

ELECTION COMMISSION OF PAKISTAN

MR. SIKANDAR SULTAN RAJA,	CHAIRMAN
MR. NISAR AHMED DURRANI,	MEMBER
MR. SHAH MOHAMMAD JATOI,	MEMBER
MR. BABAR HASSAN BHARWANA,	MEMBER
MR. JUSTICE (R) IKRAM ULLAH KHAN,	MEMBER

CASE No.F.3(4)/2024-Cord-M/F (P/F-1)

Subject: APPLICATION UNDER SECTION 4 OF THE ELECTIONS ACT,2017 ALONG WITH ALL ENABLING PROVISIONS OF THE ELECTIONS ACT,2017 AND ELECTION RULES FOR ISSUING APPROPRIATE ORDERS FOR ADMINISTERING OATH TO THE APPLICANTS AND SUSPENSION OF ENSUING SENATE ELECTION TILL THE ADMINISTRATION OF OATH TO THE EXTENT OF KHYBER PAKHTUNKHAWA PROVINCE.

AND

POSTPONEMENT OF THE SENATE ELECTIONS ON ACCOUNT OF DELAY OF OATHS OF RESERVE SEATS IN KHYBER PAKHTUNKHAWA PROVINCE

- 1 Amina Sardar, w/o Sardar Zouq Akhtar R/o Sardar House, College Road, Abbottabad Cantt, Tehsil and Zila Abbottabad.
- 2 Faiza Malik D/o Parvez Khan R/o P.O Pando Thana, Thal Har, Tehsil & District Abbottabad.
- 3 Afsha Hussain, w/o Mehboob Khan, R/o Kandeel Madain Swat.
- 4 Shazia Jadoon w/o Taimoor Malik, R/o Mohalla New Afzal Abad Near Aramasheen, Haripur.
- 5 Jamila Paracha, W/o Muhammad Fidda Qureshi, R/o Prachghan House No. 97/T Kohat

.....Applicants

For the Applicants :

Shah Khawar ASC

For Respondent

Secretary Provincial Assembly Khyber
Pakhtunkhwa

Date of Hearing

26-03-2024



ORDER

Sikandar Sultan Raja, Chairman: Through this common order, the Commission proposes to dispose of the subject applications as common question of law and facts is involved in both the petitions. Briefly stated the petitioners Jamila Paracha and 4 others have submitted applications seeking directions of the Commission to the concerned authorities to make arrangements for administration of oath to the applicants. The applicants have also prayed that until the administration of oath of the applicants, the ensuing Senate elections to the extent of Khyber Pakhtunkhwa Province may be suspended.

2. Upon receipt of the applications mentioned in the subject, notices were issued to the applicants and the Secretary, Provincial Assembly, Khyber Pakhtunkhwa. Counsel for the applicants appeared and argued the matter.

sd- 3. Learned Counsel for the applicants submitted that the Commission has issued the Notifications of the returned candidates on the reserved seats on 04-03-2024. He read out the Notifications and contended that the names of the applicants namely Amina Sardar, Faiza Malik, Afsha Hussain, Shazia Jadoon and Jamila Paracha affiliated with PML(N) were notified vide Notification No. F.6(7)/2024-Cord. on 04-03-2024. He also referred that the Commission vide another Notification No. F.5(4)/2024-Cord. notified the name of Suresh Kumar as Returned Candidate on the seat reserved for Non-Muslims on the same date. He further argued that Speaker, Provincial Assembly, Khyber Pakhtunkhwa was bound to administer oath to the notified Returned Candidates. That the Notification issued by the Commission has not been implemented by the Speaker, Provincial Assembly Khyber Pakhtunkhwa. He submitted that Senate Election is scheduled on 02-04-2024 and therefore he requested the Commission to postpone the same in the interest of justice till the administration of oath of the applicants. He further argued that the Commission has the powers under Section 4 of the Elections Act, 2017 to issue directions which are enforceable throughout Pakistan. He while concluding his arguments requested the Commission to issue appropriate directions to the Speaker, Provincial Assembly, Khyber Pakhtunkhwa to administer oath to the applicants.



