

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa
Mr. Justice Sardar Tariq Masood

Civil Misc. Application Nos. 6762 and 2797 of 2020
in
Civil Appeal No. 20 of 2014

Administrator Municipal Corporation, Peshawar. (in CMA 6762/20)
Taimur Hussain Amin and others. (in CMA 2797/20)
... Petitioners

Versus

Taimur Hussain Amin and others. (in CMA 6762/20)
Administrator Municipal Corporation, Peshawar, etc. (in CMA 2797/20)
... Respondents

For the Applicant
(in CMA No. 2797/2020): Syed Rifaqat Hussain Shah, AOR

Voluntarily Appeared: Mr. Nawazish Ali Pirzada, ASC

On Court's Notice

For the Federation: Ch. Aamir Rehman,
Additional Attorney-General for Pakistan
with Maulvi Ijaz-ul-Haq, DAG

For Government of Khyber
Pakhtunkhwa: Mr. Shumail Ahmed Butt, Advocate General
Mr. Atif Ali Khan,
Additional Advocate General
Mr. Shakeel Ahmed,
Secretary, Local Government

For Government of Punjab: Mr. Qasim Ali Chohan,
Additional Advocate General
Mr. Noorulamin Mengal,
Secretary Local Government and
Community Development

For Government of
Balochistan: Mr. Arbab Muhammad Tahir,
Advocate General
Mr. Fareed Dogar,
Additional Advocate General

For Government of Sindh: Nemo

For the Election Commission: Mr. Afnan Karim Kundi, ASC
of Pakistan Dr. Akhtar Nazir, Secretary
Mr. Muhammad Arshad, D.G. (Law)

Date of Hearing: 15 March 2021

ORDER

CMA No. 2797/2020: Syed Rifaqat Hussain Shah, learned AOR, states that the learned counsel for the applicant/petitioner is suffering from Covid-19 and requests for an adjournment. This application is accordingly adjourned.

CMA No. 6762/2020: Ch. Aamir Rehman, learned Additional Attorney-General for Pakistan on behalf of the learned Attorney-General for Pakistan, states that the learned Attorney-General is quarantined on account of having tested positive for Covid-19. He refers to CMA No. 1509/2021, through which he has placed on record the minutes of the meeting of the Council of Common Interest ('**CCI**'), and to letter dated 25 January 2021 (at page 16) whereby the 44th meeting of the CCI, scheduled to be held on 27 January 2021, was postponed. We asked him the reason for such postponement but he states that he is not aware of it. However, he states that *vide* letter dated 17 February 2021 (at page 18) the said meeting is now scheduled to be held on 24 March 2021. He also endorses the statement of the learned Attorney-General made in Court on 4 February 2021 (paragraph 8), which is reproduced hereunder:

... the learned Attorney General who was refreshingly candid to state that local governments are mandated by the Constitution and added that he has always disavowed arbitrary dissolution of any elected body and through his published articles had decried the erstwhile Article 58(2)(b) of the Constitution, which was used to dissolve Parliament.

But adds that once the CCI has officially approved the census, carried out in the year 2017, only then the mode and manner of conducting elections would be determined after delimitation of constituencies takes place.

2. We are surprised to learn that the census carried out about four years ago has still not been approved, disapproved or otherwise resolved by the CCI. The CCI is a constitutional body and we are confident that it is aware of its constitutional responsibilities to the people of Pakistan under the Constitution of the Islamic Republic of Pakistan ('**Constitution**') and shall, without further delay, do the needful. We are also confident that the next scheduled meeting of the CCI will not, once again, be adjourned. The matters of State take priority over all other matters. To postpone indefinitely a constitutional requirement, of holding elections, because CCI, which comprises of the highest executive functionaries of the Federation and the provinces, can't be bothered to meet, violates the fundamentals of the Constitution. The Constitution cannot be permitted to be violated. If the excuse of the Government were to be accepted then elections to the National and provincial assemblies can also not take place, and that would be the end of democracy.

