

IN THE HIGH COURT OF SINDH AT KARACHI**C.P. No. D-3379 of 2016**

(Abdul Latif Shaikh Versus The Province of Sindh and others)

Date	Judgment with signature of Judge
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Present:**Mr. Justice Nadeem Akhtar &****Mr. Justice Muhammad Faisal Kamal Alam**

Petitioner : Through Syed Ghulam Shabbir Shah, Advocate.

Respondent No.6. : M/s. Abdul Wahab Baloch and S.M. Shuja Abbas,
Advocates.

Mr. Mukesh Kumar G. Karara, Addl. A.G.

Mr. Dilawar Hussain, Standing Counsel along
with Mr. Abdullah Hanjrah, Law Officer of ECP.

Dates of hearing : 23.06.2016, 28.06.2016 and 30.06.2016.

Date of Judgment : _____ .2016

J U D G M E N T**Muhammad Faisal Kamal Alam, J:** Through instant

Petition, an Election Program issued by Respondent No.2-

Election Commission of Pakistan, having Reference

No.F.6(16)/2015-LGE(S) dated 03.06.2016, has been challenged

by the petitioner, who is a returned candidate from Municipal Committee Gambat, District Khairpur {MC Gambat}, and sought the following relief:

“It is, therefore, prayed that by way of appropriate writ this

Hon’ble Court may be pleased to:

- a). *Declare that the issuance of the Impugned Notification before No.F.6 (16)/2015-LGE(S) dated 03.06.2016 to the extent of election of reserved seats of MC Gambat is illegal, unlawful and unconstitutional and liable to be set aside;*
- b). *Declare that the failure by the Respondent No.3 to hold elections of ward No.2 of Municipal Committee Gambat before the election on reserved seats is illegal, unlawful and unconstitutional;*
- c). *Direct the Respondent No.3 to hold Election of Ward No.2 of Municipal Committee Gambat before the election for reserved seats;*
- d). *Suspend the operation of notification dated 03.06.2016 issued by the ECP to the extent of election of reserved seats of MC Gambat;*
- e). *Graciously grant such other and further relief as this Hon’ble Court may deem appropriate;*
- f). *Grant the costs of the Petition.”*

2. The matter in dispute relates to holding of Elections on the reserved seats in Councils including Municipal Committees and Metropolitan Corporation of Sindh Province. However, as per the averments of the petition, such an Election on the reserved seats cannot be held in above M.C. Gambat, inter alia, as still one of its General Member Seats is lying vacant.

3. The relevant background facts leading to filing of the present petition are that the present Respondent No.6 (Shaikh Khalid Hussain) won two General Member seats from Ward No.2 and 3 in MC Gambat, but subsequently resigned from Ward No.2, as in terms of Section 37 of the Sindh Local Government Act, 2013 (**SLGA**), no person can hold dual membership or retain more than one seat at a time in the same Council.

4. Undisputed facts of the present controversy are that when the present Respondents No.3 (Election Commission of Pakistan), earlier announced an Election Program for reserved seats vide their Notification No.F.6(16)/2015-LGE(S) dated 15th January, 2016, present Respondent No.6 filed a Constitutional Petition No.D-342 of 2016, inter alia, seeking almost identical relief, to the effect that first the above vacant seat of Ward No.2 M.C. Gambat be filled-up before conducting the Election on reserved seats, inter alia, as in terms of Rule 47 of the Sindh Local Councils (Election) Rules, 2015 [**said Election Rules**] the electoral college of MC Gambat is incomplete. However, subsequently, the present respondent No.6 withdrew the said petition, but, the election

process on reserved seats was stayed by the Hon'ble Supreme Court in some other litigation. It is also not denied that Members elected on General seats of MC Gambat have been administered oath, which includes present Petitioner and Respondent No.6 [being returned candidates on general seats of Wards No.10 and 3 respectively, M.C Gambat]. It would be advantageous to reproduce herein below the prayer clause of above Petition of present Respondent No.6_

“It is, therefore, prayed that this Hon’ble Court may graciously be pleased to pass order / orders as under: -

- A). To direct the Respondents / Election Commissioner of Pakistan as well as Provincial Election Commission to hold election of Ward No.2 Municipal Committee Gambat for filling vacant seat thereafter to hold the Election for reserve seats otherwise the people at large scale of ward No.2 will deprive of their representation at Municipal Committee Gambat.**
- B). To declare the Schedule announced by the Election Commission of Pakistan vide Notification bearing No.F.6(16)/2015-LGE(S) dated 15.01.2016 for holding the election of reserve seats that the electoral college of the Municipal Gambat is incomplete due to vacation of Ward No.2 of Municipal Committee Gambat, the notification in respect of be declare null and void till the filing of vacant seat.**
- C). To direct the Respondents / Election Commission of Pakistan as well as Provincial Election Commission**

to hold the Election of reserve seats till the filing of vacant seats, at the earliest.

