

ELECTION COMMISSION OF PAKISTAN

PRESENT:

Mr. Sikandar Sultan Raja
Mr. Nisar Ahmed Durrani

Chairman
Member-I

Case No. 1(2)/2022-Law

In Ref: APPLICATION UNDER RULE 15(4) OF THE KHYBER PAKHTUNKHWA LOCAL COUNCILS CONDUCT OF ELECTION RULES, 2021 FOR MODIFICATION/ SETTING ASIDE SCHEDULE/NOTIFICATION DATED 09-02-2022 AND ISSUANCE OF FRESH NOTIFICATION BY THE ELECTION COMMISSION OF PAKISTAN.

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CA NO. 72-76 OF 2022 OUT OF CPLAS NO. 224 & 251 TO 254 OF 2022 TITLED ELECTION COMMISSION OF PAKISTAN ETC. VERSUS FIDA MUHAMMAD AND OTHERS AGAINST THE JUDGEMENT DATED 01-02-2022 PASSED BY THE HON'BLE PESHAWAR HIGH COURT, ABBOTTABAD BENCH.

For the Applicants :

Mr. Mudassir Khalid Abbasi, ASC alongwith
Malik Aqal Zada in- Person

For the Government of KPK:

Mr. Shummail Ahmad Butt, Advocate General,
Khyber Pakhtunkhwa alongwith Mr. Shakeel
Ahmad, Secretary Local Government, Khyber
Pakhtunkhwa, Atif Ali Khan, Asst. Advocate
General

On Behalf of Commission:

Malik Zafar Hussain, Special Secretary
Muhammad Arshad, Director General (Law)
Khurram Shahzad, Additional Director General (Law)
Adil Kahlon, Legal Consultant, ECP

Date of hearing

: 15.02.2022

ORDER

Sikandar Sultan Raja, Chairman: The instant applications have been moved by the applicants for rescheduling of 2nd phase of local government elections in 18 districts



of Khyber Pakhtunkhwa due to harsh weather, heavy snowfall and migration of more than 60% of the population from these districts to other areas.

2. Brief facts of the matters in hand are that this Commission on 21st October, 2021 decided to hold local government elections in Khyber Pakhtunkhwa in two phases i.e. first phase on 19th December, 2021 in 17 districts and 2nd phase on 16th January, 2022 in the remaining 18 districts. However, on the applications filed by Mr. Murtaza Javed Abbasi, Sardar Muhammad Yousaf, Sadeed-ur-Rehman, Ehitsham Khursheed, Ajmal Khan, Syed Zaib, and on the request of Provincial Government, Khyber Pakhtunkhwa made through letter dated 29th December, 2021 for deferment of 2nd phase of elections on the basis of reports from Deputy Commissioners of 18 districts, decided to hold elections of 2nd phase on 27th March, 2022 instead of 16th January, 2022, vide order dated 30.12.2021 and also issued schedule for such elections on 20.01.2022.

3. The applicants through five identical writ petitions challenged the said schedule/ notification of this Commission before the Hon'ble Peshawar High Court, Abbottabad Bench on the grounds that their districts are expected to remain under heavy snow and it would not be possible for the public to exercise their right of vote as 60% of the residents of these areas migrate to other areas till the end of May. The Hon'ble High Court vide order dated 01.02.2022 allowed the writ petitions and set-aside the schedule announced by this Commission and directed it to re-schedule the elections after Ramadhan, 2022 or when the weather is normalized in these snowbound areas. The Commission assailed the said order before the august Supreme Court of Pakistan through five Civil Petitions for Leave to Appeal. On 09.02.2022, the august Court suspended the operation of judgment of the Hon'ble High Court and issued notices to all the respondents for 14.02.2022 on which date detailed arguments from both parties were heard. The august Court set-aside the judgment of the Hon'ble High Court and referred the matters to this Commission with following directions:-

"2. We are inclined to direct the ECP to take up the matter of conducting elections and the schedule for the second phase of local Government elections tomorrow at 10:00 AM, here representatives of the Government of Khyber Pakhtunkhwa, the respondents and all others who may be aggrieved of the afore-said notification, consider all reports, records and documents that may be placed before it and thereafter pass a reasoned order in accordance with law.



