

Yahya Afridi, J.- I had, in my order dated 23.02.2023, dismissed all three proceedings as they were not maintainable for adjudication of this Court under its original jurisdiction provided under Article 184(3) of the Constitution of the Islamic Republic of Pakistan, 1973 ('Constitution').

2. Before I explain the reasons for my short order declaring all three proceedings as not maintainable under the law, it would be appropriate to first record the admitted factual background leading to the present proceedings. It started with the dissolution of the Provincial Assembly of Punjab on 14.01.2023, followed by the dissolution of the Provincial Assembly of Khyber Pakhtunkhwa on 18.01.2023. This led Pakistan Tehreek-e-Insaf ("PTI"), through its Secretary General, to move the Lahore High Court by filing a constitutional petition (Writ Petition No. 5851 of 2023) under Article 199 of the Constitution, seeking, in essence, the constitutional authority to appoint a date for the holding of the General Election for the Provincial Assembly of Punjab. This petition, along with three petitions filed by *Munir Ahmed* (Writ Petition No. 6118 of 2023), *Zaman Khan Vardag* (Writ Petition No. 6093 of 2023) and *Sabir Raza Gill* (Writ Petition No. 6119 of 2023) on the same matter, were taken up on 30.01.2023, and after providing three hearings to the parties, were finally decided by the Single Bench of the Lahore High Court *vide* judgement dated 10.02.2023, whereby a clear writ of *mandamus* was issued to the Election Commission of Pakistan in terms that;

"Given the constitutional provisions mentioned above and the judgements of the Supreme Court of Pakistan, the prayer made in the "consolidated petitions" is allowed and the "ECP" is directed to immediately announce the "date of election" of the Provincial Assembly of Punjab with the Notification specifying reasons, after consultation with the Governor of Punjab, being the constitutional Head of the Province, to ensure that the elections are held not later than ninety days as per the mandate of the "Constitution"."

The Governor of Punjab and the Election Commission of Pakistan challenged the above Single Bench judgement in Intra-Court Appeals before the Divisional Bench of the Lahore High Court. With the set appeals was also a Contempt Petition filed by PTI, seeking enforcement of the Single Bench judgement dated 10.02.2023. Similarly, on 06.02.2023, *Mashal Azam Advocate* invoked the original jurisdiction of the Peshawar High Court seeking similar relief for the appointment of a date for the holding of the election to the Provincial Assembly of Khyber Pakhtunkhwa. During the pendency of the Intra-Court appeals before the Division Bench of the Lahore High Court and petition before the Peshawar High Court, a two-member bench of this Court on 16.02.2023 while hearing a service matter relating to the transfer of police officer Ghulam Mehmood Dogar (Civil Petition No. 3988 of 2022), apprehended the delay in holding of the General Elections of the Provincial Assembly of Punjab, and found that there was '*rare and imminent danger of violation of a clear and unambiguous constitutional command*'; the bench made a referral to the Hon'ble Chief Justice of Pakistan for invoking and initiating of the *suo moto* jurisdiction of this Court under Article 184(3) of the Constitution. The referral was positively considered on 22.02.2023, and *Suo Moto* Case No. 1 of 2023, along with two other Constitutional Petitions filed by the Islamabad High Court Bar Association (Const.P.1 of 2023) and a joint petition filed by Muhammad Sibtain Khan and Mushtaq Ahmed Ghani (Const.P.2 of 2023), the worthy Speakers of the Punjab and Khyber Pakhtunkhwa Assemblies, respectively, were fixed for hearing on 23.02.2023.

3. Given the factual matrix of the legal proceedings leading to the present three petitions, which came up for hearing before this Court on 23.02.2023, we note that: firstly, the Intra-Court Appeals filed by

the Governor of Punjab and the Election Commission of Pakistan against the judgment of the Single Bench dated 10.02.2023 were pending before the Lahore High Court, while the Peshawar High Court was also hearing a Constitutional Petition seeking similar relief for appointment of the date of election to the Provincial Assembly of Khyber Pakhtunkhwa; secondly, the judgments of the pending proceedings before both the High Courts could be challenged before this Court under its appellate jurisdiction envisaged under Article 185 of the Constitution.

4. This Court in *Ch. Manzoor Elahi's case*¹, while dilating on the jurisdictional contours of the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution, *inter alia*, laid down that where the High Court under Article 199 of the Constitution and this Court under Article 184(3) of the Constitution had concurrent jurisdiction and the matter was pending adjudication before both courts, the later had to show restraint in exercising its jurisdiction, premised on the principle of ensuring that a party is not deprived of his vested right of Appeal under the law. To appreciate the principle enunciated by this Court in the above case, we must consider the facts leading Ch. Manzoor Elahi to seek his legal redressal by invoking the original jurisdiction of this Court under Article 184(3) of the Constitution. Ch. Manzoor Elahi, initially challenged his incarceration in the High Court of Sindh and Balochistan, wherein the High Court on a preliminary issue of jurisdiction declared that it had the authority to issue writs in relation to tribal areas of Quetta division in the Province of Balochistan. While the appeal of the Federation against this preliminary finding of the High Court before this Court, and the main petition before the High Court was pending, Ch. Manzoor Elahi

¹ Ch. Manzoor Elahi v. The Federation of Pakistan (PLD 1975 SC 66)

also challenged before this Court his illegal detention by filing a petition invoking the original jurisdiction of the Supreme Court under Article 184(3) of the Constitution. Mr Justice Hamoodur Rahman, C.J., while rendering the opinion of the court opined that:

“It is no doubt correct that the jurisdiction of this court under clause (3) of the Article 184 can be invoked when a question of public importance concerning the enforcement of any of the fundamental rights is involved but, I would like to add, since this is the first application of its kind, that it does not follow from that this Court is bound to exercise these concurrent powers even where these conditions are fulfilled for this is only an enabling provision. If the jurisdiction of any of the High Courts has already been invoked under Article 199 of the Constitution and the matter is pending adjudication there then two further well-established principles become attracted. The first is that where two Courts have concurrent jurisdiction and a petitioner has already elected to invoke the jurisdiction of one of such Courts then he should be bound by his election and must pursue his remedies in that Court. The second is that if one of the Courts having such concurrent jurisdiction happens to be a superior Court to which an appeal lies from the other court of concurrent jurisdiction then the Superior Court will not normally entertain such an application after a similar application on the same facts has already been filed and is pending adjudication in the lower Court, because, that would deprive one of the parties to the litigation in the lower court of his vested right of appeal conferred by another provision of the Constitution, namely, Article 185.”

