

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Qazi Faez Isa, CJ
Mr. Justice Sardar Tariq Masood
Mr. Justice Syed Mansoor Ali Shah

CMA No. 10612 of 2023

[Stay Application]

And

Civil Petition No. 4365 of 2023

(Against the order dated 13.12.2023 of the Lahore High Court, Lahore passed in CM No. 1/23 in Writ Petition No. 80823/2023)

And

CMA No. 10613 of 2023

[For exemption of certified copy of impugned order]

*Election Commission of Pakistan through
its Secretary, Islamabad and another.*

... *Petitioners*

Versus

Barrister Umair Khan Niazi and others.

... *Respondents*

For the Petitioners:

Mr. Sajeel Swati, ASC.
Mr. Omer Hamid Khan, Secretary,
Election Commission of Pakistan.
Mr. M. Arshad, DG. Law, ECP.
Mr. Khurram Shahzad, ADG, Law ECP.
Mr. Falak Sher, Legal Consultant, ECP.
Ms. Saima Tariq Janjua, D.D Law, ECP.

For the Federation:

Mr. Mansoor Usman Awan,
Attorney-General for Pakistan.
Assisted by
Maryam Ali Abbasi,
Ahmed-ur-Rehman,
Saad Javid Satti, Legal Consultants
Malik Javed Iqbal Weins,
Additional Attorney-General for Pakistan.

For the Respondents:

Not represented.

Date of Hearing:

15.12.2023.

ORDER

Qazi Faez Isa, CJ.

1. Civil Misc. Application No. 10613 of 2023: This is an application for exemption of certified copy of the impugned order. Subject to all just and legal exceptions, the application is granted.

2. Civil Petition No. 4365 of 2023: This petition for leave to appeal assails the order of the learned Single Judge of the Lahore High Court, Lahore (**'the High Court'**) dated 13 December 2023. The impugned order was passed in the writ petition filed by respondent No.1 under Article 199 of the Constitution of the Islamic Republic of Pakistan (**'the Constitution'**) wherein the two petitioners before us and eight others were arrayed as respondents. The writ petition sought declaration that sections 50(1)(b) and 51(1) of the Elections Act, 2017 (**'the Act'**) were unconstitutional, void, without lawful authority and of no legal effect. The provisions of section 50 and 51 of the Act which had been assailed are reproduced hereunder:

'50. Appointment of District Returning Officer.— (1) For election to an Assembly, the Commission shall, in the prescribed manner, appoint a District Returning Officer for each district or a specified area—

- (a) from amongst its own officers subject to availability;
- (b) by selection from a list of officers provided by the Government or a Provincial Government; or
- (c) from the subordinate judiciary in consultation with the Chief Justice of the concerned High Court.

(2) Subject to the superintendence, directions and control of the Commission, the District Returning Officer shall coordinate and supervise all work in the district in connection with the conduct of an election and shall also perform such other duties and functions as may be assigned by the Commission.'

'51. Appointment of Returning Officer and Assistant Returning Officers. —

(1) The Commission shall, in the prescribed manner, appoint, from amongst its own officers or officers of any Government or corporations, autonomous or semi-autonomous bodies controlled by any Government, or from the subordinate judiciary in consultation with the Chief Justice of the concerned High Court, a Returning Officer for each constituency.

(2) A person shall not be appointed as Returning Officer for more than one constituency, save in exceptional circumstances, for reasons to be recorded.

(3) The Commission may, in the prescribed manner, appoint, from amongst its own officers or officers of any Government, or corporations, autonomous or semi-autonomous bodies controlled by any Government, as many Assistant Returning Officers as may be necessary.'

Section 50 of the Act pertains to the appointment of District Returning Officer (**'DRO'**) by the Election Commission of Pakistan (**'ECP'**) and section 51 of the Act pertains to the appointment of Returning Officers (**'RO'**) and Assistant Returning Officers (**'ARO'**).

3. It is submitted by learned Mr. Sajeel Shehryar Swati, representing the petitioners, that the stated two provisions of law have been part of the Act and subsisted at the time when the last elections were held in 2018 and

till date no one has taken any exception thereto. He further submitted that no allegations have been levelled against the conduct of any of the officers appointed as DROs, ROs and AROs. The constitutionality of the said provisions have been challenged on a general ground that appointment of the government officers as DRO, RO and ARO is violative of Article 218(3) of the Constitution and it will not lead to just and fair elections. This, it is submitted, is not sufficient to lay a challenge to the constitutionality of the said provisions of the Act.

4. It is further submitted that this Court vide judgment dated 3 November 2023 attending to a number of constitution petitions, wherein Pakistan Tehreek-i-Insaf ('PTI') was also one of the petitioners/appellants had sought that date for holding of elections be announced. Pursuant to the notice taken by this Court the President of Pakistan and the ECP met and decided to hold the General Elections on 8 February 2024. The Federal Government and the Provincial Governments and the Islamabad Capital Territory all of whom were represented before us concurred and this Court held that *'no one should now put forward any pretext to derail democracy'* (paragraph 18 of the said judgment).