4. The present appeals are accordingly allowed and the impugned judgment of Peshawar High Court dated 01-02-2022 have been found unsustainable inter alia for reasons recorded in our earlier order dated 09-02-2022 which have neither been denied nor seriously contested is set-aside. The ECP shall however, comply with directions issued above in their letter and spirit. All connected CMAs are also dismissed."

4. In pursuance of the above directions of the august Court, the matters have been taken up today. The counsel for the applicants appeared and placed before us fresh application under Rule 15(4) of the Khyber Pakhtunkhwa Local Counsel Conduct of Election Rules, 2021 for modification/setting-aside the schedule/notification dated 09.02.2022 and issuance of fresh notification, which is taken on record and copies are provided to the representative of the Commission and Advocate General, Khyber Pakhtunkhwa. The counsel submits that the applicants are the registered voters of their respective districts and humanly it would not be possible for the voters/ candidates to participate in the election process due to harsh weather conditions which is being substantiated by the report dated 22.01.2022 submitted by Director General, Pakistan Meteorological Department. He further argued that most of the districts particularly Upper Dir, Upper Chitral, Lower Chitral, Gilyat, Thandyani, Narran, Malamjaba, Bahrain, Kalam and many other areas are snowbound and of such nature where the normal course of life stands paralyzed and mobility of polling material, polling staff and general public is not possible. He also added that most of the residents of these areas migrate to other areas located at lower altitude from December till April. Many of them migrate to Rawalpindi, Swabi, Mardan and Mandi Bahudin, etc. More than 8 Million people/voters in above-mentioned snowbound areas would be disenfranchised if elections are held as per the schedule dated 09.02.2022. He further drew the attention towards the letter dated 26.01.2022 of Headquarter 11 Corps to Home and Tribal Affairs Department, Khyber Pakhtunkhwa regarding the prospects of holding of 2nd phase local government elections in Malakand and newly merged tribal districts where law & order situation is not conducive for the conduct of elections during the given schedule after merger of these areas in the province of Khyber Pakhtunkhwa. He while relying upon this letter submitted that security mechanism will become a challenge during elections. He further explained that the process of election does not mean the poll-day only but it also includes the entire electoral process starting from issuance of notification for schedule till conclusion of the result and campaign period is the vital part of it.



5. Mr. Shumail, Advocate General, Khyber Pakhtunkhwa appeared and endorsed the arguments made by the counsel for the applicants. He also emphasized on harsh weather conditions by submitting latest photographs of the hilly snowbound areas. He relied upon the judgment of the Indian Supreme Court reported as AIR 1967SC 1211 to maintain that in a similar case the Supreme Court of India gave due consideration to the harsh weather and postponed the elections due to it. He also referred the judgment reported as PLD 1989 SC 395 whereby the august Supreme Court defined the election process and specified that it does not mean a poll-day but also includes the entire process and all steps of elections. He prayed for extension of election schedule after four weeks in the month of May, 2022. He also requested the Commission to inquire about the areas where election process will not be possible due to harsh weather and Commission may also call the meteorological department to reach the just conclusion.

6. Mr. Zafar Iqbal Hussain, Special Secretary, Election Commission appeared and briefed about the factual position and apprised that the Government of Khyber Pakhtunkhwa showed its willingness to conduct the local government elections in March, 2022 which is evident from the minutes of meeting of this Commission dated 10.08.2021, letter dated 20.10.2021 of the Provincial Government of Khyber Pakhtunkhwa and orders passed by this Commission dated 21-10-2021 and 30-12-2021. The Commission has already granted ample time to the Provincial Government on various occasions upon their request for postponement of elections. Now Commission has to fulfill its constitutional obligation by holding elections as per schedule dated 09-02-2022.

7. Mr. Muhammad Arshad, Director General (Law) emphasized the importance of conduct of local government elections and also mentioned that it is the duty of Election Commission to conduct elections for the local governments as per section 219(4) of the Elections Act, 2017 within 120 days of the expiry of term of local governments. He placed reliance on the judgment reported as PLD 2010 SC 573 whereby the august Supreme Court held that Election Commission is absolutely independent with exclusive jurisdiction while performing duties under the constitution and no-interference is allowable by any of the parties. He also referred the judgment passed by the Supreme Court reported as 2021 SCMR 714 in which directions were given to the Commission to



conduct local government elections as soon as possible and the provinces cannot dictate the Commission while performing its duties.