(emphasis provided)

5. I am also mindful of the positive exercise of the original jurisdiction by an eleven member bench of this Court in the case of *Miss Benazir Bhutto*², while the petitions on the same subject matter were pending adjudication before the Lahore High Court. This Court, in the said case, made an exception to the strict adherence of the practice of this Court, as settled in *Ch. Manzoor Elahi's* case (*supra*), on the touchstone of enforcement of fundamental rights, and it was declared that the measure of applicability of the said practice has to be judged in the light of the particular facts and circumstances of each case. However, nowhere was the principle of practice given judicial recognition in *Ch. Manzoor Elahi's* case (*supra*) overturned by this

² Benazir Bhutto v The Federation of Pakistan and another PLD 1988 SC 461

Court in *Benazir Bhutto's* case (*supra*). In fact, the Court was very cautious, while invoking its jurisdiction under its original jurisdiction, as it was careful in making it clear that it was only distinguishing the case from the precedent set in *Ch. Manzoor Elahi's* case and not deviating from the principle set therein. The Court (as per Haleem J. as he was then) observed,

"It is regrettable to note that the High Court has surrendered the management of the case to the sweet will of the counsel who was taking dates at his convenience without making any serious effort to get the matter admitted to regular hearing, and the High Court, in turn, acquiescing in it, dillydallying and shirking from its duty towards a pending cause by accommodating the counsel. Therefore, there was, for a period of a year and eight months, a failure on the part of the High Court to pass any order either admitting the petition to regular hearing or rejecting it in limine, and, for that matter, even on the date of hearing of this petition, it was not known as to whether it was admitted or not. On these facts, the learned Attorney General has invoked the principle of practice as to the choice of the forum and so also the vested right of the opposite party to come in appeal to this Court as material considerations for this Court to keep its hands off from hearing the petition. As the High Court was not legally seized of the dispute as a result of an order admitting it, it remains to be seen to what extent the practice can be followed which without doubt is salutary and of long-standing"

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This observation led to taking an exception to the principle recognised in *Ch. Manzoor Elahi's* case (*supra*), which it declared declared salutary and of long standing. The judicial precedents that have since followed have recognised with respect, and maintained the *ratio decidendi* of *Ch. Manzoor Elahi's* case (*supra*).⁴

5. Given the promptness with which the single bench of the Lahore High Court proceeded with the petitions before it and decided the same, and that the judgment so rendered was under challenge in Intra-Court Appeals, surely distinguish the facts leading to the present three proceedings when placed in juxtaposition with those leading this Court in *Benazir Bhutto's* case (*supra*), to take an exception to the settled principle of restraint recognised in *Manzoor Elahi's* case (*supra*).

³ *Benazir Bhutto v The Federation of Pakistan and another* PLD 1988 SC 461, page 494

⁴ *Farough Ahmed Siddiqi v. The Province of Sindh and Wukala Mahaz Barai Tahafaz Dastoor v. Federation of Pakistan.*

The inordinate delay of one year and eight months in proceeding with the matters pending before the High Court was surely a justifiable reason to take exception to the general principle of restraint. However, the events which led to the present proceedings before this Court are starkly distinguishable. Not only were the petitions proceeded with in an expeditious manner, but decided by the Singh Bench of the Lahore High Court, thus, the facts leading to the exception taken by this Court in *Benazir Bhutto's* case (supra) cannot be applied to the facts and circumstances of the present case. Accordingly, I am of the firm opinion that the principle of restraint in exercising original jurisdiction to safeguard the right of appeal of the parties should be respected and maintained, and the three proceedings pending before this Court should not be proceeded with at this stage, being premature and not maintainable. I am also sanguine that the High Courts would proceed expeditiously with the pending matters.

6. Another crucial aspect of the present proceedings is that the matter in dispute, though in essence is constitutional, has developed into being peculiarly charged, with unflinching contested political stances being taken by the parties, which warrant this Court to show judicial restraint. This would also bolster the principle of propriety and comity, so as to not offend the hierarchal judicial domain of the High Court envisaged under the Constitution, and disturb the judicial propriety that the High Court deserves - lest it may reflect adversely on this Court's judicial preemptive eagerness to decide.

7. And thus, as I have decided to declare the present three proceedings pending before this Court being premature as not maintainable, I find my continuing to sit on the bench and hear the said petitions would not be appropriate, as any findings passed or

remarks made during the hearing of the present matters by me may prejudice the contested claims of the parties in the said petitions/appeal pending before the respective High Courts. However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions.

8. Accordingly, for the reasons stated hereinabove, I am of the firm opinion that the present proceedings pending before this Court; *Suo Moto* 1. of 2023, Constitutional Petition 1. of 2023, and Constitutional Petition 2. of 2023 are not maintainable to be adjudicated at this stage by this Court in its original jurisdiction envisaged under Article 184(3) of the Constitution, and thus are dismissed.

Judge