- D). To suspend the operation of the Programme / Schedule dated 15.01.2016 issued by the Election Commission of Pakistan for holding the Election at Municipal Committee Gambat for the members to the reserve seats of Local Councils, till the final disposal of this Petition.**

Any other or better relief which this Hon'ble Court deem fit and proper in the circumstances of the case."

5. In the intervening period, the petitioner had also preferred C.P. No.D-2694 of 2016, inter alia, with almost same averments that the official respondents should hold the election in respect of vacant seat in the subject Ward No.2 before conducting election on reserved seats. The said Constitutional Petition was also disposed of by a consent order dated 02.06.2016 to the effect that the Respondent-Election Commission of Pakistan will hold the Election of reserved seats and the subject Ward No.2 strictly in accordance with law and the order passed by the Hon'ble Supreme Court on 15.04.2016 in Civil Appeal Nos. 760 to 786 of 2016. However, at this juncture, it is necessary to clarify that the said order of the Hon'ble Supreme Court in Civil Appeals No.760 to 786 of 2016, inter alia, is in relation to holding of reserved seats with direction to revive Section 18-A of the above SLGA, which at that time was repealed by the present Respondent No.1-Sindh Government. In the said order of Hon'ble Apex Court, the present controversy relating to M.C. Gambat was not there.

6. Subsequently, the official respondents issued the afore-referred impugned Notification for holding Election on reserved seats throughout the Province, which has now been assailed by the present Petitioner, but only to the extent of M.C. Gambat. According to Petitioner's counsel, Syed Ghulam Shabbir Shah, the said M.C. Gambat consist of thirteen (13) Wards and after resignation of Respondent No.2 from the General seat of Ward No.2, the present party position in M.C. Gambat is that Pakistan People's Party [PPPP] and PML(F) both have six seats each and there is a tie between these two political Parties; and in these peculiar circumstances, if an election on reserved seats is held before filling-up vacant seat of Ward No.2 then such Election would be an illegal exercise, as the Electoral College in terms of Rule 47 [ibid] is not complete and consequently, exercise to calculate/declare share of each Political Party in the Local Council concerned as per the Item No.8 of the impugned Notification cannot at present be undertaken, in view of the above factual and legal aspect of the case. The learned counsel for the present Petitioner has relied upon a learned Division Bench Judgment of this Court reported in 2004 CLC Page-867. It was further urged that if Elections are held as per the impugned Election Programme, that is, without first filling up vacancy in subject General Ward No.2, which is subsequently filled-up, resulting in success of any of the afore mentioned Political Parties, then the present exercise of holding Election on the reserved seat would naturally become an exercise in futility as the entire composition of present electoral college of M.C. Gambat will be changed,

which will also adversely affect yet another subsequent election of Chairman and Vice Chairman. Therefore, it would be fair, just and proper that firstly the Electoral College of M.C. Gambat should be completed by holding an election on vacant seat of the subject General Ward No.2 before moving further to second stage of reserved seats election. It was further argued by the petitioner's counsel that voters /electors of Ward No.2 are being kept out of election process as they do not have any representation in MC Gambat and their elected representative/member is not there through whom they can participate in the impugned election on reserved seat at present and electing Chairman and Vice Chairman thereafter for MC Gambat. The petitioner's counsel has also relied upon a famous case reported in PLD 1993 Supreme Court Page 473 (Mohammad Nawaz Shareef *Versus* Federation of Pakistan), in which concept of political justice has been expounded by our Hon'ble Supreme Court.

7. The above submissions were controverted by present Respondent No.6, who is represented by Mr. Abdul Wahab Baloch Advocate, by filing CMA No.17253 of 2016 under Article 199 of the Constitution of Islamic Republic of Pakistan as well as his written arguments in response to written submissions of the Petitioner's counsel. According to respondent No.6, the present petition is an abuse of process of Court and the same plea was also taken by him while challenging an earlier interim restraining order dated 6-6-2016 passed in instant constitutional petition before the Hon'ble Supreme Court and in this regard he has placed an order dated 13-6-2016 of the Hon'ble Supreme Court,

