

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : W.P. NO.1593-2018

Adil Aziz Qazi

Vs.

Election Commission of Pakistan through its Secretary, Islamabad

**Petitioners by : Mr. Haseeb Hassan and Raja Aamir Shahzad, Advocates with petitioner.
Ch. Muhammad Umar, Advocate (W.P. No.1735-2018).
Mr. Adil Aziz Qazi, Advocate, proxy counsel for the petitioner (W.P. No.1705-2018).
Ch. Saleem Murtaza Mughal, AAG, Punjab (W.P. No.1804-2018).
Mr. Rashid Hafeez, DAG with Mr. Ameen Ullah, SO, Ministry of Parliamentary Affairs (W.P. No.1719-2018).
Mr. Abdul Latif Yousafzai, Advocate General, KPK (W.P. No.1805-2018).
Mr. Khalid Anwar Afridi, Advocate (W.P. No.1806-2018).
Mr. Ahsan Hameed Dogar, Advocate for Government of Sindh.
Mr. Muhammad Ayaz Khan Swati, Additional Advocate General, Baluchistan.**

Respondent by : Malik Mujtaba Ahmad, Additional D.G. (Law), Election Commission of Pakistan.

Date of decision : 10.05.2018

AAMER FAROOQ J. This judgment shall decide the instant petition as well as the petitions, mentioned in the Schedule attached herewith, as common questions of law and facts arise.

2. The petitions were heard on 10.05.2018 and were allowed through short order of the even date. Below are the reasons of our short order dated 10.05.2018.

3. The petitioners, in all the petitions, are aggrieved of and hence have challenged the Notification dated 11.04.2018 issued by Election Commission of Pakistan, whereby ban was imposed, *inter alia*, on appointments and commencement and completion of projects by the Federal and Provincial Governments.

4. Learned Counsel for the petitioner in the instant petition, *inter alia*, contended that the Notification has been given retrospective effect, which is not permissible. It was further contended that purpose of Notification, as has been mentioned, is to ensure free and fair elections, however, the election process has not yet started in as much as the election schedule has not yet been announced and the tenure of the Government still remains.

5. Learned Advocate General Khyber Pakhtunkhwa, in WP No. 1805/18, *inter alia*, contended that the election is a process and its meaning and purport has been explained by the Honourable Supreme Court of Pakistan in case reported as ‘Election Commission of Pakistan versus Javaid Hashmi’ (**PLD 1989 Supreme Court 396**). Reliance was also placed on case reported as ‘Amirzada Khan versus The Chief Election Commissioner’ (**PLD 1974 Lahore 178**). The learned Advocate General took the Court through various provisions of the Constitution of Islamic Republic of Pakistan, 1973 and The Elections Act, 2017, to show that undoubtedly, it is the function of Election Commission of Pakistan to hold fair and free elections, however, the stage for imposition of such ban, has not yet arrived. In this regard, it was contended that the tenure of the Provincial Government shall expire on

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31.5.2018 and it is only then, such like ban can be imposed. It was further submitted that the Election Commission of Pakistan has arbitrarily fixed the date of ban as 01.04.2018.

6. Learned Assistant Advocate General Punjab, in WP No. 1804/2018, adopted the arguments of Learned Advocate General KPK.

7. Similarly, Learned Deputy Attorney General of Pakistan in WP No. 1719/2018, also adopted the arguments addressed in WP No. 1805/18 and added that since this is the quarter end and also end of the Financial Year, therefore, funds are to be released for subsisting projects. It was further added that emergency appointments in medical area etc. are to be made, which shall be adversely affected. It was further contended that the appointments of various statutory bodies and even constitutional bodies are to be made including superior judiciary.

8. Learned Assistant Advocate General, Balochistan contended that though his Provincial Government has not filed a petition yet he supports the contentions made in WP No. 1804/2018.

9. Learned Counsel for the petitioner in WP No. 1705/18 also adopted arguments of Learned Advocate General, KPK.

10. Learned Counsel for the Petitioner in Writ Petition No. 1806/18, *inter alia*, contended that the petitioner is an elected Member of National Assembly from NA-47. It was further submitted that the Government had allocated and released funds for FATA but his constituency was not included and a petition was filed before Hon'ble Peshawar High Court (WP No. 4452/19), which was decided in favour of the petitioner vide judgment dated 29.2.2018 and accordingly, pursuant thereto, funds were

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allocated for NA-47. It was further contended that the impugned Notification is not applicable in the case of petitioner in as much as, in his case, the funds were allocated and are to be released pursuant to directions of the Honourable Peshawar High Court.

11. Learned Counsel for the petitioner, in WP No. 1735/18, *inter alia*, contended that the petitioner is an Autonomous Body controlled by the Government of the Punjab. It was pointed out that the petitioner is unable to complete the process of appointments due to the ban by the Election Commission of Pakistan. He also adopted arguments addressed in WP No. 1804/2018.

