

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.146/2019
Zahid Naseem and others

Versus

Election Commission of Pakistan and others

Date of Hearing:	18.02.2019
Petitioners by:	M/s Ali Nawaz Kharal and Muhammad Bilal Waince, Advocates
Respondents by:	Mr. Sanaullah Zahid, Advocate for respondent No.1 Qazi Mansoor Ahmad, Advocate for the respondent No.2.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioners impugn the order dated 18.12.2018, passed by the Election Commission of Pakistan (respondent No.1), holding that the resignations submitted by the petitioners *“shall be considered as final”*.

2. The record shows that in the local government elections held in the Province of the Punjab in the year 2015, petitioner No.1 (Zahid Naseem) was elected as Chairman, Union Council No.52, District Council Gujranwala; petitioner No.2 (Farooq Azam Khan) was elected as Chairman, Union Council No.46 (Chak No.40/ML), District Council Bhakkar; petitioner No.3 (Naeem Ijaz Chaudhary) was elected as Chairman, Union Council No.48, District Council Vehari; and petitioner No.4 (Mehr Aashiq Hussain) was elected as (Chairman Union Council No.17, Doburji Aiyen Municipal Corporation Sialkot.

3. It is an admitted position that the petitioners had submitted their nomination forms for contesting in the general elections for the National Assembly/ Provincial Assembly in the year 2018. Since Section 28 of the Punjab Local Government Act, 2013 (“Punjab L.G. Act”) bars the Chairman of a Union Council from contesting elections for any other political office without resigning from his office, the petitioners had admittedly submitted their resignations so as to enable them to contest in

the general elections. The Provincial Election Commissioner (Punjab) had forwarded attested copies of the petitioners' resignations to respondent No.1 so that the seats against which the petitioners had been elected as Chairmen of Union Councils could be declared as vacant. All the petitioners were defeated in the general elections. In order to retain their Chairmanship of the Union Councils, the petitioners applied for the withdrawal of their resignations.

4. Vide order dated 24.09.2018, respondent No.1 allowed the petitioners' applications for the withdrawal of their resignations. Subsequently, vide order dated 29.11.2018, respondent No.1 directed notices to be issued to the petitioners to show cause as to why *"their resignations be not considered final and as to why they be not de-notified"*. Vide impugned order dated 18.12.2018, respondent No.1 reviewed its earlier order dated 24.09.2018 (whereby the petitioners' applications for the withdrawal of their resignations were allowed by respondent No.1) and it was held that *"[a]ll the resignations tendered by the respondents from the respective posts shall be considered final"* and they be de-notified. The said order dated 18.12.2018 has been impugned by the petitioners in the instant writ petition.

5. Learned counsel for the petitioners, after narrating the facts leading to the filing of the instant petition, submitted that respondent No.1 had no jurisdiction to review its earlier order dated 24.09.2018; that the right of review is a substantive right and has to be specifically conferred by Statute; that the impugned order dated 18.12.2018 is without jurisdiction; that valuable rights were created in the petitioners' favour on the basis of respondent No.1's order dated 24.09.2018 which was reviewed, vide respondent No.1's order dated 18.12.2018; that Section 34(2) of the Punjab L.G. Act could not be given an overriding effect over the provisions of the Election Act, 2017; that the petitioners did not suffer from any of the disqualifications under Article 62 or 63 of the Constitution; that the Local Government Statutes of Provinces other than the

Province of the Punjab do not contain any prohibition of the nature as contained in Section 28 of the Punjab L.G. Act; that the petitioners had withdrawn their resignations before they were accepted; and that the procedure provided in the Punjab Local Governments (Resignation) Rules, 2016, had not been followed in accepting the petitioners' resignations. In making his submissions, learned counsel for the petitioners placed reliance on the judgment dated 25.06.2018, passed by the Hon'ble Lahore High Court in Election Appeal No.6/2018 and order dated 25.06.2018, passed in Election Appeal No.15/2018 and connected matters. Learned counsel for the petitioners prayed for the writ petition to be allowed in terms of the relief sought therein.