3. Mr. Afnan Karim Kundi, the learned counsel representing the Election Commission of Pakistan ('**the Commission**') together with the Secretary and Director General (Law) of the Commission, refers to CMA No. 1555/2021 filed by the Commission and states that the Commission was ready to conduct local government elections in the province of Punjab, however, on 3 February 2021 the Punjab Local Government (Amendment) Ordinance, 2021 ('**the Amendment Ordinance**') comprising of 70 pages was promulgated, which *'made the Commission's earlier efforts towards carrying out delimitation, enlistment of Electoral Groups and subsequent conduct of local government elections, **redundant**'*. The CMA also states that the Amendment Ordinance was promulgated without taking the Commission into confidence. It is also pointed out that when this matter was fixed in Court on 4 February 2021, the promulgation of the Amendment Ordinance which had taken place a day earlier was not disclosed and kept secret. He states that the entire effort undertaken by the Commission for holding of elections has been wasted because the entire exercise will have to be undertaken afresh in the light of the Amendment Ordinance.

4. Our attention had earlier been drawn to a stay order issued by the High Court of Balochistan operating in the province of Balochistan. However, the said petition has been dismissed and the stay has been vacated *vide* order dated 22 February 2021, which is confirmed by Mr. Arbab Muhammad Tahir, the learned Advocate General, Balochistan. Therefore, the legal impediment towards holding local government elections in the province of Balochistan stands removed.

5. Mr. Kundi further states that the Commission had made requisite arrangements to hold local government elections in the province of Khyber Pakhtunkhwa and is ready to hold such local elections. However, Mr. Shumail Ahmed Butt, the learned Advocate General, Khyber Pakhtunkhwa states that the process of delimitation in his province, which is dependant on the approval of the census by the CCI followed by delimitation, has to be completed first and only thereafter the local government elections can be held. Apparently the position taken by the province of Sindh is the same as that taken by the province of Khyber Pakhtunkhwa. Regrettably, there is no representation on behalf of the province of Sindh. However, the Commission does not subscribe to the views of these two provinces.

6. The matter of holding local government elections lies within the domain of the Commission as per Article 219(d) of the Constitution and a province cannot dictate to the Commission, if and/or when, the same can be held. On the contrary, Article 220 of the Constitution mandates that, *'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.'* In case the Federation and/or the Province(s) create hurdles in the way of the Commission holding elections, they will be violating the Constitution, which may attract serious consequences.

7. Mr. Kundi on behalf of the Commission states that the tenure of the local government in Islamabad Capital Territory has expired recently and points out that the learned Attorney-General had already stated that the Federation will fully cooperate in the holding of the local government

elections in the Islamabad Capital Territory, therefore there is no issue with regard to holding of elections in the Islamabad Capital Territory.

8. With regard to the province of Punjab the learned Additional Advocate General Punjab, Mr. Qasim Ali Chohan, has taken issue with the written and verbal statement made by and on behalf of the Commission, that the Commission was not aware that the Amendment Ordinance was to be promulgated. Therefore, we asked him to refer to any document which may disclose that the Commission was taken into confidence, but he was unable to do so. We questioned him as to why, if as he states the Commission was not correct, was the Amendment Ordinance not brought to the notice of this Court on 4 February 2021, when this matter was heard. He replied that he was also not aware of the Amendment Ordinance at the time. Nonetheless, he states that he has been instructed by the Secretary, Local Government and Community Development, who is present in Court, to state that the Commission is misstating facts. Since the said Secretary was unabashedly keen to address the Court, we allowed him to do so, but he too was not able to refer to any document on the record (or even in his possession) to show that the Commission knew about the promulgation of the Ordinance. He then audaciously resorted to hearsay stating that both the provincial Law Minister and the Chief Secretary Punjab had told him that the Commission had been informed. We express our extreme displeasure with the unbecoming conduct of the Secretary and of the Government of Punjab, who have taken issue with the statement of the Commission and have done so without a shred of evidence.

