

IN THE SUPREME COURT OF PAKISTAN
(Original Jurisdiction)

C.M.A. No. _____/2023

IN

Constitution Petition No. 5 of 2023

Mohammad Sibtain Khan and others Petitioners
Versus	
Election Commission of Pakistan and othersRespondents

CONCISE STATEMENT UNDER ORDER XVIII RULE 1 OF THE
SUPREME COURT RULES, 1980 ON BEHALF OF THE FEDERATION
OF PAKISTAN

Respectfully Sheweth:

1. That the titled Petition seeks to challenge the order dated 22-03-2023 passed by the Election Commission of Pakistan (“ECP”). Vide order dated 22-03-2023, the ECP has given 08-10-2023 as the new date for the general elections to the Provincial Assembly of the Punjab. Previously and as per the prayer in the instant Petition, pursuant to the order of this Court passed in SMC No. 1/2023 and CPs No. 1 and 2 of 2023, the President of Pakistan had appointed 30-04-2023 as the date for the general elections to the Provincial Assembly of the Punjab. Through the instant Petition, the Petitioners have assailed the ECP order dated 22-03-2023, which, according to the Petitioners, is in violation of this Court’s order dated 01-03-2023.

2. The Federation seeks to object to the maintainability and hearing of the instant Petition for being based on misreading and mistaken understanding of the order/judgment dated 01-03-2023 passed in SMC No. 1/2023 and C.Ps No. 1 and 2 of 2023. In order to ascertain the true import of the order/judgment dated 01-03-2023, it is imperative that the chronology of events/hearings leading up to 01-03-2023.

Invocation of Suo Motu under Article 184(3)

3. Vide order dated 16-02-2023 passed in C.P No.3988 of 2022 titled Ghulam Mehmood Dogar v. Federation of Pakistan, Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Sayyed Mazahar Ali Akber Naqvi took *suo motu* notice on the delay in holding the general elections to the Provincial Assembly of the Punjab. Upon the recommendation of the two-member Bench, the Hon'ble Chief Justice of Pakistan invoked the *suo motu* jurisdiction of this Court under Article 184(3) of the Constitution, by his administrative order dated 22-02-2023, and constituted a nine-member Bench to consider the questions of law framed therein and also fixed the connected C.Ps No.1 and 2 of 2023 for hearing before the nine-member Bench.

Proceedings on 23-02-2023

4. On 23-02-2023, the nine-member Bench issued notices to the Respondents including, the political parties who are part of the

Pakistan Democratic Movement (PDM). Two members of the Bench (Hon'ble Mr. Justice Yayha Afridi and Hon'ble Mr. Justice Ather Minallah) had dismissed SMC No. 1/2023 and CPs No. 1 and 2 of 2023, vide order dated 23-02-2023.

Proceedings on 24-02-2023 & Order released on 27-02-2023

5. Respondents including, the political parties, namely, PMLN, PPPP and JUI-P entered appearance and a joint statement on behalf of the aforesaid three political parties was read out in the Court. These three political parties objected to the inclusion of Hon'ble Mr. Justice Ijaz ul Ahsan and Hon'ble Mr. Justice Sayyed Mazahar Ali Akber Naqvi on the Bench. The Hon'ble Judges graciously chose to recuse themselves from further participating in the proceedings in SMC No. 1/2023 and CPs No. 1 and 2 of 2023. The aforesaid is evident from paragraph No. 9 of the reasons recorded by Hon'ble Mr. Justice Syed Mansoor Ali Shah and Hon'ble Mr. Justice Jamal Khan Mandokhel, released on 27-03-2023. Paragraph No. 9 is reproduced, as follows, for ready reference:

“9. In the meeting, the two Hon'ble Judges (Ijaz ul Ahsan and Sayyed Mazahar Ali Akbar Naqvi, JJ.) after deliberations decided to recuse themselves from the Bench. It was also considered that the two Hon'ble Judges (Yahya Afridi and Athar Minallah, JJ.), who had already made and announced their final decision of

dismissing the constitution petitions and the *suo motu* proceedings on 23.02.2023 and had in their order left it to the Hon'ble Chief Justice to decide if they were required to sit through the remaining proceedings in the following words – "However, I leave it to the Worthy Chief Justice to decide my retention in the present bench hearing the said petitions." Therefore, a Bench comprising the remaining five Judges of the nine-member Bench was reconstituted by the Hon'ble Chief Justice, to simply further hear the case and no specific order was passed to exclude the two Hon'ble Judges."

