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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

Case No: W.P.28685/2012

Rao Naeem Sarfraz **Versus** The Election Commission of
Pakistan, etc.

JUDGMENT

Date of hearing	29.11.2012
Petitioner by	Ch. Ahmed Uzair, Advocate in W.P. No.28685/2012 and Dr. Khalid Ranjha, Advocate in W.P. No.29224/2012
Respondents by:	Syed Abdul Hayee Gillani, Additional Attorney General for Pakistan. Ch. Muhammad Hussain, Deputy Attorney General for Pakistan Mr. Shan Gull, Additional Advocate General. Mr. Rashdeen Nawaz Advocate on behalf of respondent No.3. Muhammad Umer Riaz and Saqib Haroon, Advocates for respondent No.4. Mr. Muhammad Ijaz Anwar, Advocate for voter Gujrat NA-107. Mr. Nadeem Yousaf Rana, Advocate for respondent No.3 in W.P. No.29224/2012. Muhammad Naeem Akhter, Assistant Director (Legal). Ali Akhtar Khan, Law Officer, Election Commission of Pakistan. Raja Amer Khan and Ch. Naseer Ahmed, respondents No.4 & 5 in W.P. No.29224/2012 in person.

Syed Mansoor Ali Shah, J:- This judgment shall decide
the instant petition, as well as, Writ Petition No.29224/2012 as
both the petitions raise identical questions of law and facts.

2. Election Commission of Pakistan (“ECP”) vide Notification dated 26.09.2012 issued under Sections 11 and 108 of Representation of the People Act, 1976 (“ROPA”) read with sub article (4) of Article 224 of the Constitution of Islamic Republic of Pakistan, 1973 (“Constitution”) announced the Bye-Elections in the following constituencies of National Assembly of Pakistan, as well as, Provincial Assemblies of Punjab and Sindh:-

NATIONAL ASSEMBLY OF PAKISTAN	
1.	NA-107 Gujrat-IV
2.	NA-162 Sahiwal-III
3.	NA-245 Karachi-VII
PROVINCIAL ASSEMBLY OF PUNJAB	
1.	PP-26 Jhelum-III
2.	PP-92 Gujranwala-II
3.	PP-122 Sialkot-II
4.	PP-144 Lahore-VIII
PROVINCIAL ASSEMBLY OF SINDH	
1.	PS-21 Naushero Feroze-III

3. According to the Notification polling day of Bye-Elections was scheduled for 17.11.2012. Subsequently, vide impugned Notification dated 08.11.2012 (“Impugned Notification”) issued under Section 11A of ROPA read with Article 254 of the Constitution, the polling date of Bye-Elections was ‘refixed’ as 04.12.2012.

4. Grievance of the petitioners, who are elector (voter) and candidate from two of the aforesaid constituencies namely; NA-162 Sahiwal-III and PP-122 Sialkot-II, respectively, is that new election schedule issued under the Impugned Notification is in

violation of Article 224(4) of the Constitution, in as much as, the Bye-Elections ought to be held within 60 days from the date the seat fell vacant. He submits that vacancy in the present case occurred on 20.09.2012 in pursuance to the judgment of the august Supreme Court of Pakistan in *Syed Mehmood Akhtar Naqvi's Case* (C.P. No.5 of 2012), hence, Bye-Elections should have been called within two months i.e., latest by 20.11.2012, however, due to amendment/re-fixation of the election schedule under the Impugned Notification, the polling date has been extended to 04.12.2012 which falls outside the permissible constitutional period of 60 days, hence the Bye-Elections cannot be held. Supplementing the above argument, learned counsel submitted that the Constitution prescribes that elections ought to be held not later than 120 days before the expiry of the term of the government. The term, of both the Assemblies, expires on 16.03.2013 and the election date is announced as 04.12.2012, hence less than 120 days are left between the elections and the completion of the term of the Assemblies, therefore, holding the Bye-Elections under the Impugned Notification is unconstitutional.

5. It was vehemently argued by the learned counsel for the petitioners that Article 224(4) of the Constitution has to be interpreted in favour of the electorate. It is submitted that reading of the said article in its literal sense leads to absurdity, in as much as, the Bye Elections cannot be held if less than 120 days remain before the term of the Assemblies expires. He submits that the entire exercise amounts to wastage of tax-payers money which is to be spent on preparation and conducting of elections and no useful purpose will be achieved as the term of the returned candidate in the respective Assemblies will be less than 120 days.

