

Excerpts from the text of the order of

ISLAMABAD, June 10: The following are excerpts from the text of the order of the Chief Election Commissioner, declaring bye-elections of two NA and one PA constituencies of Karachi as null and void.

BEFORE THE ELECTION COMMISSION OF PAKISTAN ISLAMABAD

PRESENT:

CHIEF JUSTICE @ IRSHAD HASAN KHAN
MR JUSTICE NASIM SIKANDAR
MR JUSTICE QAZI EHSANULLAH QURESHI
MR JUSTICE AHMED KHAN LASHARI
MR JUSTICE MUHAMMAD SADIQ LEGHARI

IN RE: SUMMARY ENQUIRY REGARDING BYE-ELECTIONS HELD AT KARACHI ON 12.5.2004.

Present:

Dr. Qazi Khalid Ali, Additional Advocate General Sindh.
On Court's notice.
Mr. Anwar Haider, Additional Chief Secretary (Home)
Government of Sindh, Karachi.
Syed Pir Ali Shah, District & Sessions Judge, Karachi Central.
Mrs. Naseem Mansoor, 1st Addl. District & Sessions Judge, Karachi Central.
Mr. Muhammad Azeem, 2nd Senior Civil Judge, Karachi Central.

For Contesting Candidates from MQM:

Mr. A. Iqbal Qadri, Advocate appeared on 20.5.2004 and 27.5.2004.
Mr. Nawab Mirza, Advocate appeared on 2.6.2004 and 9.6.2004.

Dates of hearing: 20th and 27th May, 2nd and 9th June, 2004.

ORDER

CHIEF JUSTICE @ IRSHAD HASAN KHAN, CEC:

On the 12th of May, 2004, polling took place in three National Assembly constituencies No. NA-240 Karachi-II, NA-243 Karachi-V, NA-246 Karachi-VIII and one Provincial Assembly constituency No. PS-127 Karachi-XXXIX at Karachi. Complaints started receiving in the Election Commission office at Islamabad regarding commission of alleged irregularities by candidates of Mutahidda Majlis-e-Amal (MMA), Mutahidda Qaumi Movement (MQM) and other political parties participating in the bye-election held in all the above constituencies. Reports of clashes between workers of MMA and MQM were also received in which eight or more persons were killed and 29 persons were injured.

2. In view of reports of alleged grave

illegalities being committed and the large scale killing in the above constituencies, Chief Election Commissioner of Pakistan took immediate cognizance of the matter and passed order on 13.5.2004, entrusting the case to Mr. Justice Muhammad Sadiq Leghari, Judge Sindh High Court/Member Election Commission for holding enquiry into the matter. Till finalisation of the enquiry, the declaration of results of the returned candidates was held in abeyance. The next date of hearing was fixed therein for 20th May, 2004 for taking further proceedings in the matter and notices were issued to all concerned.

On 15.5.2004, the Election Commission held a meeting wherein the order dated 13.5.2004, passed by the Chief Election Commissioner entrusting the case to Mr. Justice Muhammad Sadiq Leghari, learned Member, Election Commission to hold an inquiry into alleged grave irregularities in the conduct of bye-elections in the said constituencies, was approved. It was also decided that on conclusion of the proceedings, the record thereof shall be placed before the Election Commission for decision in accordance with law.

26. We have thoroughly scrutinized the material available on record, including the reports of the Additional Home Secretary, Sindh, District Returning Officers of Karachi West, Karachi Central and Malir District and the Returning Officers of NA-240 Karachi-II, NA-243 Karachi-V, NA-246 Karachi-VIII and PS 127 Karachi-XXXIX in this summary inquiry under Section 103AA of the Act read with Section 104 thereof and Article 6 of the Order. For facility of reference, the above provisions are reproduced here under as follows:

"103AA. Power of Commission to declare a poll void.—(1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such summary inquiry as it may deem necessary, it is satisfied that, by reason of grave illegalities or violation of the provisions of this Act or the rules, the poll in any constituency ought to be declared void and by notification in the official Gazette, call upon that constituency to elect a member in the manner provided for in section 108."

"(2) Notwithstanding the publication of the name of a returned candidate under sub-section (4) of section 42, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to a decision of a Tribunal."

"(3) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be a Tribunal to which an election petition

has been presented and shall, notwithstanding anything contained in Chapter VII, regulate its own procedure."

"104. Directions of Commission in certain matters.—Anything required to be done for carrying out the purpose of this Act, for which no provision or no sufficient provision exists shall be done by such authority and in such manner as the Commission may direct."

"6. Powers of Election Commission.—(1) The Election Commission shall have power to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order doing complete justice in any matter pending before it and an order for the purpose of securing the attendance of any person or the discovery or production of any document."

"(2) Any such direction or order shall be enforceable throughout Pakistan and shall be executed as if it had been issued by the High Court."

