

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Ijaz ul Ahsan
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Munib Akhtar
Mr. Justice Yahya Afridi
Mr. Justice Sayyed Mazahar Ali Akbar Naqvi
Mr. Justice Jamal Khan Mandokhail
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Athar Minallah

SUO MOTU CASE NO. 1 OF 203

Suo Motu Regarding Holding of General Elections
to the Provincial Assemblies of Punjab and KP)

And

CONST. PETITION NO.1 OF 2023

And

CONST. PETITION NO.2 OF 2023

Islamabad High Court Bar Association
Islamabad through its President Muhammad
Shoaib Shaheen, ASC Islamabad

(in Const.P.1/2023)

Muhammad Sibtain Khan and others
(in Const.P.2/2023)

...Petitioner(s)

Versus

Election Commission of Pakistan through the
Chief Election Commissioner, Islamabad and
others
(in Const.P.1&2/2023)

...Respondent(s)

In attendance:

Mr. Shehzad Ata Elahi, Attorney General for Pakistan
Ch. Aamir Rehman, Addl. AGP

Mr. Muhammad Shoaib Shaheen, ASC
Mr. Abid S. Zuberi, ASC
(in Const.P.1/2023)

Syed Ali Zafar, ASC
Mr. Zahid Nawaz Cheema, ASC
(in Const.P.2/2023)

Mr. Sajeel Sheryar Swati, ASC
Mr. M. Arshad, DG Law, (ECP)
Mr. Zafar Iqbal, Spl. Sec. (ECP)

Date of Hearing : 23.02.2023

O R D E R

We have before us two Constitution Petitions; one is filed by the Islamabad High Court Bar Association through its President Mr. Shoaib Shaheen (*Const.P.1 of 2023*) and the other is filed by the Hon'ble Speakers of the Punjab Provincial Assembly and the Khyber Pakhtunkhwa Provincial Assembly, respectively (*Const.P.2 of 2023*). Both the petitioners have challenged the failure by the Governors of the respective Provinces to announce the date of holding of general elections to the respective Provincial Assemblies. For reference it is noted that the Provincial Assembly of the Punjab was dissolved on 14.01.2023 whereas the Provincial Assembly of Khyber Pakhtunkhwa was dissolved on 18.01.2023.

2. Prior to the filing of the petition by the Hon'ble Speakers of the two Provincial Assemblies, the Hon'ble President of Pakistan wrote to the Election Commission of Pakistan directing them to announce the date of holding of elections to the said Provincial Assemblies. Finally on 20.02.2023 the Hon'ble President of Pakistan in exercise of his power under Section 57(1) of the Elections Act, 2017 announced 09.04.2023 as the date for the holding of elections to both the Provincial Assemblies.

3. Constitution petitions seeking the above mentioned relief are also pending before the learned Lahore High Court and the learned Peshawar High Court. The petition filed before the learned Lahore High Court matured into a judgment dated 10.02.2023 passed by a learned Single Judge wherein the Election Commission of Pakistan has been directed to announce a date in consultation with the Governor of the Province. Both the Election Commission of Pakistan and the Governor of Punjab have reservations about the judgment dated 10.02.2023 and have challenged the same in Intra Court Appeals. The appeals were initially fixed on 16.02.2023

when the notices were issued for 21.02.2023. However, on 21.02.2023 the learned Law Officer sought further time to obtain instructions from the learned Attorney General for Pakistan and the matter was adjourned for 27.02.2023.

4. The proceedings before the learned Peshawar High Court have also been pending for considerable time. These are next scheduled for 28.02.2023 in which report by the Election Commission of Pakistan has to be submitted.

5. Notwithstanding the lapse of nearly five weeks after the dissolution of the respective Provincial Assemblies, the matter regarding the constitutional authority that has the power to fix the date of elections to the Provincial Assemblies under the Constitution of Islamic Republic of Pakistan, 1973 ("Constitution") is still *sub judice*. Article 224 of the Constitution imposes a constitutional imperative that General Elections must be held within 90 days of the date of dissolution of the Assembly. Meanwhile, a request by a Bench of the Court was made on 16.02.2023 to one of us (the CJP) for taking up *Suo Motu* proceedings on the matter of fixing date of holding of general elections in the two Provinces. This request was deliberated. The time already consumed in the conclusive pending proceedings before the High Courts and the initiative taken by the Hon'ble President of Pakistan to fix the date of election under Section 57(1) of the Elections Act, 2017 was duly considered. In these circumstances, on 22.02.2023 one of us (the CJP) invoked the *Suo Motu* original constitutional jurisdiction to hear the following three questions:

- a) Who has the constitutional responsibility and authority for appointing the date for the holding of a general election to a Provincial Assembly, upon its

dissolution in the various situations envisaged by and under the Constitution?