The order released on 27-02-2023 reflected the above and resulted in resumption of hearing of SMC No. 1/2023 and CPs No. 1 and 2 of 2023 by a five-member Bench.

Order/Judgment dated 01-03-2023

6. On 01-03-2023, the opinions of remaining five-members were announced in the open court, detailed reasons followed on 27-03-2023 (Hon'ble Mr. Justice Syed Mansoor Ali Shah and Hon'ble Mr. Justice Jamal Khan Mandokhel) and 31-03-2023 (Hon'ble Mr. Justice Yahya Afridi). Three members of the Bench (Hon'ble Chief Justice, Hon'ble Mr. Justice Munib Akhtar and Hon'ble Mr. Justice Muhammad Ali Mazhar) allowed CPs No. 1 and 2 of 2023 and held

in SMC No. 1/2023 that the *President is the competent authority to appoint the date for the general elections to the Provincial Assembly of Punjab and Governor to do the same for the general elections to the Provincial Assembly of Khyber Pakhtunkhwa*. However, Hon'ble Mr. Justice Syed Mansoor Ali Shah and Hon'ble Mr. Justice Jamal Khan Mandokhel had dismissed SMC No. 1/2023 and CPs No. 1 and 2 of 2023. The Federation's position, as was expressed by the Minister for Law & Justice as well as the then Attorney General for Pakistan, has consistently been that by a majority of 4-3, SMC No. 1/2023 and CPs No. 1 and 2 of 2023 stood dismissed. The Federation's viewpoint is supported by the reasons released on 27-03-2023 by Hon'ble Mr. Justice Syed Mansoor Ali Shah and Hon'ble Mr. Justice Jamal Khan Mandokhel in the following paragraphs:

"Decision by 4-3 or 3-2 majority"

35. We also find it necessary to narrate the reasons for non-issuance of the Order of the Court in the present case, to make them part of the record. We believed that our decision concurring with the decision of our learned brothers (*Yahya Afridi and Athar Minallah, JJ.*) in dismissing the present *suo motu* proceedings and the connected constitution petitions, had become the Order of the Court by a majority of 4-3 while our other three learned brothers held the view that their order was the Order of the Court by a majority of 3-2. Because of this difference of opinion, the Order of the Court, which is ordinarily formulated by the head of the Bench could not be issued. We are of the considered view that our decision

concurring with the decision of our learned brothers (*Yahya Afridi and Athar Minallah, JJ.*) in dismissing the present *suo motu* proceedings and the connected constitution petitions is the Order of the Court with a majority of 4 to 3, binding upon all the concerned. The answer lies in understanding the administrative powers enjoyed by the Hon'ble Chief Justice in reconstituting a Bench, when the Bench once constituted and assigned a case has commenced hearing of a case. This court has held in *H.R.C. No.14959-K of 2018*, that "once the bench is constituted, cause list is issued and the bench starts hearing the cases, the matter regarding constitution of the bench goes outside the pale of administrative powers of the Chief Justice and rest on the judicial side, with the bench. Any member of the bench may, however, recuse to hear a case for personal reasons or may not be available to sit on the bench due to prior commitments or due to illness. The bench may also be reconstituted if it is against the Rules and requires a three-member bench instead of two. In such eventualities the bench passes an order to place the matter before the Chief Justice to nominate a new bench. Therefore, once a bench has been constituted, cause list issued and the bench is assembled for hearing cases, the Chief Justice cannot reconstitute the bench, except in the manner discussed above." The Court further held that "in the absence of a recusal by a member of the Bench, any amount of disagreement amongst the members of the Bench, on an issue before them, cannot form a valid ground for

reconstitution of the Bench....reconstitution of a bench while hearing a case, in the absence of any recusal from any member on the bench or due to any other reason described above, would amount to stifling the independent view of the judge. Any effort to muffle disagreement or to silence dissent or to dampen an alternative viewpoint of a member on the bench, would shake the foundations of a free and impartial justice system... a bench, once it is constituted and is seized of a matter on the judicial side, cannot be reconstituted by the Chief Justice in exercise of his administrative powers, unless a member(s) of the bench recuses or for reasons discussed above”.