27. A bare reading of these provisions, when read together, would indubitably show that there is no bar on the power of the Election Commission to pass any order for doing complete justice in any matter pending before it, regardless of the technicalities. The power available to the Election Commission though corresponds with the provisions of Article 187 of the Constitution but is not subject to any fetters imposed under the law.

28. The consolidated statements of counts, as prepared by the Returning Officers concerned, indicate that from PS-127 Karachi-XXXIX Mr. Yousuf Munir Shaikh; from NA-240 Karachi-II Mr. Muhammad Abid Ali Umang; from NA-243 Karachi-V Mr. Abdul Waseem and from NA-246 Karachi VIII Mr. Nisar Ahmed Panhwar were the winning candidates whereas Mr. Muhammad Umar Jat, Qari Muhammad Usman, Hafiz M. Taqi and Rashid Naseem respectively stood the runners-up.

29. The learned Additional Advocate General, Sindh rightly contended that according to the consolidated statements of counts, the margin of votes obtained by the winning contesting candidates and the losing contesting candidates, is very wide. Nevertheless, this circumstance alone, in the facts and circumstances of the case, is not a sole factor for determining whether or not 'grave illegalities' were committed during the polls. The question of applicability of Section 103AA *ibid* to the circumstances of this case are to be examined in the over-all context of grave illegalities/violation of law and rules.

30. Be that as it may, admittedly, on the polling day a large number of complaints/telegrams were received by the Election Commission wherein the allegations of intimidation/harrasment of voters, stuffing of ballot papers, forcibly taking away of ballot box, polling agents made hostages or

removed from the polling stations at gun-point by armed Gondas and interference with the polling process, were leveled by the contesting candidates.

31. The Commission gave an opportunity to all the candidates present before it on the various dates of hearing to present their cases. They effectively availed this opportunity through oral arguments as well as their written submissions. The learned Additional Advocate General, Sindh and the contesting candidates belonging to MQM objected to the jurisdiction of the Commission to hold summary enquiry under Section 103AA of the Act. Objection was also raised with regard to withholding of results. Both these objections were over-ruled through order dated 20.5.2004 and 27.5.2004 respectively, which may be treated as part of this order.

32. The question of jurisdiction of the Commission, therefore, stands concluded by its earlier decision referred above. Undoubtedly, a Constitutional Petition No. 610 of 2004 has been filed in the High Court of Sindh to challenge, *inter alia*, the above orders. The petition has been admitted to regular hearing but the Hon'ble High Court has not stayed these inquiry proceedings. Thus there is no justification to unduly prolong these proceedings.

33. We see no merit in the contention that since the police reports as well as the reports of the District Returning Officers of concerned Districts and the Returning Officers of constituencies No. NA-240 Karachi-II, NA-243 Karachi-V, NA-246 Karachi-VIII and PS 127 Karachi-XXXIX do not disclose any illegalities in the polling process during the conduct of bye-elections on 12.5.2004, therefore, Section 103AA of the Act is not attracted. Suffice it to say that it is unsafe to rely on the police reports simpliciter. As regards the reports of the Returning Officers, *prima facie*, presumption of regularity is attached to these reports. Be that as it may, if these reports are to be relied upon then why large scale complaints were made by the parties regarding alleged grave illegalities. We, therefore, would not rely on these reports simpliciter.

34. As regards "Rejoinders" filed to the complaints by the contesting candidates from MQM, even if they are believed in their entirety, in the absence of any rebuttal from the other contesting candidates, who have not joined the proceedings, suffice it to say that mere indiscriminate firing in the said constituencies resulting into death of a large number of persons has, *ipso facto*, the effect of interference with the free exercise of right of franchise of the electorate during the bye-elections in Constituencies No. NA-240 Karachi-II, NA-246 Karachi-VIII and PS-127 Karachi-XXXIX. The extent of interference is wholly immaterial. We may point out at this stage that the learned Additional Advocate General frankly stated that in PS-127

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XXXIX five persons were on account of firing and six result of blows of hard and apons between 3.00 p.m. to on the polling day. Clearly, the effect of interference with exercise of right of franchise constituency. Such an interference within the purview of "grave illegalities" in terms of Section 40.

Initially there were security lapses on part of the local administration in maintaining law and order during which resulted in tragic loss of innocent citizens in Constituency No. NA-240 Karachi-II and Karachi-VIII. No incident of violence was reported on record in NA-243 Karachi-V. The state of affairs in PS-127 Karachi-XXXIX has been discussed in the preceding paragraph. There was no loss of life in NA-243 Karachi-V. The losing candidates also appeared before the Commission to deny their allegations of grave illegalities, despite ample opportunities. The case of Karachi-V, therefore, stands on its own footing.

It may, however, clarify that in the proceedings under Section 103AA of the Election Commission, only confined to examine the merits or otherwise of declaring the election null and void in a constituency.