- b) How and when is this constitutional responsibility to be discharged?
- c) What are the constitutional responsibilities and duties of the Federation and the Province with regard to the holding of the general election?

6. In essence there is a short question about which authority is reposed with the power by the Constitution to fix the date of elections to a Provincial Assembly. This short question has not been addressed or answered before in any judicial proceedings. There is a constitutional time constraint and for that reason we have taken up this matter for our urgent consideration.

7. Therefore, in the first place, notice is issued under Order XXVII-A CPC to the learned Attorney General for Pakistan and the Advocate Generals of all the four Provinces and the Islamabad Capital Territory to assist the Court, *inter alia*, on the questions formulated above. In addition, notice is issued to the Election Commission of Pakistan, Government of Pakistan through Secretary Cabinet Division, Government of Punjab through its Chief Secretary and Government of Khyber Pakhtunkhwa through its Chief Secretary.

8. The Hon'ble President of Pakistan and the Hon'ble Governors of the Provinces of the Punjab and Khyber Pakhtunkhwa are high constitutional functionaries who are mentioned in the Constitution with respect to the matter of holding of elections consequent upon the dissolution of the relevant Assemblies. In the circumstances of the present case, they are immune under the provisions of Article 248 of the Constitution from process of the Court. However, they may have points of

view to share with the Court on the constitutional questions that have arisen for our determination. Therefore, the Principal Secretaries to each of those three high constitutional functionaries shall be served with a notice to inform the Hon'ble President of Pakistan and the Hon'ble Governors of the two Provinces of Punjab and Khyber Pakhtunkhwa for giving instructions to their respective Principal Secretaries for placing their respective points of view on record of this Court.

9. Notice is also issued to Vice Chairman Pakistan Bar Council and the President, Supreme Court Bar Association to assist the Court on the legal questions raised.

10. The Attorney General for Pakistan has submitted that the major political parties in Parliament should also be issued notices so that they are aware of these proceedings and may express their point of view, if so inclined. Let notices be issued to the member parties of the Pakistan Democratic Movement (PDM). However, on account of the urgency of the matter, the persons, office bearers and parties named above shall not wait to respond notices ordered today in Court, when such information is conveyed through the electronic media, the print media or courier. The Secretary Ministry of Information and Broadcasting is directed to take step for our aforesaid notices to be conveyed to all concerned through the print and electronic media.

11. During the course of proceedings, one of us (*Athar Minallah, J.*) raised the point that the dissolution of Punjab Assembly and Khyber Pakhtunkhwa Assembly on 14.01.2023 and 18.01.2023 respectively were violative of the Constitution because the Chief Ministers of both the Provinces acted on the dictate of a political party / political leader. Likewise,

one of us (*Syed Mansoor Ali Shah, J.*) has enquired about the reasons behind the dissolution of the Punjab Assembly and Khyber Pakhtunkhwa Assembly and if these are justiciable can the Court examine whether either or both Assemblies can be restored. These points are reflected neither in the petitions before the Court nor the request for invoking the *Suo Motu* jurisdiction. The points, may subject to the foregoing, be considered at an appropriate stage while keeping in mind the urgency in the matter.

12. These proceedings are accordingly adjourned to tomorrow i.e. 24.02.2023 at 11:00 am when those in attendance shall present their skeleton arguments and file any documents that are necessary in aid of their submissions.

Justice Jamal Khan Mandokhai.