36. We endorse the above view and hold that a Judge forming part of a Bench once constituted and seized of the case assigned to it cannot be excluded from that Bench unless he recuses himself from hearing that case or becomes unavailable to sit on the Bench for some unforeseen reason. After having made a final decision on the matter at an early stage of the proceedings of a case, the non-sitting of a Judge in the later proceedings does not amount to his recusal from hearing the case nor does it constitute his exclusion from the Bench. In this case, the two Hon’ble Judges having decided the matter, left the option of their sitting or not sitting on the Bench with the Hon’ble Chief Justice, for further hearing of the case. The exercise of this option by the Hon’ble Chief Justice has no effect on the judicial decision of those two Hon’ble Judges passed in the case. The reconstitution of the Bench was simply an

administrative act to facilitate the further hearing of the case by the remaining five members of the Bench and could not nullify or brush aside the judicial decisions given by the two Hon'ble Judges in this case, which have to be counted when the matter is finally concluded. It is important to underline that the two Hon'ble Judges (*Ijaz ul Ahsan and Sayyed Mazahar Ali Akbar Naqvi, JJ.*) were not removed from the Bench but had voluntarily recused themselves. Thus, their short orders are very much part of the case, therefore, the administrative order of reconstitution of the Bench by the Hon'ble Chief Justice cannot brush aside the judicial decisions of the two Hon'ble Judges who had decided the matter when the case was heard by a nine- member Bench. Failure to count the decision of our learned brothers (*Yahya Afridi and Athar Minallah, JJ.*) would amount to excluding them from the Bench without their consent, which is not permissible under the law and not within the powers of the Hon'ble Chief Justice. Therefore, we are of the opinion that the dismissal of the present suo motu proceedings and the connected constitution petitions is the Order of the Court by a majority of 4 to 3 of the seven-member Bench. We are also fortified in our opinion by the precedent of the well-known *Panama case*. In the said case, the first order of the Court was passed by a 3-2 majority, and in the subsequent hearings conducted in pursuance of the majority judgment the two Hon'ble Judges, who had made and announced their final decision, did not sit on the Bench but they were not considered

to have been excluded from the Bench and were made a party to the final judgment passed by the remaining three Hon'ble Judges, and they also sat on the Bench that heard the review petitions."

[Emphasis supplied]

Consequence of Dismissal of SMC No. 1/2023 and CPs No. 1 and 2 of 2023

7. As a consequence of dismissal of SMC No. 1/2023 and CPs No. 1 and 2 of 2023, the President is not empowered to appoint the date for holding general elections to the Provincial Assembly of Punjab nor is the Governor, Khyber Pakhtunkhwa required to give the date for general elections to the Provincial Assembly of Punjab. Resultantly, the ECP order dated 22-03-2023 cannot be questioned in the instant proceedings. As a result, the instant Petition is liable to be dismissed.

Effect of Order dated 29-03-2023 passed in SMC No. 4/2022

8. A three-member Bench has, vide order dated 29-03-2023 passed in SMC No. 4/2023, held that hearing in all matters proceeding under Article 184(3) be postponed till such time, the issues/legal questions highlighted in the aforesaid order are adequately addressed under Article 191 of the Constitution. At the time, the aforesaid order was passed, the proceedings in the instant Petition were continuing. However, through an administrative circular dated 31-03-2023, the aforesaid judicial order was overruled. A judicial order or judgment,

if it is contrary to any law or a binding precedent, can only be overruled or disregarded by declaring it *per incuriam*. This can only be done through another judicial order by a Bench of higher strength, keeping in view the principle of *horizontal precedent* and *stare decisis*.

9. It is respectfully submitted that the circular dated 31-03-2023 is illegal, unlawful and undermines the integrity of the justice system. An administrative officer of this Court cannot disregard a judicial order passed by this Court. If this practice is allowed, it will lead to extremely dangerous consequences where any executive functionary can disregard this Court's order base on his/her understanding of the judgment.

Composition of the Three-Member Bench

10. When the proceedings in the instant Petition began, they were heard by a five-member Bench. On 30-03-2023, Hon'ble Mr. Justice Amin ud Din Khan recused. Upon his recusal, the strength of the Bench was reduced to a four-member Bench. On 31-03-2023, Hon'ble Mr. Justice Jamal Khan Mandokhel also recused. In his recusal note, the Hon'ble Judge has opined that the impact of judgment/order dated 29-03-2023 passed in SMC No. 4/2022 should have been considered in the Court, maintainability of the instant Petition in light of dismissal order of SMC No. 1/2023 and CPs No. 1 and 2 of 2023 by a four-member majority and determination of aforesaid by Full Court ought to have been considered first.