8. Mr. Khurram Shahzad, Additional Director General (Law) also referred the judgment reported as PLD 2021 SCMR 714 in which august Supreme Court in view of the expiry of tenure of the local governments in Khyber Pakhtunkhwa on 28th August, 2019 and other provinces, directed the Election Commission to conduct the local government elections in all four provinces as soon as possible. He further argued that the Pakistan Meteorological Department operates under World Meteorological Organization and as per their scientific declaration exact weather forecast can only be given for three days. He further drew our attention towards the weather forecast mentioned on the website of AccuWeather whereby the expected maximum temperature on 31-03-2022 in Batagram will be 23 Degrees Celsius, Thandiani 15 Degrees Celsius, Manshera 24 Degrees Celsius, Chitral 18 degrees Celsius, Nathiagali 27 degrees Celsius, and Dasu 16 Degree Celsius which is favorable for conduct of 2nd phase of local government elections in these areas. Moreover, as per the website of NASA Space Place Team, NOAA scijinks which maintains that a seven-day forecast can accurately predict the weather about 80 percent. However, 10 days or longer forecast is only half the time right. He also submitted notification of Elementary and Secondary Schools, Education Department dated 17-12-2021 regarding opening of schools after winter vacations from 1st March, 2022 which shows that residents of snowbound areas will go back to normal routine in March. He has also drawn attention of the Commission towards conduct of various elections in winter season for instance General Election in 1997 was held on 03-02-1997 and General Election, 2007-2008 was held on 18th February, 2008. He also relied on two judgments passed in Writ Petitions No. 1280-A of 2018 and 53-A/76-A of 2018 of Peshawar High Court whereby the Hon'ble High Court had dismissed the petitions of the Petitioners seeking same relief on the basis of weather conditions and also held that weather alone could not be a ground for postponement of elections in the province. He requested for conduct of 2nd phase of local government elections as per schedule given by Election Commission on 09-02-2022 as per constitutional mandate and duty of the Commission as the mandatory period of 120 days during which elections should have been held, has already expired.

9. We have heard the arguments and have perused the available record presented before us. Undoubtedly, It is the duty of Election Commission to hold elections well in



time and to make such arrangements as are necessary to ensure that election is conducted honestly, justly, fairly and in accordance with law and corrupt practices are guarded against. Right of vote is also a fundamental right by virtue of the Constitution of Islamic Republic of Pakistan. The term of Khyber Pakhtunkhwa local government has already expired on 28th August, 2019. As per Article 140(A) of the Constitution, each province by law is bound to establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments and holding of such local government elections in the provinces is the constitutional duty and mandate of the Election Commission as per Article 140(A)(2) of the Constitution. Delay in conduct of such elections amounts to violation of Articles 140A, 219(d) of the Constitution and Section 219(4) of the Elections Act, 2017. We also derive strength from the recent judgment of the august Supreme Court reported as 2021 SCMR 714 referred above wherein it was held that under Article 220 of the Constitution all the executive authorities are bound to assist the Commission. All the decisions taken by the Commission with regard to conduct of elections are binding on the provinces and provinces cannot dictate to the Commission and if they do not comply with the directions of the Commission, they will be violating the Constitution and law, which may attract serious consequences as per the judgment *ibid*. It is also noticed that the conduct of local government elections in the province has already been delayed for more than two years on one pretext or another and ample time has been granted by this Commission to the Provincial Government, Khyber Pakhtunkhwa and no further delay can be afforded. The people of the area are being disenfranchised and the Provincial Government remained reluctant to conduct the local government elections. It is also evident from the record submitted by the representative of the Election Commission that there are precedents where elections were conducted in various snowbound areas in the month of February/ March. It is also before us that even in the presence of threats in various areas like Bakakhail, Dara Adamkhail, Dara Narmikhail etc. during first phase of local government elections and during the re-poll, the Election Commission did not show any hesitation and conducted local government elections as per notified schedule in a peaceful manner. Similarly, it is not the mandate and the duty of law enforcement agencies and Meteorological Department to determine the situation for holding of elections rather they are to assist the Commission for making necessary arrangements in this regard.



10. In view of the above, we find no substance in the applications which are hereby dismissed. The schedule issued by this Commission on 09.02.2022 in respect of holding of elections of 2nd phase on 31st March, 2022, shall remain intact.

11. Order accordingly.



Muhammad Sultan Raja
Chairman

Muhammad Ahmed Durrani
Member