1. Late last night (22.2.2023) I received a file that the Hon'ble Chief Justice has taken suo motu notice on the basis of an order passed by Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Mazahar Ali Akbar Naqvi in CPLA No. 3988/2022, which was filed by Ghulam Mehmood Dogar against order dated 24.11.2022 passed by the Federal Service Tribunal ("FST") in respect of his transfer. Learned Mr. Abid S. Zuberi is the counsel of Ghulam Mehmood Dogar.
2. The petition of Ghulam Mehmood Dogar was pending when on 16.2.2023 the learned members of the Bench called the Chief Election Commissioner of the Election Commission of Pakistan, who was not a party to the petition, and was asked about the holding of elections to the Provincial Assembly of Punjab. Irrespective of the reply of the Chief Election Commissioner the Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Mazahar Ali Akbar Naqvi deemed it appropriate to refer the matter to the Hon'ble Chief Justice to take suo motu notice. The matter pertaining to election has no nexus or connection with the abovementioned service matter.
3. It is noteworthy that three audio recordings came out. In one recording learned Mr. Abid Zuberi is reportedly talking to ex Chief Minister about the pending case of Ghulam Mehmood Dogar, which in my opinion was very serious.
4. Besides the learned Judges have already expressed their opinion by stating that elections "are required to be held within 90 days" and that there was "eminent danger of violation" of the Constitution. With greatest respect the Hon'ble Chief Justice has added to the points mentioned by the two learned Judges and has also expressed his opinion. Such definite opinions have decided this matter and done so without taking into consideration Article 10A of the Constitution.
5. Thus in these circumstances it was not appropriate to refer the matter to Hon'ble Chief Justice for taking suo motu notice under Article 184(3) of the Constitution. Suo motu action is not justified.

Islamabad.
23.02.2023.

Syed Mansoor Ali Shah J.- It is a constitutional and a legal duty of every Judge of this Court to sit in a Bench constituted by the Hon'ble Chief Justice and hear case(s) entrusted to that Bench, unless for some lawful justification a Judge recuses himself from hearing a particular case. In the absence of any lawful justification, mere recusal may amount to abdication of the constitutional and legal duty. With this understanding, I have opted not to recuse myself from hearing these cases, despite having reservations on how the original jurisdiction of this Court under Article 184(3) of the Constitution has been invoked *suo motu* in the present case as well as on the constitution of the present Bench. I, however, find it my constitutional and legal obligation to bring on record my reservations, lest it may be misunderstood that I have none and my silence taken as my assent.

2. The *suo motu* matter (SMC 01 / 2023) before us arises from a judicial order of a learned two-member Bench of this Court¹ made while hearing a service matter of a civil servant, wherein they made recommendation to the Hon'ble Chief Justice to invoke *suo motu* the original jurisdiction of this Court under Article 184(3) of the Constitution. The order was made in a case which, in my view, had no concern whatsoever with the present matter before us, reflecting to an ordinary reader of the order an unnecessary interest of the two-member Bench in the matter. Attached to the said order is the a controversy in the public domain, generated by the audio leaks relating to one² of the members of the said Bench. Inspite of the requests from within the Court and outside the Court, there has been no institutional response to the allegations either by this Court or by the constitutional forum of the Supreme Judicial Council. Further, there is news of references being filed against the said member before the Supreme Judicial Council by the Bar Councils. In this background and before these allegations could be probed into and put to rest, inclusion of the said member on the Bench in the present matter of "*public importance*" appears, most respectfully, inappropriate. This inclusion becomes more nuanced when other senior Hon'ble Judges of this Court are not included on the Bench.

3. The Hon'ble Chief Justice has been pleased to observe in his order invoking the original jurisdiction of this Court under Article 184(3) of the Constitution *suo motu*, in categorical terms that "*These matters*

¹ Dated 16.02.2023 passed in CP No. 3988 of 2022 and CMA No. 676 of 2023.

² Justice Sayyed Mazahar Ali Akbar Naqvi

involve the performance of constitutional obligations of great public importance apart from calling for faithful constitutional enforcement.” But, in spite of the said observation, the two senior most Hon’ble Judges of this Court have not been made part of this Bench to hear and decide upon the matters of “great public importance”, for reasons not expressed in the order constituting the present Bench.

4. Our greatest strength as an apex judicial institution lies in the public confidence and public trust people of our country repose in us. Our impartiality, including the public perception of our impartiality, transparency and openness in dispensing justice must at all times be undisputed and beyond reproach.

Islamabad,
23rd February, 2023

Yahya Afridi, J.- For detailed reasons to be recorded later, it appears that *prima facie* these petitions fall within the purview of Article 184(3) of The Constitution of the Islamic Republic of Pakistan, 1973. However, it would not be judicially appropriate to exercise the power to make an order under the aforementioned provision of the Constitution given that the matters raised in the petitions are presently pending adjudication before the Lahore High Court in Intra-Court Appeal No. 11096 of 2023, Contempt of Court Petition No. 10468/W/2023, and the Peshawar High Court in Writ Petition No. 407-P/2023.