4. Secretary, Provincial Assembly, Khyber Pakhtunkhwa appeared and submitted that the meeting of the Assembly will be convened in accordance with the Rules of the Business of the Assembly and Speaker, Provincial Assembly has not refused to administer oath to the applicants.

5. The legal team of ECP comprising of DG Law, ADG law, DD law, and Legal Consultant assisted the Commission. They argued that under Article 218(3) of the Constitution hereinafter referred "the Constitution", the Commission is charged with duty to organize and conduct elections and to make such arrangements as are necessary to ensure that election is conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against. They explained that the National and Provincial Assemblies are the electoral colleges for election to the Senate and elected member(s) of an assembly are voter(s) of the said electoral college(s) and are entitled to vote. They argued that right to vote is fundamental right guaranteed under Article 17(2) of the Constitution as held by the Hon'ble Supreme Court in the case of Ch. Nasir Iqbal and others Vs. Federation of Pakistan reported in PLD 2014 SC 72. They further argued that the connotation to "make such arrangements" used in Article 218(3) of the Constitution includes facilitation of the voters to cast their votes. They maintained that in order to fulfill its constitutional duty under Article 218 (3), the Commission is vested with powers under the Article ibid read with Section 4 and 8 of the Elections Act 2017 hereinafter referred as "the Act" to pass such orders and issue appropriate directions to the concerned authorities to facilitate the administration of oath to the applicants to fulfill the constitutional command.

6. They placed reliance on PLD 2012 SC 681 "Worker's Party through Akhtar Husain VS Federation of Pakistan and others".

7. We have heard the learned counsel for the applicants, the legal team of ECP and have perused the available record.

8. The Commission notified the applicants as returned candidates against the reserved seats for women and non-Muslims in the Khyber Pakhtunkhwa Assembly vide Notification No.F.6(7)/2024-Cord on 04-03-2024. According to applicants, they approached the Speaker of the Provincial Assembly, Khyber Pakhtunkhwa for convening meeting of the assembly to administer oath to them, however, the Speaker declined.



9. From what has been argued, the following questions/ formulations emerge;

Q.No. 1: Whether or not the right to contest election and to vote is a fundamental right?

Ans: Article 17(2) of the Constitution guarantees fundamental right of every citizen not being in the service of Pakistan to be a member of a political party or to form a political party. The Hon'ble Supreme Court has interpreted the Article ibid in a number of cases from time to time wherein it has been held that right to form a political party subsume right to contest election and right to vote. The Hon'ble Supreme Court in the case of Ch. Nasir Iqbal and others Vs. Federation of Pakistan reported in PLD 2014 SC 72 has held that;

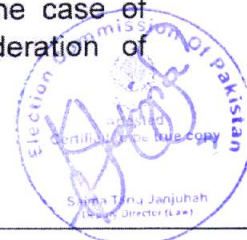
"6. Under Article 17 of the Constitution every citizen has right to vote to participate in the governance of the country through their chosen representatives. The law provides the people of this country, irrespective of their social ethnical status and religious affiliation, to choose their P representative in whom they repose confidence. Hence, every eligible individual should be allowed to utilize the right to vote irrespective of his caste or creed or any other consideration. The Supreme Court of Pakistan adjudged many cases on the aspect of access of voters to the credentials of the contesting candidates. Reference in this behalf may be made to the case of Mian Najeeb-ud-Din Owaisi v. Amir Yar (C.M.A. 1535 of 2013 etc.) wherein this Court held as under:

"The voters who are about to elect their representatives are one of the most important stakeholders, therefore, to achieve the object of honest, just and fair elections, they would not constitutionally and legally allow a candidate to manage to sneak into Parliament without proving that he is qualified to represent them as such representative has to perform the noblest and honourable job of making policies and laws for the Nation."