11. It is respectfully submitted that the instant Petition is a follow up of SMC No. 1/2023 and CPs No. 1 and 2 of 2023. The President had appointed 30-04-2023 as the date for general elections to the Provincial Assembly of Punjab under a mistaken understanding/reading of the judgment dated 01-03-2023. Hon'ble Mr. Justice Ijaz ul Ahsan had graciously recused himself from the aforesaid matters, having already disclosed his mind while taking *suo motu* notice in C.P No.3988 of 2022 titled Ghulam Mehmood Dogar v. Federation of Pakistan etc. Therefore, for the same reasons, he may graciously consider recusing from hearing the instant Petition, to meet the ends of justice.
12. The Hon'ble Chief Justice and Hon'ble Mr. Justice Munib Akhtar were among the three (3) members who had allowed the CPs No. 1 and 2 of 2023 and SMC No. 1/2023. Since, the question of the primacy/applicability order/judgment dated 01-03-2023 by the three-members (Hon'ble Chief Justice, Hon'ble Mr. Justice Munib Akhtar and Hon'ble Mr. Justice Muhammad Ali Mazhar) vis-à-vis the orders/judgments rendered by four-members (Hon'ble Mr. Justice Syed Mansoor Ali Shah, Hon'ble Mr. Justice Yayha Afridi, Hon'ble Mr. Justice Jamal Khan Mandokhel and Hon'ble Mr. Justice AtherMinallah) has arisen, therefore, it would be in fitness of things that the Hon'ble Chief Justice and Hon'ble Mr. Justice Munib Akhtar may also kindly recuse themselves from hearing the instant Petition.

Balancing Articles 224(1) and 218(3) with Article 224(2)

13. The scheme of neutral caretakers to assist the ECP in organizing and conducting free and fair elections was introduced through the Constitution (Eighteenth Amendment) Act, 2010 (the “Eighteenth Amendment”). Prior to the Eighteenth Amendment, the caretaker governments were appointed by the President and the Governors, in the center and the provinces, respectively. However, the elections held under such caretaker governments were always marred by allegations of rigging. Article 224 (inserted via the Eighteenth Amendment) and Article 224A (inserted via the Twentieth Amendment) endeavor to ensure that the mandate and requirement of Article 218(3) i.e. organizing and conducting free and fair elections is achieved.
14. To give effect to the scheme of Articles 224 and 224A, the Elections Act, 2017 contains an elaborate and exhaustive set of powers and functions that the caretaker governments can and are required to perform. Section 230 of the Elections Act, 2017 prescribes the limitation upon the powers and functions of the caretaker governments. The issue at hand is that the provincial governments were statedly dissolved to achieve political objective i.e. to force general elections to the National Assembly. While there is nothing wrong with such political objective, otherwise, but under the constitutional scheme, organizing and conducting free and fair elections in the presence of elected provincial governments in the

Provinces of Punjab and Khyber Pakhtunkhwa may not be possible. It is true that bye-elections have been organized and conducted in the presence of elected governments, however, the same may not be taken as a benchmark to organizing and conducting the general elections. In the past, there have been instances where allegations of massive rigging and corrupt practices were made against an elected provincial government. This question of harmonizing Articles 224 and 218(3) is of first impression and has not been dealt with by the superior courts of Pakistan. On this count alone, it is appropriate that the Full Court gives a conclusive finding on this aspect, outlining the powers and functions that an elected government may perform and the limitations thereon, in an eventuality where general elections to the National Assembly are held in the presence of an elected provincial government, and vice versa.

In view of the foregoing, it is submitted as follows:

- I. The instant Petition may kindly be dismissed in view of the majority (4-3) order/judgment dated 01-03-2023 passed in SMC No. 1/2023 and CPs No. 1 and 2 of 2023;
- II. In the alternative, the proceedings in the instant Petition may kindly be postponed in light of order dated 29-03-2023 passed in SMC No. 4/2022;
- III. This Hon'ble Bench, in view of submissions made in paragraphs 11 and 12, may graciously recuse from hearing the instant Petition and a Bench comprising of all remaining Hon'ble Judges of this Court, who did not hear SMC No. 1/2023, CPs No. 1 and 2 of 2023, may kindly be constituted to decide the questions raised herein;

Any other order that this Hon'ble Court deems appropriate, under the facts and circumstances and in view of the submissions made herein above, may also very kindly be passed.

Filed by:

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3-4-2023