While the jurisdiction of this Court under Article 184(3) of the Constitution is an independent original jurisdiction that is not affected by the pendency of any matter on the same subject matter before any other court or forum, the decision already rendered by the Lahore High Court in Writ Petition No. 6093/2023, pending challenge in Intra-Court Appeal No. 11096 of 2023, and the peculiarly charged and unflinching contested political stances taken by the parties, warrant this Court to show judicial restraint to bolster the principle of propriety. This is to avoid any adverse reflection on this Court's judicial pre-emptive eagerness to decide.

Therefore, passing any finding or remarks during the proceeding of the present petitions by this Court would not only prejudice the contested claims of the parties in the said petition/appeal pending before the respective High Courts but, more importantly, offend the hierarchical judicial domain of the High Court as envisaged under the Constitution. It would also disturb the judicial propriety that the High Court deserves in the safe, mature, and respectful administration of justice. Accordingly, I dismiss these three petitions.

Having decided that exercising powers under Art. 184(3) of the Constitution in the present three petitions pending before us would not be appropriate, I find that my continuing to hear the said petitions is of no avail. However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions.

Athar Minallah, J.- I concur with the articulate opinion recorded by my learned brother Justice Yahya Afridi. I also had the privilege of going through the order of the Hon'ble Chief Justice of Pakistan. However, with utmost respect, it does not appear to be consistent with the proceedings and the order dictated in the open Court. The questions raised before us cannot be considered in isolation because questions regarding the constitutional legality of the dissolution of the provincial assemblies of Punjab and Khyber Pakhtunkhwa cannot be ignored. Were they dissolved in violation of the scheme and principles of constitutional democracy before completion of the term prescribed under the Constitution of the Islamic Republic of Pakistan ('the Constitution')? The questions regarding the legality of the dissolution involve far more serious violations of fundamental rights. The matter before us is definitely premature, because it is pending before a constitutional Court of a province, as noted in the opinion of my learned brother Yahya Afridi, J. During the proceedings, I had proposed that the question of legality of the dissolution of the respective provincial legislatures must also be examined before considering the matter placed before us. The Honb'ble Chief Justice, who was heading the bench, had by assuming and invoking the *suo motu* jurisdiction conferred under Article 184(3), accepted to include the proposed questions for consideration. The learned brothers on the bench did not object and, therefore, while dictating the order in open Court, the inclusion of the proposed additional questions for consideration was duly acknowledged and announced. The Hon'ble Chief Justice was, therefore, pleased to assume/invoke the jurisdiction in consonance with the principles highlighted by this Court in Suo Motu Case No.4 of 2021

(PLD 2022 SC 306). I was asked to formulate the precise questions which are as follows:

- (a) Whether the power of a Chief Minister to make advice for the dissolution of the Provincial Assembly is absolute and does not require any valid constitutional reason for its exercise?
- (b) Is a Chief Minister to make such advice on his own independent opinion or can he act in making such advice under the direction of some other person?
- (c) If such advice of a Chief Minister is found constitutionally invalid for one reason or another, whether the provincial assembly dissolved in consequence thereof can be restored?

2. The interpretation of the Constitution is the prerogative as well as the duty of this Court. It is also an onerous duty to protect, preserve and defend the Constitution. It has been observed by this Court that the Constitution is an organic document designed and intended for all times to come. Interpretation of the Constitution by this Court has a profound impact on the lives of the people of this country, besides having consequences for future generations. The framers of the Constitution have conferred an extraordinary jurisdiction on this Court under Article 184(3). The manner in which this power is to be exercised is in itself a matter of immense public importance. While invoking the jurisdiction great care has to be exercised. Article 176 of the Constitution describes the constitution of this Court. I am of the opinion that it is implicit in the language of Article 184(3) that the conferred extraordinary original jurisdiction must be entertained and heard by the Full Court. In order to ensure public confidence in the proceedings in hand and keeping in view the importance of the questions raised for our

consideration, it is imperative that the matter regarding the violation and interpretation of the Constitution is heard by a Full Court. The interpretation of Article 184(3) of the Constitution in this context, therefore, also requires interpretation.

ORDER OF THE BENCH

Keeping in view the order dated 23.02.2023 and the additional notes attached thereto by four of us (Justice Syed Mansoor Ali Shah, Justice Yahya Afridi, Justice Jamal Khan Mandokhail and Justice Athar Minallah) as well as the discussion/deliberations made by us in the ante-Room of this Court, the matter is referred to the Hon'ble Chief Justice for reconstitution of the Bench.

Sd/-
Chief Justice

Sd/-
Judge

Islamabad
27.02.2023