6. On the other hand, learned counsel for respondent No.1 submitted that respondent No.1's earlier order dated 24.09.2018 was based on the misconception that the judgment dated 25.06.2018, passed by the Hon'ble Lahore High Court/Appellate Tribunal had been passed in exercise of jurisdiction under Article 199 of the Constitution; that in fact the said judgment was passed by the Hon'ble Lahore High Court sitting as an Appellate Tribunal; that as an Appellate Tribunal, the Hon'ble Lahore High Court could not ignore the mandate of Section 28 of the Punjab L.G. Act; and that since respondent No.1's earlier order dated 24.09.2018 was not just void but *per incuriam*, respondent No.1 was well within its rights to have reviewed the same through the impugned order. Learned counsel for respondent No.1 prayed for the writ petition to be dismissed.

7. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

8. The facts leading to the filing of the instant petition have been set out in sufficient details in paragraphs 2 to 4 above and need not be recapitulated.

9. Since the petitioners' claim that vested rights had been created in their favour with the passing of respondent No.1's

order dated 24.09.2018, whereby their applications for the withdrawal of their resignations were allowed, some recital is necessary of the circumstances and the basis on which the said order was passed.

10. Section 28(1) of the Punjab L.G. Act bars the Chairman of a Union Council from contesting an election of any political office without resigning from such office. Section 28(2) of the Punjab L.G. Act allows a member of a local government to contest elections for any other political office without resigning from the membership of the local government but bars him for simultaneously holding more than one office. The concession given by section 28(2) of the Punjab L.G. Act to the member of the local government of contesting election for any other political office is not available to the Chairman of a Union Council.

11. In the Province of the Punjab, a few Chairmen of Union Councils wanted to contest in the general elections scheduled to be held on 25.07.2018. The nomination papers of such candidates were rejected by the Returning Officers, because they had not resigned from the Chairmanship of Union Councils before submitting their nomination papers for their candidature in the general elections. Vide judgment dated 25.06.2018, the election appeals filed by such candidates before the Hon'ble Lahore High Court, sitting as an Appellate Tribunal, were allowed and it was held *inter-alia* that *“the provisions of Section 28 of the Punjab Local Government Act, 2013 would have no effect upon qualification of the candidates for National or Provincial Assemblies, even if they are sitting office holders in Local Government.”*

12. It was on the basis of the said judgment dated 25.06.2018, passed by the Hon'ble Lahore High Court/Appellate Tribunal that respondent No.1 allowed the petitioners' applications for the withdrawal of their resignations from the Chairmanship of Union Councils.

13. Now the Division Bench of the Hon'ble Lahore High Court, vide judgment dated 14.09.2018, passed in writ petition

No.235025/2018, titled *“Fozia Khalid Vs. Election Appellate Tribunal”* held *inter-alia* that the bar contained in Section 28 of the Punjab L.G. Act was genuine and that no one could contest for any other election without resigning from the specified post of the local government, including the post of Chairman of a Union Council. Furthermore, in the said judgment, the Hon'ble Lahore High Court held as follows:-

“12. Another aspect of this issue is the burden placed on the election process and the voter, simply because the holder of the offices mentioned in Section 28 of the PLGA has to make a choice and where the decision involves the risk of losing the present office. If the holders of the barred offices do not resign before filing nomination papers, they can be declared successful in the elections for the other political office. This means that the candidate is able to exercise his or her choice after going through the entire election process. If the candidate is successful they resign from the present office and if unsuccessful they go back to their present office. In all situations the issue is one of personal choice and the risk attached with such choices. A candidate cannot use the offices named in Section 28(1) of the PLGA as a fall back position in the event that he or she is not successful in the run for some other public office, in this case the Provincial Assembly. We are of the opinion that the Petitioner has the right to choose between either offices and cannot require the entire process to bear the burden of her ‘risk’. Time and again we have been informed by her counsel that she will resign if she can contest the Bye-Elections. In this regard, we are of the opinion that a wrong precedent cannot be set to comply with the wishes of one candidate.