12. Malik Mujtaba Ahmed, Addl. D.G. (Law), appearing on behalf of Election Commission of Pakistan, *inter alia*, contended that under Articles 218(3) and 220 read with Sections 4, 5 and 8 of the Elections Act, 2017, the Election Commission of Pakistan is empowered to impose such ban. It was further submitted that various complaints were received by the Election Commission of Pakistan regarding undue favor being extended by the Government Officials/elected representatives in making appointments. When confronted, whether the credentials of the applicants were verified or any inquiry was made regarding the veracity of the complaints, the reply was in negative.

13. Arguments advanced by learned counsels for the parties have been heard and the documents placed on record examined with their able assistance.

14. As noted above, the petitioners are aggrieved of Notification dated 11.4.2018 issued by Election Commission of Pakistan, whereby ban has

been imposed on appointments etc. For the sake of brevity, the operative part of the Notification is reproduced below:

“NOW THEREFORE, in exercise of the powers conferred upon it under Articles 218(3) and 220 of the Constitution, Sections 4, 5 and 8(c) of the Elections Act, 2017 and all other powers enabling it in that behalf, the Election Commission of Pakistan is pleased to direct as under:

- a. That all kinds of recruitments in any Ministry, Division, Department or institution of the Federal Government or any Department or institution of any Provincial and Local Governments is banned forthwith except recruitments by the Federal or a Provincial Public Service Commission and those where test/interviews have already been conducted by 1st April, 2018.***
- b. That all development schemes which have been approved with effect from 1st April 2018 like installation of gas pipelines, supply of electricity, roads carpeting, water supply schemes etc. shall not be executed by the Federal/Provincial/local governments authorities. Moreover, the Federal Government, the Provincial Governments and the local Government shall not issue tenders of such schemes till conclusion of General Elections 2018.***
- c. That diversions of funds already allocated to various development projects in the country is banned forthwith and the spending of funds so diverted shall stand frozen forthwith”***

The Notification states that the same has been issued under Articles 218(3) and 220 along with Sections 4, 5 and 8(c) of the Elections Act, 2017. For the ease of convenience, the referred provisions are reproduced below:

“Article 218(3)

It shall be the duty of the Election Commission 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 220

It shall be the duty of all executive authorities in the Federation and in the Provinces to assist the Commissioner and the Election Commission in the discharge of his or their functions.

Section 4

(1) The Commission shall have the power to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it and an order for the purpose of securing the attendance of any person or the discovery or production of any document.

(2) Any such direction or order shall be enforceable throughout Pakistan and shall be executed as if it had been issued by the High Court.

(3) Anything required to be done for carrying out the purposes of this Act, for which no provision or no sufficient provision exists, shall be done by such authority and in such manner as the Commission may direct.

Section 5

(1) The Commissioner or the Commission may require any person or authority to perform such functions or render such assistance for the purposes of this Act as he or it may direct.

(2) It shall be the duty of all executive authorities in the Federation and in the Provinces to render such assistance to the Commissioner and the Commission in the discharge of his or its functions as may be required by the Commissioner or the Commission.

(3) The Federal Government and each Provincial Government shall make available to the Commission such staff as it may require for the performance of its functions and under this Act.

Provided that where the Commission decides to utilize the services of serving judicial officers, it may do so in consultation with the Chief Justice of the High Court concerned.

(4) After the Election Programme has been issued and till publication of the names of the returned candidates in the Official Gazette any Government or Authority shall not post or transfer any official appointed or deputed in connection with an election without prior approval in writing of the Commission including posting or transfer the decision whereof has not been implemented and the Commission may itself issue necessary directions to any such Government or authority for the posting or transfer of any official.

Section 8(c)

Save as otherwise provided the Commission may;

issue such directions, exercise such powers and make such consequential orders as may in its opinion be necessary for ensuring that an election is conducted honestly, justly, fairly and in accordance with the provisions of this Act and the Rules”.

The bare reading of the above provisions of the Constitution of Islamic Republic of Pakistan, 1973 and the Elections Act, 2017, shows that one of the important functions of Election Commission is to conduct fair, free and just elections. The Commission, in order to perform this constitutional and statutory function, can issue such directions and pass such orders as are required for the purpose. **It is reiterated that one of the constitutional functions of the Election Commission is to conduct fair and just election** (emphasis added). Elections are not just a solitary event, but are a process. The concept of election as a process was elucidated in the judgment reported as ‘*Amirzada Khan versus the Chief Election Commissioner*’ (PLD 1974 Lahore 178), wherein *Karam Elahi Chauhan and Mazhar ul Haq JJ.*, observed as under:-

“As to when does an election starts and when it ends or what is the meaning of the word election is a question to be answered with reference to the context of each case and the relevant law or statute. See Halsbury's Laws of England Third Edition, Volume XIV, para 315, which though deals with a different subject but is a sufficient pointer to the general principle which has been mentioned by us. Generally speaking election is a process which starts with the issuance of the election programme and consists of various links and stages in that behalf, as for example, filing of the nomination papers and their scrutiny, the hearing of objections and the holding of the actual polls etc. If any of these links are challenged it really tantamount to challenging (the process of) election”

The celebrated judgment, on the subject which explains the meaning of election is, ‘*Election Commission of Pakistan versus Javaid Hashmi*’ (PLD 1989