6. It is further contended that in changing the date from 17.11.2012 to 04.12.2012 the Election Commission has failed to consider the fact that the limited election expenses in a sum of Rs 1.0 million for the Provincial Assembly and Rs 1.5 million for the National Assembly have been exhausted and there are no funds available with the candidates to carry out their campaign during the period of extension (i.e., 17-days) which has seriously impaired their right to contest the elections.

7. On the interpretation of Article 224(4) of the Constitution it is submitted that the fundamental tenet of interpretation is that where ordinary interpretation or literal meaning of the words would create inconsistency, inconvenience and absurdity, the Court may depart from the ordinary interpretation or the literal meaning of the words. In support of this, reliance has been placed on Jamat-i-Islami Pakistan through Syed Munawar Hassan Secretary General v. Federation of Pakistan through Secretary, Law, Justice and Parliamentary Affairs (PLD 2000 SC 111), Sardar Khan Niazi v. District Coordination Officer, Multan and 4 others (PLD 2006 Lahore 638), Khalid Qureshi and 5 others v. United Bank Limited I.I. Chundrigar Road, Karachi (2001 SCMR 103).

8. Learned counsel submitted that the word “shall” appearing in Article 224(4) of the Constitution is not mandatory but directory as mandatory interpretation of the word ‘shall’ appearing in the above article causes severe inconvenience. He placed reliance on Muhammad Saleh v. The Chief Settlement Commissioner, Lahore and 2 others (PLD 1972 SC 326), Majid Bukhari v. The State (PLD 2000 Lahore 108) in support of this contention.

9. Learned counsel for the petitioner submitted that constitutional words and phrases should receive broader and

wider interpretation for realizing the social, economic and political vision encapsulated in the Constitution. The approach of the Court should be dynamic, progressive and liberal keeping in view the changed circumstances. In support of this he relied on: Munir Hussain Bhatti, Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 407, Pakistan Tobacco Company Ltd. and others v. Government of N.W.F.P. through Secretary Law and others (PLD 2002 SC 460), Sardar Bahadur Khan Bangulzai and others v. Sardar Attaullah Khan Mengal and another (1999 SCMR 1921), Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahabb-ul-Khairi and others v. Federation of Pakistan and others (PLD 1996 SC 324), The Mumbai Kamgar Sabha, Bombay v. M/s Abdulbhai Faizullabhai and others, (AIR 1976 SC 1455), Abdul Aziz alias Labha and others v. The Province of West Pakistan (PLD 1958 S.C. (Pak.) 499), Mohammad Nur Husain v. The Province of East Pakistan and others (PLD 1959 SC (Pak.) 470), Mian Manzoor Ahmad Wattoo v. Federation of Pakistan and 3 others (PLD 1997 Lahore 38).

10. Learned Counsel also placed reliance on section 151A of the Indian Representation of the People Act, 1951 which provides for the time limit for filling vacancies to the assemblies and prescribes that the vacancy should be filled if the remainder term of a member in relation to a vacancy is NOT less than one year.

11. Learned counsel for respondent No.4 raised a preliminary objection that the instant petition is not maintainable in terms of Article 225 of the Constitution and has placed reliance on Election Commission of Pakistan through its Secretary v. Javaid Hashmi and others (PLD 1989 SC 396), Rana Aftab Ahmad Khan v. Muhammad Ajmal and another (PLD 2010 SC 1066) and Malik Javed Akhter alias Javed Awan v. Returning

Officer Constituency No.PP-157, Lahore-XXI and 2 others (2004 YLR 1459). On merits he contends that period of 60 days mentioned in Article 224(4) of the Constitution is a directory provision in terms of Article 254 of the Constitution. In support of this he has placed reliance on Reference No.1 of 1988, Made by the President of Pakistan under Article 186 of the Constitution of the Islamic Republic of Pakistan (PLD 1989 SC 75) and Zahur Textile Mills Ltd. V. Federation of Pakistan and others (PLD 1999 SC 880). He, therefore, submits that the impugned schedule of Bye-Election is within the parameters of Article 224(4) of the Constitution and the said Bye-Elections are permissible under the Constitution.

12. Learned Additional Attorney General for Pakistan on notice under Order 27-A of CPC representing the Attorney General for Pakistan, as well as, Federal Government supports the earlier Notification of the ECP dated 26.09.2012, however, he has somewhat half-heartedly also supported the second Notification. As the position taken by the learned Additional Attorney General for Pakistan was not clear, he was asked to submit his position in writing, which is reproduced hereunder and the letter placed on the record as Mark "A";

"The Election Commission of Pakistan has submitted a report in aid of holding of bye-elections on 4th December, 2012. This Election is in respect of the vacant seats of National Assembly and Provincial Assemblies. Holding of this election is within the parameters of Article 224 (4) which speaks of elections to be held within sixty days of the vacancy of seats not later than 120 days before the expiry of the term of the Assemblies.