13. The ‘resign to run’ principal is premised on encouragement to run for public office and to make the process of election more competitive. It creates a level playing field and ensures that a person holding public office does not divert its resources for personal advancement. It is also a check on those holding public office and ensures that they do their jobs and can account for the time spent in office. Public resources and functions are safeguarded and the sanctity of the election process is maintained.”

14. The Hon'ble Supreme Court, vide order dated 27.09.2018, passed in civil petition No.2044-L/2018, upheld the said judgment dated 14.09.2018 of the Hon'ble Lahore High Court. The Hon'ble Supreme Court held, in effect, that the nomination papers filed by a Mayor, Deputy Mayor, Chairman or Vice Chairman of a local government/local council, to contest elections to the Provincial

Assembly of the Punjab without resigning from such office, were liable to be rejected.

15. These were the circumstances in which respondent No.1, vide order dated 29.11.2018, directed notices to be issued to the petitioners to show cause as to why *“their resignations be not considered final and as to why they be not de-notified”*. The show cause notices issued to the petitioners make express reference to Hon'ble Lahore High Court's judgment dated 14.09.2018 and the Hon'ble Supreme Court's order dated 27.09.2018.

16. It is an admitted position that the petitioners had submitted their resignations from the Chairmanship of Union Councils so as to enable them to contest the general elections held on 25.07.2018. Had the petitioners not submitted such resignations, their nomination papers for contesting the general elections would not have been accepted. After being unsuccessful in the general elections, the petitioners want to retain their seats as Chairman of the Union Councils by withdrawing their resignations (which had been submitted prior to the acceptance of their nomination papers by the Returning Officers for the general elections). In the case at hand, what needs to be determined is whether a resignation submitted (for whatever reason) by a Chairman of a Union Council in accordance with Section 34(1) of the Punjab L.G. Act can be withdrawn in view of the deeming clause contained in Section 34(2) of the Punjab L.G. Act.

17. Ordinarily, it is open to a person to make his resignation operative from a future date or to withdraw his resignation before its acceptance by the competent authority. The services of an employee normally stand terminated from the date on which his resignation is accepted, unless there is any law or statutory rule governing the conditions of service to the contrary. Under Section 34 of the Punjab L.G. Act, a resignation tendered by the Chairman of a Union Council is deemed to have been accepted and effective forthwith. For the purposes of clarity, the said Section is reproduced herein below:-

“34. Resignation.- (1) A Mayor, Deputy Mayor, Chairman, Vice Chairman or a member may resign his office by tendering resignation in writing under his hand to the local government of which he is the Mayor, Deputy Mayor, Chairman, Vice Chairman or a member.

(2) The resignation tendered under subsection (1) shall be deemed to have been accepted and effective forthwith and the local government shall forward copies of the resignation to the Election Commission and the Government.”

18. As regards the judgment dated 25.06.2018, passed by the Hon'ble Lahore High Court/Appellate Tribunal in election appeal No.06/2018, it does not, in any manner, interpret Section 34 of the Punjab L.G. Act. As mentioned above, in the said judgment, it was held *inter-alia* that the Returning Officers could not have rejected the nomination papers of the Mayor, Deputy Mayor, Chairman or Vice Chairman of a local government for elections to the National or Provincial Assemblies without resigning from their seats in the local government.

19. Learned counsel for the petitioners submitted that since the procedure prescribed in the Punjab Local Governments (Resignation) Rules, 2016 (“the 2016 Rules”) for the submission and acceptance of resignation had not been complied with in the case at hand, the petitioners could not be held to have validly tendered their resignations. The said Rules were framed prior to the submission of the resignations by the petitioners. Rule 3(1) of the said Rules is in *pari materia* to Section 34(1) of the Punjab L.G. Act. Rule 3(2) of the said Rules requires a Chairman of a local government to submit his resignation in person to the Chief Officer or the Secretary of the local government. Rule 3(4) of the said Rules requires the officer or official receiving the resignation to make an endorsement on the resignation certifying the fact of the resignation having been delivered to him in person with free will, date and time of such delivery. Such an officer or official is also required to cause the particulars of such resignation to be entered in the register maintained for the purpose. Under Rule 4 of the said Rules, the Chief Officer or the Secretary of the local government is required to forward copies of resignation within seven days of the receipt of resignation to

the Election Commission of Pakistan with the approval of the house of the local government. In the event a meeting of the house of a local government is not possible, the Chief Officer or the Secretary of the local government is required to place the resignation before the Deputy Mayor or the Vice Chairman for its approval for forwarding the copies of the resignation to the Election Commission of Pakistan.