It has vehemently reiterated and decided on behalf of Messrs Yousaf Munir Shaikh, Muhammad Abid Ali Umang, Abdul Waseem and Nisar Ahmed Panhwar on the last dates of the Election Commission to declare through the names of the candidates secured the highest number of votes to be elected as provided in Section 42 of the Act, therefore, as returned candidates published.

It is no cavil with the proposition that in terms of Section 42 of the Act, the names of the candidates secured the highest number of votes to be declared elected by public notification. This provision, however, subject to the provision 103AA of the Act and read in isolation thereof.

In terms of Section 103AA of the Act, the Commission can declare the election null and void, if from facts appearing from the record and after a preliminary inquiry as it may deem fit, it is satisfied that, by reason of grave illegalities or violation of provisions of the Act or the rules, any constituency ought to be

declared null and void in the above mentioned three constituencies.

40. The rationale for enacting Section 103AA is to preserve the sanctity of the ballot box in all its purity and under all circumstances. In order to restore the confidence of the electorate in the sanctity of the process, the polls have to be declared null and void in the above mentioned three constituencies.

41. When faced with this, it was argued on behalf of Messrs Yousaf Munir Shaikh, Muhammad Abid Ali Umang, Abdul Waseem and Nisar Ahmed Panhwar, on the previous dates of hearing as well as by the learned Additional Advocate General, Sindh today that at none of the polling stations in the four constituencies the polling was stopped; there were no instances or incidents of removal of ballot boxes from the polling stations and there was no concrete evidence available on record to come to the conclusion that any voter was not allowed to cast his/her vote, although there were allegations and counter-allegations from winning and losing side candidates but such allegations could only be determined by way of election petitions as envisaged by Section 52 of the Act, therefore, the polls cannot be declared as null and void. The only remedy available to an aggrieved person is to file an election petition.

42. We are not impressed by the arguments. Clearly, the admitted act of indiscriminate firing resulting into killing of 8/9 persons and injuries to 29 persons in NA-240 Karachi-II, NA-246 Karachi-VIII and injuries to persons in PS-127 Karachi-XXXIX tantamounts to an illegal interference with the free exercise of the right of franchise of the electorate. Whether the interference related to a part of any section of the electorate, big or small, or the majority of the electorate, is wholly immaterial. Clearly, such acts fall within the purview of "grave illegalities" in the conduct of election in the context of Section 103AA of the Act, therefore, the polls in these constituencies were vitiated by grave illegalities/violation of the law and the rules. As pointed out earlier, it is the duty of the Election Commission to restore the confidence of the electorate in the sanctity of the process by declaring the polls as null and void in the above three constituencies.

43. In view of the discussion in the preceding paragraphs, we are satisfied that the sanctity of the polls in Constituencies No. NA-240 Karachi-II, NA-246 Karachi-VIII and PS-127 Karachi-XXXIX during the bye-elections held on 12.5.2004, was vitiated by grave illegalities.

This is mandated under the Constitution and the law.

45. After taking into consideration all the attending circumstances and very carefully scrutinizing the material available on record, we are satisfied that by reason of grave illegalities, violation of the law/rules, the polls in Constituencies No. NA-240 Karachi-II, NA-246 Karachi-VIII and PS-127 Karachi-XXXIX ought to be declared null and void. We order accordingly.

46. The polls in Constituency No. NA-243 Karachi-V stand on a different footing. Although there are allegations and counter allegations but the material available on record does not indicate that firing took place in this constituency. Similarly, neither any death was reported to have occurred nor any person was reported to be injured in this constituency, therefore, the free right of franchise by the electorate has not been interfered with in this case.

47. Bye-elections to above mentioned three constituencies will be held on 9th August, 2004. Fresh programme giving dates for each stage is being issued separately.

48. As per consolidated results prepared by the concerned Returning Officers, the name of Mr. Abdul Waseem from NA-243 Karachi-V shall be notified forthwith as a returned candidate.

49. We direct the Government of Sindh to identify sensitive and trouble-prone areas in Constituencies No. NA-240 Karachi-II, NA-246 Karachi-VIII and PS-127 Karachi-XXXIX and to make such effective arrangements as are necessary against the evil and corrupt practices of booth capturing, intimidation/harrasment of voters and destroying the sanctity of the ballot box. Adequate foolproof arrangements must be made on the polling day to prevent any untoward incident. Sindh Government shall also ensure that the Army is called in aid of civil power to maintain law and order during the bye-elections. (The underlining is by way of emphasis).

50. To ensure free, fair and transparent bye-elections in the said three constituencies, display of arms shall be prohibited under Section 144 of the Criminal Procedure Code by issuing appropriate orders by the competent authority, fifteen-days before the polling day, on the polling day and fifteen-days after the polls.

(Chief Justice @ Irshad Hasan Khan)

Chief Election Commissioner

(Justice Nasim Sikandar)

Judge, Lahore High Court/

Member Election Commission