Foreign Affairs has already taken practical steps which include, seeking the necessary permission from the governments of the nine short-listed countries enumerated by the ECP.

In this context, the following 07 countries have already conveyed their permission for conducting polling in their respective territories with the proviso that the date and timing of the election should be conveyed to them in a timely manner in order to enable them to make the necessary security/administrative arrangements. The 07 countries which have conveyed their permission are:

- (i) Australia;
- (ii) Bahrain;
- (iii) Canada;
- (iv) Kuwait;
- (v) Oman;
- (vi) Saudi Arabia; and
- (vii) UK.

The response of the remaining two countries – UAE and USA – is awaited. Our Heads of Mission in these two countries are in touch with the concerned host authorities.

The Ministry of Foreign Affairs being an integral part of the overall governmental machinery was consulted in drafting of the CMA No.2389/13. The apprehensions and reservations contained therein, relate to the capacity limitations of the Missions. It was therefore, deemed necessary to apprise the Court about the constraints, which may impede the smooth conduction of the polling process. Therefore, bringing these capacity issues to the attention of the Honourable Court was considered necessary and is in conformance with the duty of the Foreign Ministry.

Nonetheless, the Ministry of Foreign Affairs reiterates its commitment and reassures the Honourable Court and the ECP that it stands ready with all its resources at its disposal to carry out any task assigned to it for the realization of the right to vote to Overseas Pakistanis."



10. The Ministry of the Overseas Pakistanis disclosed as under: -

"10. It is again submitted that the Ministry of Overseas Pakistanis is in coordination with the relevant Ministries and would provide all possible assistance through its CWA Missions working under the respective Heads of Missions i.e. Ambassadors/High Commissioners in line with the directions of the Honourable Supreme Court."

11. On behalf of Ministry of Finance, Mr. Sadaqat Ahmed, Section Officer (Litigation) appeared and stated that the Finance Ministry is ready and willing to provide funding as per the direction of this Court or the ECP.

12. Syed Sher Afgan, Director General (Elections), ECP, stated that the issue under discussion had been considered by the Chief Election Commissioner as well as by the Commission, which is reproduced hereunder:

"6. In view of the above, if the learned Members agree, we may respectfully inform the Supreme Court tomorrow that although we welcome their observations in relation to giving Overseas Pakistanis the right to vote, the ECP is of the considered view that this initiative should not be hurriedly implemented for the forthcoming elections."

13. It is to be noted that on 26.04.2013, the Court started dictating the order and meanwhile learned Attorney General for Pakistan so also Mr. Muhammad Munir Piracha, Sr. ASC, for the ECP sought time to seek instructions in this behalf from the Election Commission of Pakistan. Now today (29<sup>th</sup> April) the learned Attorney General for Pakistan appeared and has presented under his signatures a statement (CMA No.2454 of

2013) which is the outcome of a meeting held by him with the ECP. For convenience, the same is reproduced herein below: -

- "1. That the undersigned held a meeting with the Chief Election Commissioner and all the members of the Election Commission of Pakistan (ECP). The ECP has appreciated the role of the Supreme Court of Pakistan (SCP) keeping in view the utmost concern, desire and expectation which the apex Court has with the former qua enabling the Overseas Pakistanis to cast their votes outside their constituency and country. On this premise the voters residing within their country but residing outside their constituency or province deserve at the least a similar treatment. Surely all this is possible depending on finances and time frame.*
- 2. That during the meeting, the ECP unanimously agreed to accomplish the desired task while requesting the Government of Pakistan to prepare requisite proposals for effecting the required legislation which may be made applicable to the aforesaid voters after the forthcoming General Elections in the country.*
- 3. That the ECP has also expressed its satisfaction with regard to the efforts made so far by various departments of the federal government in carrying out the necessary steps in extending cooperation to achieve the desired results in the shortest possible time thereby enabling the ECP to agree to the applicability of the aforesaid legislative proposals in the above terms."*

14. A perusal of the statement reproduced hereinabove clarifies that the ECP recognizes the right to exercise franchise to expatriate Pakistanis on well known principle of law that they deserve at least a similar treatment and facilitation qua the voters residing within the country but outside their constituency or province.

15. However, reservations for extending the facility to expatriate as expressed is the non-availability of the requisite legislation in respect whereof the ECP has agreed to accomplish

the desired task by requesting the Government of Pakistan to do the needful but after the forthcoming General Elections in the country added with the reason of non-availability of finances and the paucity of time in view of the facts noted hereinabove. View point of the Ministry of Finance and other Ministries has categorically noted on the previous dates of hearing wherein they had expressed their desire to accomplish the task by providing finances as per the directions of this Court or the ECP and likewise Ministry of Foreign Affairs, Chairman NADRA and the Ministry of Overseas Pakistanis had also given positive response in this behalf. It is equally important to note that the ECP has expressed its satisfaction with regard to the efforts made so far by various departments of the Federal Government in carrying out the necessary steps in extending co-operations to achieve the desired results in the shortest possible time thereby enabling the ECP to agree to the applicability of the aforesaid legislative proposals in the above terms.

16. We have heard the learned counsel for the petitioners, the Representatives of the Ministries of Foreign Affairs, Overseas Pakistanis, Finance as well as the ECP and the learned Attorney General for Pakistan. However, the learned Attorney General for Pakistan, questioned the maintainability of the petitions, as according to him, neither the Fundamental Right of the petitioners is involved nor the ECP being an independent institution is obliged to provide them the facility to exercise the Right of Franchise outside the territory of Pakistan and, if any Overseas Pakistani comes on the day of polling he can exercise the Right of Franchise. The jurisdiction of this Court has also been objected to

by him in granting the relief. He further argued that it is the job of the ECP to arrange the Elections, therefore, no direction can be issued to the ECP for providing the facilities to Expatriates to exercise their Right of Franchise outside the Pakistan. He further stated that as the legislation has to be promulgated and it is not the job of this Court but of the National Assembly, which is presently stands resolved and until an Assembly is elected, no legislation is possible besides this Court cannot take upon itself to legislate the laws.

17. Thus, under the circumstances, we are of the opinion that once on having recognized that facility can be extended to the expatriates to exercise right of franchise, the ECP's further efforts/input is required to achieve the object in the forthcoming General Elections can conveniently be achieved.

18. Therefore, for the reasons to be recorded later, we dispose of both the petitions with the observations that let the ECP make all possible efforts to achieve the object, as has been noted hereinabove so the expatriates may also participate in the forthcoming General Elections in exercise of their fundamental rights conferred under Article 17(2) of the Constitution of the Islamic Republic of Pakistan, 1973.

*CJ.*

*J.*

Islamabad  
29.04.2013  
Hashmi

*J.*