20. It is not denied that the petitioners had tendered their resignations in writing under their hands to the local government of which they were Chairmen. Up until the acceptance of their nomination papers for contesting the general elections, the petitioners considered their resignations to have been validly tendered in accordance with Section 34 of the Punjab L.G. Act. It is only after they had lost the general elections that they now claim that the resignations they had submitted were not in accordance with the procedure prescribed in the 2016 Rules. The petitioners cannot be allowed to approbate and reprobate by asserting that their resignations were not valid. The petitioners gained an advantage by submitting their resignations, the advantage being the acceptance of their nomination papers for the general elections. This Court, while exercising discretionary/equitable jurisdiction, cannot permit the petitioners to take such a contradictory stance.

21. Even otherwise, it is my view that a resignation submitted in accordance with the requirements of Section 34(1) of the Punjab L.G. Act, cannot be considered as invalid or irregular simply because it was not forwarded to the Election Commission of Pakistan in accordance with the procedure prescribed in 2016 Rules. Since there is no requirement in Section 34 of the Punjab L.G. Act for resignation submitted by the Chairman of a Union Council to be approved by a house of a local government before the same is forwarded to the Election Commission of Pakistan or for there to be an endorsement of the officer or official receiving the resignation, certifying that the resignation has been delivered in person with free will, a resignation submitted in

accordance with Section 34 of the Punjab L.G. Act, cannot be considered as invalid or irregular on account of non-compliance with the requirements of the said Rules. I find the said requirements in the 2016 Rules to be inconsistent with Section 34(2) of the said Act. In the case of Sunbiz Private Limited Vs. Federation of Pakistan through Secretary, Ministry of Information (2018 YLR 1785), I had the occasion to hold as follows:-

“30. It is well settled that rules and regulations are subordinate and delegated legislation deriving authority and legal cover from the provisions of the parent statute. Rules framed under a statute cannot override the provisions of the statute under which they were framed and on which their very existence was dependent. The power to make subordinate legislation/rules/regulations is derived from the enabling statute and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the statute. Rules cannot be made to supplant the provisions of the enabling statute but to supplement it. The delegate is not authorized to make a provision beyond the policy of the statute. The delegate cannot override the statute either by exceeding the authority or by making provisions inconsistent with the statute. Rules made under a statute are treated for the purpose of construction as if they were in the enabling statute and are to be of the same effect as if contained in the statute. But the rules are to be consistent with the provisions of the statute, and if a rule goes beyond what the statute contemplates, the rule must yield to the statute. A general power to make rules or regulations for carrying out or giving effect to the statute is strictly ancillary in nature and cannot enable the authority on whom the power is conferred to extend the scope of general operation of the statute. Therefore, the rule making authority cannot widen the purposes of the statute, or to add new and different means to carrying them out, or to depart from or vary its terms.”

22. Now as regards the contention of the learned counsel for the petitioners that since the power to review its own orders had not been conferred by law on respondent No.1, the earlier order dated 24.09.2018 (whereby the petitioners' applications for the withdrawal of their resignations were allowed), could not have been reviewed by respondent No.1, I am of the view that since the said order dated 24.09.2018 was in stark derogation of the mandate of Section 34(2) of the Punjab L.G. Act, and therefore, was an order *per incuriam*. In holding so, I place reliance on the following:-

- (i) In the case of Young Vs. Bristol Aeroplane CO. LTD. Lord Greene, M.R. [1944] 2 ALL ER 293 , held as follows:-

“The Rules of the Supreme Court have statutory force and the court is bound to give effect to them as to a statute. Where the court has construed a statute or a rule having the force of a statute its decision stands on the same footing as any other decision on a question of law but where the court is satisfied that an earlier decision was given in ignorance of the terms of a statute or a rule having the force of a statute the position is very different. It cannot, in our opinion, be right to say that in such a case the court is entitled to disregard the statutory provision and is bound to follow a decision of its own given when that provision was not present to its mind. Cases of this description are examples of decisions given per incuriam.”