9. It appears, we have not learnt a single lesson from our tragic history. When Pakistan emerged on the world stage, it was a proud country with the largest Muslim population in the world. But the people's interest and franchise was discarded; officers facilitated unconstitutional rule; the country ruptured into two and we were left with half a country. This truncated country can no longer accept nor will we permit the Constitution's subversion and unconstitutional rule. Obedience to the Constitution is the *inviolable obligation of every citizen* (Article 5) and

anyone subverting or attempting to subvert the Constitution commits *high treason* (Article 6).

10. The learned Additional Advocate General Punjab has referred to para (c) on page 8 of CMA No. 1513/2021, filed by the Government of Punjab, wherein the '*political manifesto of the present Government*' is mentioned and an extract from the said *political manifesto* is attached. We wish to remind the Advocate General and the Secretary, Local Government and Community Development, of the Government of Punjab, who have signed the CMA that governments do not, and cannot have, *political manifestos*. *Political manifestos* by their very nature and description are of political parties; it does not behove the Advocate General and a Secretary of the Government of Punjab to project a particular political party's manifesto.

11. A government servant's overt anxiousness to please politicians and project the political views of a political party must be frowned upon. A government servant's loyalty must always be to the Constitution, the law and the people, whose taxes pay his salary and who will also be paying for his pension. In any event, the said manifesto states that, '*We will transform Pakistan by devolving power and decision-making to the people through an empowered local government.*' Since, in the instant case, the subsisting local governments were uprooted we cannot comprehend how power has been devolved and decision making transferred at the local level nor how uprooting local governments has empowered local governments. The said manifesto goes on to state that, '*Local development in villages and small towns in Pakistan is controlled by MPAs and MNAs, or by the bureaucracy, who do not want to cede authority and relevance.*' If we were to accept this view, the Government of Punjab, by sending home the elected local representatives of the people, did exactly what the manifesto proclaimed must never be done. The third tier of government, the local governments, and the local elected representatives of the people were removed and this vacuum remains.

12. It is clear that the Commission was kept completely in the dark with regard to the promulgation of the Amendment Ordinance by the Governor

of Punjab on behalf of the Government of Punjab, let alone having been taken into confidence prior to its promulgation and having its views solicited with regard to the 70 pages of the Amendment Ordinance. The Commission is a constitutional body, which all executive authorities are mandated by the Constitution to assist.

13. Mr. Nawazish Ali Pirzada, learned ASC, states that he has filed Constitution Petition No. 48/2019, in which the dissolution of the subsisting local governments in the province of Punjab before completion of their mandated five year period, was challenged and also had assailed the Punjab Local Governments Act, 2019 (**'the Act'**) through which the local governments were dissolved. He states that the said petition was filed on 11 December 2019, but objections thereto were raised by the Registrar's office on 18 December 2019. Therefore, an appeal against the said objections was promptly filed on 8 January 2020, which was finally put up for hearing in Chambers and decided on 22 April 2020 and then the petition was fixed in Court on 13 July 2020, that is, six months after its filing. A three-member Bench headed by the Hon'ble Mr. Justice Mushir Alam passed a comprehensive order and had issued notice. However, the learned counsel submits, the Registrar did not then fix the petition in Court until much later and fixed it before another Bench. The petition, he states, remains pending. We have repeatedly observed that election matters must be dealt with on a priority basis. The criticality of the said petition was even greater because it had challenged the Act which had disenfranchised the people and, we are informed, sent fifty-six thousand elected representatives home, and who were substituted by the bureaucracy of the province. We are informed that the last hearing in the said petition took place on 26 October 2020 and since then five months have passed, but the petition has not been fixed for hearing.

14. The Registrar of this Court should have ensured that the said petition be fixed at the very earliest. However, unnecessary objections to its maintainability were first raised and then it took a few months before the petition was placed for hearing in Court. The progress of the petition was further delayed when, after issuance of notice by this Court, the

Registrar did not fix it for hearing. If election matters are not decided at the earliest, people lose faith in democratic institutions. The said petition raised questions of immense public importance as the people of the most populous province of the country had been disenfranchised at the local level. By not fixing the petition for hearing, the Registrar undoubtedly undermined the people's perception of the independence of the Supreme Court. Therefore, we are constrained to express our displeasure at the Registrar's conduct. We should continuously recollect that the Pakistan, comprising of East and West Pakistan, could not be sustained when the peoples' elected representatives were not given their due. We cannot remain silent spectators to the disenfranchisement that has been brought about, and when those who have challenged such an act are effectively denied access to justice by administrative measures it raises grave misgivings.