5. The learned counsel submits that to ensure that elections are held on 8 February 2024, certain number of days are required to do different acts which the law requires prior to the holding of the said elections and the impugned order passed at the eleventh hour if allowed to remain in the field would not permit the holding of elections on 8 February 2024. It is further submitted that ECP had prepared the Election Programme which was intended to be announced today but if the impugned order is sustained this will not be possible as without appointment of DROs, ROs, and AROs elections cannot be held. He further states that the High Court has by the impugned interim order effectively decided the writ petition and there is inherent contradiction in the impugned order because paragraph 7 thereof states *'to place this file before the Hon'ble Chief Justice for the constitution of a Larger Bench'*, and at the same time in the successive paragraph 8 suspends the four notifications, all dated 11 December 2023, issued by the ECP particulars whereof are as under:

- 1) Notification No.F.6(1)/2024-Coord,
- 2) Notification No.F.2(2)/2023-Coord-Vol-VIII(1),

- 3) Notification No.F.2(2)/2023-Coord-Vol-VIII(2),
- 4) Notification No.F.2(2)/2023-Coord-Vol-VIII(3).

6. We have noted that the total number of DROs, ROs, and AROs under the notification is 2,753 whose working has been stopped by the High Court thereby derailing the process of elections with a stroke of pen. The High Court also did not appreciate that the officers that have been appointed were to perform functions throughout Pakistan and in passing the impugned order it acted well beyond its territorial jurisdiction. Further, the very opening words of Article 199 of the Constitution were apparently disregarded by the High Court insofar as availing of the alternate adequate remedy available to the petitioner. We are informed that section 55(3) of the Act was such a remedy if respondent No. 1 had grievance against the conduct of any particular officer. We enquired from the petitioners whether any application or objection was submitted before the ECP under section 55(3) of the Act, that is, availing of the alternate adequate remedy and were told that this was not done. The respondent No. 1 is stated to be an office holder of the very same political party, that is, PTI which was before this Court when the said judgment was passed and no such concern was expressed at that time.

7. The DROs, ROs and AROs were appointed pursuant to four notifications while one of these notifications pertain to the officers of the ECP whereas the remaining three notifications pertain to government officers who have already been holding their respective positions and have not been put in place for the purpose of elections or on any one's behest. Initially the ECP had pursuant to sections 50(c) and 51(1) of the Act written to the Chief Justices of the five High Courts and requested them to provide judicial officers for the upcoming elections and not a single one of the Chief Justices is stated to have agreed to do so. In reply thereof a letter issued by the Lahore High Court specifically stated that no judicial officer can be spared because about 1.3 million cases require adjudication and provision of such judicial officers would result in the increase of pendency of which the ultimate sufferers would be the litigants. Under such circumstances, insistence upon the provision of judicial officers to be appointed as DROs, ROs and AROs would effectively mean that a writ has to be issued against the High Court which is not permissible under Article 199(5) of the Constitution as held in *Gul Taiz Khan Marwat v Registrar, Peshawar High*

Court (PLD 2021 Supreme Court 391) which is a judgment of five-member Bench of this Court. It has been held therein that against an order passed by the High court on the administrative side the remedy lay before the Supreme Court under Article 184(3) of the Constitution.

8. Points noted require consideration, therefore, leave to appeal is granted. Notice be issued to the respondent No. 1 and to the Federation of Pakistan. Notice under Order XXVIA of the Code of Civil Procedure, 1908 be also issued to the Attorney-General for Pakistan and all the Advocate-Generals of the Provinces and Islamabad Capital Territory. To come up immediately after winter vacations.

9. Civil Misc. Application No. 10612/2023: Ordinarily this Court does not suspend orders without issuing of notice but in view of the fact that the impugned order in the present case has come into direct conflict with the judgment of this Court and the writ petition *prima facie* appears not to be maintainable, we are doing so. Further the impugned order also comes in the way of the ECP to proceed with its constitutional duty and responsibility for the holding of the elections as mandated under the Constitution. In the given circumstances and considering the constitutional and legal stipulation as well as the judgment of this Court on the same matter, the operation of the impugned order is suspended and further proceedings before the High Court are stayed.

10. We are informed that the Election Programme which was supposed to be issued today but in view of the impugned order has not been done. However, the impugned order now stands suspended, therefore, the ECP shall issue Elections Programme today. In this regard the ECP has given an undertaking that the same will be issued today. Since the impugned order is suspended the learned counsel for ECP stated that the notification No. F.2(2)/2023-Coord-Vol-VIII dated 14 December 2023 and letter No. F.23(1)/2021-GE-(TRG-PADRM-Vol-II) dated 14 December 2023 issued by the ECP pursuant to the impugned order will be withdrawn.

11. The respondent No. 1 is stated to be a barrister and as such expected to be well-conversant with the Constitution and to have read the judgment of this Court which had clearly stipulated that, '*no one should be allowed to put forward any pretext to derail democracy*'. However, one individual

appears to have just done that and it is indeed a matter of considerable regret that he claims to belong to a political party and we are told that he has served as an Additional Advocate-General, Punjab when the said political party was in Government. In view of the conduct of the respondent No. 1 we call upon him to submit an explanation why action for contempt of court should not be initiated against him under the Contempt of Court Ordinance, 2003 read with Article 204 of the Constitution.

Chief Justice

Judge

Judge

Islamabad:
15.12.2023
(M. Tauseef)