Supreme Court 396). In the referred judgment the Full Bench of the august Apex Court observed as follows:-

“While considering the meaning of the word election the expression "conduct of the election" in sub Article 3 of Article 218 should be taken into consideration as that expression is of a wide import and should be read into other provisions which occur in the same chapter to give a purposeful meaning of the word "election"

The Honourable Supreme Court, after discussing Pakistani and Indian case law on the subject, concluded as follows:-

“Thus in its wide sense the word election has been appropriately used in the Article with reference to the entire process consisting of several steps taken for its completion which have a bearing on the result of the process”

15. It is obligatory on the Election Commission to conduct just and fair elections while doing so, it can pass any order or issue appropriate directions. The referred function of the Election Commission was highlighted by the Honourable Supreme Court in case reported as ‘Workers’ Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6-others Vs. Federation of Pakistan and 2-others’ **(PLD 2012 Supreme Court 681).**

16. Election, is a process, hence the Election Commission is to ensure that the entire process is just, fair, honest and free. In case reported as **(PLD 1974 Lahore 178)** supra, it has been stated to commence with the announcement of election programme. Under Section 14 of the Elections Act, 2017, the Election Commission is to prepare a comprehensive action plan for conduct of elections four months prior to when the general elections are due on expiry of the term of the Assembly. The plan, inter alia, include the following:-

- a) **Delimitation of constituencies**
- b) **Revision of electoral rolls**

- c) **Enlistment of political parties.**
- d) **Allocation of symbols**
- e) **Appointment of and training of staff for election**
- f) **Preparation of constituency wise polling list.**

Under Section 57 of the 2017 Act, the election programme is ordered/approved by the President of Pakistan on the recommendations of Election Commission of Pakistan and thereafter published in the Official Gazette. The process of election is to start from the approval of the Schedule by the President and its notification in the gazette.

17. Admittedly on 11.04.2018, the election programme had not been announced and/or notified in the gazette, therefore the election process had not commenced.

18. The reasons, cited in the impugned Notification for issuance of the same and imposition of ban on fresh appointments, initiation of projects and even completion of the existing ones, are that there were complaints that the sitting MNAs etc. are misusing their positions and making appointments and starting projects. However, on behalf of Election Commission, no record of complaints to that effect, was shown which could attract ban of the nature as has been imposed. There were few complaints, which as per admission of the representative of Election Commission, were not verified and even the complainants were not called upon to furnish affidavits in support thereof. In such facts and circumstances it cannot be said that there were wide-scale complaints regarding misuse of authority in making appointments or starting projects with the motive of gaining undue advantage in the forthcoming

elections. No cogent material was placed before the Court, which could justify issuance of the impugned Notification.

19. As has been stated in the same, the purpose for the issuance of Notification, is to ensure free, just and fair elections. Generally, such like directions, as have been made in the impugned Notification, are attracted and issued by the Election Commission, when the election schedule has been announced; the Assembly has completed its tenure and the interim set up comes into existence. This is more so because the Interim Government is to carry out day-to-day affairs and not to take decisions and pass orders which have long term bearing or can put any person or Political Party in an advantageous position. Reliance is placed on case reported as '*Khawaja Muhammad Asif versus Federation of Pakistan*' (**2013 SCMR 1205**). If it is the constitutional obligation of the Election Commission to hold free, just and fair election. It is also the Constitutional right of every elected government to complete the Constitutional term and exercise its executive authority, as provided in the Constitution and the law. Balance has to be drawn in respect of both, the Constitutional duties and the rights.

20. The powers provided to the Election Commission in the Constitution and the Elections Act, 2017 are very wide and resultantly, it can pass orders and make decisions which are micro and/or macro in nature i.e. which are either complaint specific or have a blanket effect, as is in the instant case.

21. The upshot of the above discussion is that Election Commission has the power to issue such directions and pass orders as are required for holding fair, just, honest and free elections. However, the election process has not yet commenced; though it is not provided in the Constitution or the Elections Act, 2017, as to the time when the Elections Commission can pass orders or issue directions for conducting free and fair election, but one would suppose that the same can be done when the election process commences. For if, it was otherwise i.e. directions could be issued even prior to the commencement of the election process, then that would mean that it could be anytime within the currency of the term of any elected government and in our opinion, it would defeat the spirit of law. Even-otherwise, there are no substantial complaints on record which amount to misuse of authority in making appointments or starting projects which resulted for the issuance of the impugned Notification, the implications whereof are drastic, as not only commencement of projects has been stopped but completion of the existing ones, have come to a halt. As noted above, the Election Commission instead can appointment or project specific orders, wherever it felt that this is being done to gain advantage in the next elections instead of imposition of ban all over Pakistan in carrying out pending projects or commencement of the projects and making fresh appointments. Election Commission has given retrospective effect to the Notification, as it was issued on 11.4.2018 but came into effect on 01.04.2018. It is trite law that notification cannot have retrospective effect.

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22. In view of the foregoing, the petitions noted above, are allowed and the impugned Notification dated 11.04.2018 is set aside.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

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