15. The learned counsel states that the Act violated the Constitution as *prima facie* observed by the three-member Bench in its order of 13 July 2020 in which they had referred to the Constitution and its Article 7, which defines the *State* and provides for three-tiers of government, Article 17(2), which enshrines the Fundamental Right of Freedom of Association, and Article 140A which mandates the establishment of local government. He also refers to Article 219(d) of the Constitution whereby the Commission is responsible for holding local government elections. He submits that dissolving local governments prematurely effectively undermines the State. He points out that as a consequence of section 4 of the Punjab Local Government (Amendment) Act, 2017 which omitted section 126 from the Punjab Local Government Act, 2013, which provision permitted the dissolution of local governments before completion of their term, meant that the prescribed tenure of local governments could not, henceforth, be dissolved before completion of their term. The premature dissolution of the local governments on 4 May 2019, before the completion of their terms, was also stated by the Commission to be unconstitutional (as recorded in order dated 28 January 2021).

16. The learned counsel states, that if it is assumed for argument's sake, that the Act conformed with the Constitution, its section 3(2) stipulated that fresh local government elections must be held within one year, which period was later extended to 21 months by the Punjab Local Government (Amendment) Act, 2020. He states that, the Act was promulgated on 4 May 2019, therefore, one year expired on 3 May 2020 and the extended 21 months on 3 February 2021. Therefore, the Act, whereby elected representatives of the people were sent home, was itself violated by not holding fresh elections which shows the *mala fide* of the Government of Punjab.

17. The learned Mr. Pirzada then refers to the Amendment Ordinance promulgated by the Governor on 3 February 2021 and states that it was yet another device to deprive the people from electing their local representatives who would represent and govern them at the local level. He states that Article 128 of the Constitution empowers promulgation of ordinances by governors under certain stipulated, limited and prescribed conditions and such power can only be exercised when the provincial assembly is not in session. We enquired from the learned Additional Advocate General Punjab when the provincial assembly was prorogued and he states that this was done on 1 February 2021. The learned counsel states that the government could not have come up with a 70 page Ordinance overnight; have it drafted, vetted, finalized and then approved by the provincial cabinet and having done so, sent it to the Governor, through the Chief Minister, for the issuance of an ordinance. He states that it is clear that the Amendment Ordinance was already ready for promulgation when the provincial assembly was prorogued but was withheld by the Governor to avoid submitting it as a bill before the provincial assembly of Punjab for its consideration. And, the act of the Governor was a fraud on the Constitution. There is substantial merit in the learned counsel's submissions because it is extremely difficult to believe that a 70 page Amendment Ordinance suddenly emerged for promulgation by the Governor immediately after proroguing the provincial assembly. Therefore, it needs consideration whether this constitutes a case of *mala fide* and intentional contravention of Article 128 of the

Constitution by the Government/Governor, and if so, what are the consequences thereof.

18. The learned Mr. Pirzada further states that the conditions for promulgating an ordinance, prescribed in Article 128, were not met because there was no necessity which required immediate action to be taken for the promulgation of the Amendment Ordinance. He has also referred to the Objectives Resolution/Preamble to the Constitution, which, by virtue of Article 2A of the Constitution, is now a *substantive part* of the Constitution, and which mandates that sovereignty belongs to Almighty Allah alone and authority is to be exercised by the people of Pakistan through their chosen representatives. He submits that the Act, and then the Amendment Ordinance violate, the concept of being governed by one's chosen representatives, negates democracy and representative government. He adds that in promulgating the Amendment Ordinance, the Government itself expressed no confidence in the majority of the members of the provincial assembly who had voted in the Act. He further submits the Governor who is an unelected and appointed individual cannot supplant the Government's or his own arbitrary decision on the majority of over 370 members of the Punjab provincial assembly who had voted in the Act. He still further submits that the executive making law through ordinances is a vestige of colonial rule, is undemocratic and negates the concept of representative government. There are hardly any countries which retain this mechanism to enact laws. The learned counsel also points to the legal and constitutional quagmire which will result if the provincial assembly discards the Amendment Ordinance or it dies its natural death after ninety days. Concluding his submissions, he states that a Governor is a symbol of the Federation and represents every person residing in the province but sadly continues to act as a member of a political party by participating in political meetings and holding political events in the Governor's house and in doing so contravened both his oath of office and the Constitution.