In this case, the cut-off dates according to the Election Commission are 16.11.12 for the National Assembly Seats and 08.12.12 for the Provincial Assemblies. The lapse, if any is sought to be taken care by Article 254 of the Constitution read with Section 11-A of ROPA.

Be that as it may, Article 254 would be attracted after the holding of the election and not before that.

Ex-facie, the first notification dated 26.09.12 was within the parameters of Article 224 (4) in all respects."

13. Learned Additional Advocate General Punjab was also asked to assist the Court. He made the following submissions:

- i. Article 224 (4) of the Constitution is unequivocal and has to be mandatorily followed even in the presence of Article 254 of the Constitution. He submitted that the term 'immediate' in Article 224 (1) makes it incumbent for the general elections to take place within the stipulated cut-off date. It is, therefore, for this reason that the period of 120 days provided in article 224(4) of the Constitution has to be strictly construed and cannot be deviated from. Otherwise, it will result in two elections being held in a constituency within a period of four months. It is this aspect against which the constitution makers have guarded the voters and the citizens by providing cut-off dates. These cut-off dates are therefore not to be treated as redundant.
- ii. The presence of Article 254 of the Constitution does not take away anything from the above argument because Article 254 is in the nature of a deeming clause and protects and sanctifies action taken under the Constitution but beyond the stipulated time period provided by the Constitution. While it may be a good defence it cannot be used as a frontal attack to encourage, legitimize and perpetuate an unconstitutional act.
- iii. Article 6 of the Constitution is attracted as an attempt is being made to transgress the Constitution.

- iv. It is submitted that the present elections will, in any case, not ensure meaningful representation in that there may be no or little time left for any legislative business. Hence, article 224(4) of the Constitution has to be seen in this context. The time period, if not read strictly, will offend the principle of proportionality in as much as the entire exercise of holding bye-elections will be futile and will achieve no purpose.

14. I have deliberated on the questions raised above and hold as follows:

PRELIMINARY OBJECTION

15. The preliminary objection raised by the respondent is based on Article 225 of the Constitution and supported by the ratio laid down in Javaid Hash mi 's Case (PLD 1989 SC 396). It is argued that the only remedy available to the petitioner is to file an election petition under Section 52 of ROPA, hence, the instant petition is not maintainable.

16. The rigour and ambit of Article 225 of the Constitution has been redefined and refashioned over the years. The jurisprudence on the question as it stands today is that interference can be made by this Court under Article 199 of the Constitution if the order under challenge is without lawful authority, *corum non-judice* and based on *malafide*. In this regard reliance is placed on Federation of Pakistan and others v. Mian Muhammad Nawaz Sharif and others (PLD 2009 SC

644)¹ wherein Tassaduq Hussain J. speaking for the august Supreme Court of Pakistan has held as under:

“47. After the judgment of Javed Hashmi’s case (ibid), this Court had provided a limited window in writ jurisdiction under Article 199 of the Constitution to challenge an order passed by a functionary of the Election Commission during currency of the election process or after the said process is over, provided the said order is patently illegal, the law does not provide remedy either before or after the election process and if the order relates to disqualification of a candidate, the alleged disqualification is floating on surface requiring no further probe.....”

The above view is supported by the earlier judgments of the august Supreme Court of Pakistan reported as Let.-Gen. (R) Salahuddin Tirmizi v. Election Commission of Pakistan (2008 SCMR 735)², Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Pakistan, Islamabad and another (PLD 2005 SC 52)³, Aftab Shahban Mirani v. President of Pakistan and others (1998 SCMR 1863)⁴, Ghulam Mustafa Jatoi v. Additional District & Sessions Judge/Returning Officer, N.A. 158, Naushero Feroze and others (1994 SCMR 1299)⁵. The dissenting view of Nasim Hasan Shah J. in Ja vaid Hashmi’s

Case, is also instructive and is reproduced hereunder:-

“I cannot, speaking with utmost respect, agree with the view that since Article 225 by its mandate creates an independent jurisdiction (an Election Tribunal) for redress of grievances in regard to election disputes and the Constitution intends that all questions of law and facts must be decided by it, in the exercise of that jurisdiction; redress of every grievance relevant to an election dispute must perforce be sought by an election petition, after the process of election is over. In my humble opinion such width and amplitude cannot be read into the provisions of Article 225. I am, on the other hand, of the opinion that any decision or order made by a functionary charged with the conduct of elections which is made in excess of his authority, being coram non iudice, would still be subject

¹ Five Member Bench.