- (ii) In the cases of Province of the Punjab Vs. Dr. S. Muhammad Zafar Bukhari (PLD 1997 SC 351) and The State Vs. Haji Nasim-ur-Rehman (PLD 2005 SC 270), the Hon'ble Supreme Court placed reliance on the following extract from the Halsbury's Laws of England, Fourth Edition, Volume 26 in paragraphs 577-578:-

“A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow; or when it has acted in ignorance of a House of Lords' decision, in which case it must follow that decision; or when the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the Court had not the benefit of the best argument adduced, as a general rule, the only cases in which decisions should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority.”

23. Since respondent No.1's order dated 24.09.2018 was an order *per incuriam*, there was no legal impediment before respondent No.1 in recalling the same after observing the requirements of due process. It is not denied that show cause notices were issued to the petitioners before the said order dated 24.09.2018 was recalled. In the case of Nirmal Jeet Kaur Vs. State of M.P. (2004) 7 Supreme Court 588, it was held that to perpetuate an error is no heroism and to rectify it is the

compulsion of the judicial conscience. In the case of Dilawar Hussain Vs. District Coordination Officer, Okara (2004 CLC 324), the respondent/authority had rectified its earlier mistake by recalling a permission that had been granted in excess of its jurisdiction. In paragraph 14 of the said report, the Hon'ble Lahore High Court held as follows:-

“14. It is well-settled proposition of law that the Tribunal acting beyond sphere allotted to it by law and action is a nullity in the eye of law and the superior Courts would refuse to perpetuate something patently unjust and unlawful as laid down in Raunaq Ali's case reported as PLD 1973 SC 236. The action of respondents, in the case in hand, sanctioning the gate in the boundary wall of the Medical Colony was beyond their authority and it was itself a nullity in the eye of law and if recalled would not prejudice the rights of the petitioners because an order/action which is a nullity in the eye of law is not sustainable and it gives no vested right to a party in whose favour it is passed.”

24. If the said contention made on behalf of the petitioners is accepted, it would amount to the emergence of a position where an order *per incuriam* would occupy the field. It is well settled that the Constitutional jurisdiction of this Court cannot be resorted to in order to create or perpetuate an illegality. Reference in this regard may be made to the law laid down by the Superior Courts in the cases of Multan Electric Power Supply Company Ltd. through its Chief Executive Vs Muhammad Ashiq and others (PLD 2006 SC 328), Mian Muhammad Rashid Qadri Vs Province of the Punjab (2003 SCMR 912), Lt. Col. Muhammad Aslam Vs Defence Housing Authority through Administrator (PLD 2008 Lahore 261), Zulfiqar Ali Khan Vs District Government Ghotki at Mirpur Mathelo (2006 CLC 20) and Muhammad Ikram and another Vs Rent Controller (2004 CLC 1326).

25. Since the mandate of Section 34 of the Punjab L.G. Act is that any resignation tendered by the Chairman of a Union Council shall be deemed to have been accepted and shall become effective forthwith and the local government shall forward copies of resignations to the Election Commission of Pakistan and the government for necessary action accordingly, I do not find any legal or jurisdictional infirmity in respondent

No.1's order holding that a resignation once tendered by *inter-alia* the Chairman of a Union Council, cannot be withdrawn and becomes effective there and then due to the deeming clause contained in Section 34(2) of the said Act.

26. By reason of the above, I do not find any merit in this petition, which is accordingly dismissed

(MIANGUL HASSAN AURANGZEB)
JUDGE

APPROVED FOR REPORTING

*Qamar Khan**

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