Therefore, right to vote is a fundamental right and no voter cannot be deprived of this fundamental right.

Q.NO 2: Whether the connotation "to make such arrangements" used in Article 218(3) include the facilitation of voters by the Commission to enable them to cast their votes?

Ans : Article 218(3) of the Constitution cast duty upon the Commission to make all such arrangements including to ensure free and fair elections. Such arrangements encompass facilitation of voters to cast their votes. The Commission will be failing in its constitutional duties if a voter is not provided a level playing field to exercise his right. Therefore, the connotation "to make such arrangements" subsume the facilitation of voters to cast their votes. The Hon'ble Supreme Court in the case of "Workers Party Pakistan through Akhtar Hussain VS Federation of Pakistan and others" reported in PLD 2012 SC 681 has held;



"41. The Election Commission may also exercise its powers in anticipation of an ill that may have the effect of rendering the election unfair. In the case titled as In Re: Petition filed by Syed Qaim Ali Shah Jellani (PLD 1991 Jour. 41) the Elections Commission exercised its powers under Article 218(3) pre-emptively, by making all necessary arrangements to ensure that a certain class of people would be allowed to vote. This case implies that where a violation of the standards mentioned in Article 218(3) has not as yet taken place, the Election Commission is legally empowered under Article 218(3) to exercise its powers pre-emptively in order to avoid a violation of these standards. Furthermore, Mst. Qamar Sultana v. Public at Large (1989 MLD 360) and In Re: Complaint of Malpractices in Constituency No. NA-57, Sargodha-V (supra) both reinforce the argument that the Election Commission is fully empowered by Article 218(3) to make 'such orders as may in its opinion be necessary for ensuring that the election is fair, honest etc'. These decisions recognize that the Election Commission enjoys broad powers not only to take pre-emptive action but also to pass any and all orders necessary to ensure that the standards of 'honesty, justness and fairness' mentioned in Article 218(3) are met."

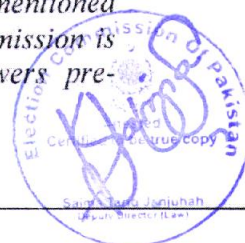
Q.No 3: Whether or not the Commission has power to issue appropriate directions to the concerned authorities to make arrangements for administration of oath to the applicants?

Ans : Section 4(1) of the Act empowers the Commission to issue such directions or orders as may be necessary for the performance of its functions and duties including an order for doing complete justice in any matter pending before it including the attendance of any person.

sd- Similarly, Section 8 (c) of the Act empowers the Commission to issue such instructions, exercise such powers and make such consequential orders as may in its opinion be necessary for ensuring that an election is conducted honestly, justly, fairly and in accordance with law and in accordance with the provisions of the Act and the Rules framed there under. Article 218(3) of the Constitution also cast onerous duty upon the Commission to ensure free and fair election and to exercise such powers and make such arrangements to fulfill the constitutional command.

The Hon'ble Supreme Court in the "Workers Party Pakistan through Akhtar Hussain VS Federation of Pakistan and others" reported in PLD 2012 SC 681 has held that;

"41. The Election Commission may also exercise its powers in anticipation of an ill that may have the effect of rendering the election unfair. In the case titled as In Re: Petition filed by Syed Qaim Ali Shah Jellani (PLD 1991 Jour. 41) the Elections Commission exercised its powers under Article 218(3) pre-emptively, by making all necessary arrangements to ensure that a certain class of people would be allowed to vote. This case implies that where a violation of the standards mentioned in Article 218(3) has not as yet taken place, the Election Commission is legally empowered under Article 218(3) to exercise its powers pre-



emptively in order to avoid a violation of these standards. Furthermore, Mst. Qamar Sultana v. Public at Large (1989 MLD 360) and In Re: Complaint of Malpractices in Constituency No. NA-57, Sargodha-V (supra) both reinforce the argument that the Election Commission is fully empowered by Article 218(3) to make 'such orders as may in its opinion be necessary for ensuring that the election is fair, honest etc'. These decisions recognize that the Election Commission enjoys broad powers not only to take pre-emptive action but also to pass any and all orders necessary to ensure that the standards of 'honesty, justness and fairness' mentioned in Article 218(3) are met.