19. Under the circumstances it is clear that this matter may be bifurcated into two; one with regard to the province of Punjab and the

other with regard to the other provinces and the Islamabad Capital Territory. We dispose of this matter with regard to the holding of local government elections in the province of Balochistan where their term expired on 27 January 2019, Khyber Pakhtunkhwa where their term expired on 28 August 2019, Sindh, where their term expired on 20 August 2020 and the Islamabad Capital Territory, where their term expired on 4 March 2021 in terms of the assurance of the Commission that it is ready to hold local government elections therein. It is pointed out that *all executive authorities in the Federation and in the provinces are mandated by Article 220 of the Constitution to assist the Commissioner and the Election Commission in the discharge of his or their functions*. Therefore, we expect that local government elections will be held in these three provinces and the Islamabad Capital Territory as soon as possible.

20. With regard to the province of Punjab since CP No. 48 of 2019 is pending adjudication before a three-member Bench of this Court, it would be appropriate if such Bench decides it. However, we agree with the learned Mr. Pirzada that the petition be fixed for hearing immediately and that the Registrar cannot justifiably not do so. Therefore, we direct the Registrar that the said petition be immediately fixed for hearing and further direct him to immediately solicit the orders of the Hon'ble Chief Justice to have it fixed for hearing either before the Bench headed by the Hon'ble Mr. Justice Mushir Alam or as directed by the Hon'ble Chief Justice. To facilitate an early decision of the petition and to avoid unnecessary and time-consuming duplication of record, the filings and orders herein be attached with the said petition. However, the record of Civil Appeal No. 20/2014 and CMA No. 2797/2020, be retained which is to be decided separately, as it could not be decided today because of the adjournment sought on behalf of the counsel.

21. Before parting, it would be best to recollect and abide by the advice proffered by the founder of the nation, the great Muhammad Ali Jinnah, immediately after Pakistan had gained independence. He addressed in Chittagong, East Pakistan, officers on 25th March 1948; and told them:

... you are now the servants of Pakistan. Servants can only do their duties and discharge their responsibilities by

serving. Those days have gone when the country was ruled by the bureaucracy. It is people's Government, responsible to the people more or less on democratic lines and parliamentary practices. ... You have to do your duty as servants; you are not concerned with this political party or that political party; that is not your business.

22. Then, on 14 April 1948, the Quaid-e-Azam reiterated his advice to the officers in Peshawar, West Pakistan, and told them:

The first thing that I want to tell you is this, that you should not be influenced by any political pressure, by any political party or individual politician. If you want to raise the prestige and greatness of Pakistan, you must not fall a victim to any pressure, but do your duty as servants to the people and the State, fearlessly and honestly. Service is the backbone of the State. Governments are formed, Governments are defeated, Prime Ministers come and go, Ministers come and go, but you stay on, and, therefore, there is a very great responsibility placed on your shoulders. You should have no hand in supporting this political party or that political leader – this is not your business.

23. On the above occasions the Quaid-e-Azam also had advice for leaders and politicians:

I wish also to take the opportunity of impressing upon our leaders and politicians in the same way that if they ever try to interfere with you and bring political pressure to bear upon you, which leads to nothing but corruption, bribery and nepotism – which is a horrible disease and for which not only your province but others too, are suffering - if they try and interfere with you in this way, I say, they are doing nothing but disservice to Pakistan.

Judge

Judge

Bench-III
Islamabad
15.03.2021
(Farrukh)

Approved for Reporting