² Five Member Bench.

³ Three Member Bench.

⁴ Three Member Bench.

⁵ Five Member Bench.

to the control of the High Court in exercise of its jurisdiction under Article 199. The legislature expects every statutory authority to act within the limits of the law and if any such authority steps out of these limits or refuses to function as the law requires him to function and he proceeds to make an order not within the limits of the law; such an order can be declared under Article 199 of the Constitution as without lawful authority and to be of no legal effect.

It is, no doubt true, that the election process must be completed expeditiously and that the constitution of the assembly should be distinctly and speedily known and that interference by the High Court at the intermediate stage can interrupt this process. But it must also be remembered that the exercise of jurisdiction under Article 199 is discretionary. The High Court can, therefore, be expected in the sound exercise of its discretion not to interfere at the intermediate stage unless it is absolutely essential to do so in the interest of justice, maintenance of purity of elections, supremacy of law and to prevent arbitrariness. The High Court mindful of its duty in this respect can legitimately be expected to desist from interfering in the election process, unless it is entirely imperative—an expectation fully vindicated by the exemplary restraint and responsibility exhibited by it in the recent case of the dissolution of the National and Provincial Assemblies (Muhammad Sharif v. Federation of Pakistan PLD 1988 Lah. 725).

While I agree that it is most desirable that the election process should not be interrupted during the intermediate stage, I cannot agree that to avoid the complications of any such interference a blanket ban should be read into Article 225 to every litigative challenge made to every kind of illegal order passed by an election authority. The law laid down in this respect by Courts in Pakistan and reiterated in the recent judgment of the Full Court in Federation of Pakistan v. Ghulam Mustafa Khar (PLD 1989 SC 26) is otherwise. Herein it was observed that “this Article 270-A does not take away the jurisdiction of the High Courts from reviewing acts, actions or proceeding which suffered from defect of jurisdiction or were coram non judice or were mala fide. For this purpose it is unnecessary to draw a distinction between malice in fact and malice in law”. Accordingly, I would, therefore, hold that orders passed even by election authorities, which are outside the limits of the law, are not immune from challenge and correction, by the High Court under Article 199. Undoubtedly, in doing so the High Court will exercise its jurisdiction with extreme circumspection, in full consciousness of the normal rule that it should not interfere with the process of the elections at an intermediate stage, but leave it to the Tribunal to correct all errors committed after the election is over.” (emphasis supplied)

17. On the basis of the consistent view maintained by the august Supreme Court of Pakistan, the preliminary objection raised by the respondent is overruled.

ON MERITS

18. The questions that require determination by this Court are as follows:-

- a. Whether Bye-Elections can be held after 60 days from the date of occurrence of the vacancy as prescribed in article 224(4) of the Constitution?
- b. Whether there should be clear 120 days between the polling date and the date of the expiry of the terms of the assemblies?
- c. Whether adverse financial impact on the budget of election expenses due to extension in polling date is a ground to annul Bye-Elections ?

19. Article 224 (4) of the Constitution states as follows:-

- (4) When, except by dissolution of the National Assembly or a Provincial Assembly, a general seat in any such Assembly has become vacant not later than one hundred and twenty days before the term of that Assembly is due to expire, an election to fill the seat shall be held within sixty days from the occurrence of the vacancy.

The above Article is invoked if a general seat of the National Assembly or Provincial Assembly falls vacant, except by the dissolution of National Assembly or the Provincial Assembly, not later than 120 days before the terms of the Assembly is to expire. A minimum period of 120 days is required between the date of occurrence of vacancy and the date of expiry of the term of the Assembly. Therefore, if a general seat falls vacant when the time between the date of occurrence of the vacancy and the date of expiry of the term of the Assembly is less than 120 days, Bye-Elections to the National Assembly or Provincial Assemblies cannot be held under Article 224(4) of the Constitution.

20. What then is the wisdom and scheme of the Constitution in providing these timelines? Let us take a hypothetical situation where the seat of a member of Assembly falls vacant on 120th day from the date of expiry of the Assembly. Under Article 224 (4) the Bye-Elections have to be held within 60 days from the occurrence of the vacancy. If “Election” is to cover the “entire process culminating in a candidate being elected” as per Ja vaid Has h mi ’s Case (PLD 1989 SC 396), the remaining period of 60 days is available for the returned candidate to sit in the Assembly and represent the constituency. However, closer look of sub-articles 224(1) and 224(2) of the Constitution read with Section 42 of ROPA show that the term “election” does not include the time spent in the announcement of the result of the election for which an extra period of 14 days has been envisaged in the above sub-articles. Therefore, a period of 74 days (60 days + 14 days) is spent on electing a candidate against a vacant seat and the remaining period for the returned candidate to sit in the Assembly and represent the constituency is reduced to 46 days (i.e., 120 days -74 days = 46 days). The constitutional mandate under Article 224 (4) of the Constitution appears to be that unless 46 days or more are available for a candidate to sit in the Assembly, Bye-Elections cannot be held. In the present case the dates are as follows:

Date of vacancy of the seat:	20.09.2012
Date of expiry of the National Assembly:	16.03.2013
Total time between the two dates:	177 days
Polling date:	04.12.2012
Results expected on:	18.12.2012 (within 14 days)
Time left from 18.12.2012 till 16.03.2012:	88 days (as opposed to the constitutional minimum of 46 days)

In the case of the Provincial Assemblies:

Date of vacancy of the seat	20.09.2012
Date of expiry of the Provincial Assembly:	08.04.2013
Total time between the two dates:	200 days
Polling date:	04.12.2012
Results expected on:	18.12.2012 (within 14 days)
Time left from 18.12.2012 till 08.04.2013	111 days (as opposed to the constitutional minimum of 46 days)

21. The argument that 120 days must exist between the polling date and the date when the term of the assemblies expire is fallacious and does not flow from the Constitution. Article 224(4) of the Constitution clearly states that the period of 120 days start from the date of the occurrence of the vacancy.

22. The next question pertains to holding of the bye-election within the constitutional period of 60 days from the occurrence of the vacancy. In this case the dates are as follows:

Date of vacancy:-	20.09.2012
Polling date:-	04.12.2012
Number of days:-	76 days

Election Commission of Pakistan extended the polling date from 17.11.2012 to 04.12.2012 on the basis of Letter dated 06.11.2012 issued by the Home Department, Government of the Punjab to the Secretary, Election Commission of Pakistan, Islamabad which states as follows:-

“3. Law Enforcement Agencies of Punjab are heavily engaged in making foolproof security arrangements for Muharram-ul-Harram. Pakistan Army and Rangers have also been requisitioned in aid of civil power. In view of prevailing security situation and threat assessment, it is requested that bye elections scheduled on 17th and 27th November, 2012 may be postponed until after 15th Muharram (3rd December, 2012).”

The above shows that the reason from the extension was an imminent threat of a law and order situation and security of the public at large. It is for such eventualities that the Constitution provides for relaxation of constitutional timeframe. Article 254 of the Constitution states as under:-

“254 When any act or thing is required by the constitution to be done within a particular period and it is not done within that period, the doing of the act or thing shall not be invalid or otherwise ineffective by reason only that it was not done within that period.”

Under the above Article, the Constitution mandates that if any act is not done within a particular time, as provided under the Constitution, the said act will not be invalid because of this reason alone. The constitutional relaxation does not extend an unqualified license or in any way dilute the importance of constitutional timelines. The extension must be grounded in good cause and justified by *bona fide* reasons. The purpose of Article 254 of the Constitution is not to permit anyone to defeat or frustrate the Constitution, hence it is not available where the constitutional timeframe is not honoured without any justifiable public interest or for oblique political ends or to override the scheme of the Constitution e.g., the minimum period of 46 days as discussed above. In this particular case, the polling date was extended in the public interest and to avoid the threat of a law and order situation. This gives a lawful justification for extending time. The extension also does not upset the constitutional minimum of 46 days to represent the constituency as a Member of the Assembly. No other reason for the extension of time frame under Article 224(4) of the Constitution has been argued or pleaded before this Court by the petitioners. Article 254 of the Constitution is, therefore, applicable and comes to the rescue of the ECP.

23. The argument that holding of Bye-Elections will result in wastage of funds cannot be held over and above the constitutional principle of continuous representation of the people in the Assemblies through their representative. This is an essential characteristic of a Republic and cannot be compromised.

24. The argument regarding election expenses cannot be gone into as the petitioner has failed to attach any record or details of election expenses or the estimated future expenses required during the period of extension. Even otherwise, this Court does not delve into question of factual inquiry while exercising its constitutional jurisdiction.

25. It is also noticed that only one petitioner from the entire constituency has come forward while the private contesting respondents are candidates who are ready and willing to contest the elections. It shows that electors are keen that Bye Elections are held and their constituencies represented in the Assemblies.

26. For the above reasons, I hold that the impugned Notification dated 08.11.2012 issued by the ECP does not offend Article 224(4) of the Constitution. Hence, this petition has no force and is, therefore, dismissed with no order as to costs.

(Syed Mansoor Ali Shah)
Judge

*M. Tahir**

APPROVED FOR REPORTING