42. The Parliament has framed different laws to effectuate the above constitutional provision and to regulate elections to the National and Provincial Assemblies. ROPA reiterates and further vests the Election Commission with the responsibilities and powers to, inter alia, regulate and check intra-party affairs and actions taken by candidates and parties in anticipation of and on Election Day, resolve all election disputes, declare the election void and to award punishments for violating relevant election laws. In appreciation of the arduousness of its task, section 5(2) of ROPA further empowers the Election Commission to "require any person or authority to perform such functions or render such assistance for the purposes of this Act as...it may direct". The Election Commission may, under section 103(c) of ROPA also "issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly, and in accordance with the provisions of this Act and the rules". Article 220 of the Constitution also directs the Federal and Provincial machinery to assist the Election Commission in fulfilling its constitutional responsibilities. The law, therefore, entrusts the Election Commission with exclusive, broad and extensive powers to attend to all issues related directly and ancillary to the election process."

The above discussion makes it abundantly clear that the Commission has ample power to issue such directions and make such consequential orders to ensure that election is conducted honestly, justly, fairly and in accordance with law.

Q. No 4: What consequential order can be made, if the order of the Commission is not complied with in a given time?

Ans : Section 128 of the Act empowers the Commission to extend the time for completion of the Senate election, for reasons which it considers sufficient, by making necessary amendments in the Notification issued under Section 107 of the Act. Therefore, in case of non compliance of directions and order issued under Article 218(3) read with Section 4(1) and Section 8(c) of the Act, the Commission may in addition to any other action may extend the time for completion of the Senate election to the extent of the Province of Khyber Pakhtunkhwa till the administration of oath to members of the Provincial Assembly against the reserved seats including the applicants.




10. Today, the office submitted copy of a short order dated 27-3-2024 passed by the Hon'ble Peshawar High Court in W.P. No.1617-P/2024 on the same subject matter. Operative part is reproduced as follows;

"(a) Worthy Speaker Khyber Pakhtunkhwa Provincial Assembly is directed to administer oath to the petitioners and; also allow them to sign the Roll of Members in terms of Article 65 & 255 of the Constitution of Islamic Republic of Pakistan 1973 read with Rule 6 of Khyber Pakhtunkhwa procedure and; conduct of Business Rules 1988 along with all other enabling provisions of the Constitution and; the ibid Rules by including the matter in question as Agenda item No.1 of the first business day of the session requisitioned for upcoming Senate Election and;

(b) He is also directed to allow and; facilitate the petitioners in casting their votes in the upcoming Senate election scheduled for 02.04.2024"

In view of the above discussion and; the order of the Hon'ble Peshawar High Court, the Commission in exercise of its powers under Article 218(3) of the Constitution read with Section 4(1), Section 8(c) of the Act and all other enabling powers in this behalf, directs that in case of failure of the Speaker, Provincial Assembly, Khyber Pakhtunkhwa to comply with the directions of the Hon'ble Peshawar High Court referred hereinabove, the Commission shall be constrained to postpone the ensuing Senate election and extend the time for completion of the Senate election to the extent of Khyber Pakhtunkhwa Provincial Assembly in terms of Section 128 of the Act and amend the Notification issued under Section 207 of the Act till the administration of oath to the applicants. The applications are allowed in the above terms.


(SIKANDAR SULTAN RAJA)
Chief Election Commissioner/
Chairman


NISAR AHMED DURRANI
Member


SHAH MUHAMMAD JATOI
Member


BABAR HASSAN BHARWANA
Member


JUSTICE (R) IKRAMULLAH KHAN
Member

Announced on:
28-03-2024