wherein it has been observed that the plea of abuse of process of Court may be taken in the present sub judice constitutional petition. As per the respondent No.6, the election on the reserved seats can be conveniently held in terms of the impugned Election Schedule without causing any prejudice to any party including the present petitioner as everyone will have a fair chance to participate in the bye-election on the subject General seat of M.C. Gambat Ward No.2. In his written arguments, said respondent No.6 has placed reliance upon Section 5 of Manual of General Election (Election Procedure / Rules 2002) read with Election Rules (Amended) Ordinance, 2007, wherein, inter alia, it has been provided that if a nominee of a political party is elected on more than one general seat then all the seats won by him shall be counted for the purpose of calculation on the general seats won by that party in the National or Provincial Assembly, as the case may be. Consequently, respondent No.6's counsel has attempted to draw an analogy that the present Electoral College for election on reserved seats stand completed as the present party position in M.C. Gambat is 7:6, that is, seven (07) seats including both seats won by R-6) won by PML[F] and six seats by PPPP, respectively. As per learned counsel of respondent No.6, the general seat of subject ward No.2, which was earlier given up/surrendered by the present respondent No.6 [admittedly] is also to be counted for election on reserved seats.

8. The Respondent-Election Commission of Pakistan has also filed its para-wise Comments and has not disputed the factual

side of the petition, particularly, the crucial factual aspect, that on account of resignation of present respondent No.6 from his General Ward No.2 seat, at present, both the above named political Parties have equal number of general seats [as mentioned above] in MC Gambat.

9. However, Respondents No.3 and 4 [ECP and Provincial Election Commissioner respectively] justified their present impugned action of announcing the election program primarily on the ground that the same has been issued in pursuance of the earlier orders passed by this Court as well as by the Hon'ble Supreme Court and a relevant portion of the Apex Court Order has been reproduced in the above Comments of said Respondents No. 3 and 4.

10. Mr. Mukesh G. Karara, learned Addl. AG representing the respondent No.1-Province of Sindh has contended that the respondent No.6 resigned from his second General Seat of Ward No.2 around six months back, that is, on 11th December, 2015 and by now Election Commission of Pakistan (Respondent No.3) should have held bye-elections on subject vacant seat of Ward No.2, but Respondent-ECP did not even issue any Election Schedule and due to this lapse on their part (of Respondent-ECP), even the Electoral College of M.C. Gambat till date remains incomplete in terms of Rule 47 of the above cited Rules. Learned Addl. A.G. further argued that if vacant seat in Ward No.2 is filled up first, it which will not violate the above referred order of the

Hon'ble Supreme Court. As per Mr. Mukesh Karara, such an exercise would result in completing the Electoral College of M.C. Gambat, however, though mildly, but in the same breath, the learned Addl. A.G. also averred that for holding elections for reserved seats the present strength of members who have administered oath of the Council can be calculated to fulfill statutory requirement of the Electoral College.

11. With the assistance of all the learned counsel we have perused the case record as well as pleadings of earlier *lis*.

12. Surprisingly, the present respondent No.6 in earlier C.P. No.D-342 of 2016 has taken up the same plea, which is the subject matter of present C.P. and that is why the same has been reproduced in preceding paragraphs. Memo of earlier C.P. No.D-342 of 2016 is also part of present case record [available at page no. 31], wherein it has been specifically stated by the present respondent No.6 on oath that since he has resigned from the subject Ward No.2 seat in compliance of Section 37 of the above SLGA, therefore, the Electoral College is incomplete and the election program announced by the **present respondent-ECP at that relevant time vide their notification dated 15.01.2016** be declared null and void. In this regard, the present respondent No.6 along with other returned / successful candidates had also made their joint representation {at page 35, Annexure-D of disposed of C.P. NO.D-342 of 2016} before the present Respondent No.3 [ECP] that the vacancy in MC Gambat Ward No.2 should be filled

up before election on reserved seats. Coincidentally, present respondent No.6 had relied upon the same decision of Syed Ali Murad Shah [supra] which has now been cited by the present petitioner. The second crucial factual aspect of the case is that the Respondent No.2 (The Secretary Local Government) in its Comments filed in earlier round of litigation in C.P. No.D-2654 of 2016, which was earlier preferred by the present petitioner, has categorically mentioned the party position as a tie, that is, both PPP and PML[F] have won six seats each in M.C. Gambat. The said comments are available at page 77, as Annexure G of the present case.

13. In view of the above uncontroverted factual position, the plea of present respondent No.6 about abuse of process of court if at all is available, the same can be pressed against him only. The respondent No.6 cannot approbate and reprobate at the same time as his present stance is completely contrary to his pleadings in his earlier petition. The legal ground agitated by Respondent No.6 as mentioned under paragraph-6 of his written arguments for calculating the seats won by returned candidate of a political party in National and Provincial Assembly, is not applicable in the present matter, in view of express provision of Section 37 of SLGA, which is the governing law for settling the present issues at hand and which expressly prohibits dual membership in a Council.

14. Now adverting to the main bone of contention that which election should be held first. The petitioner's counsel has also

relied upon a famous case reported in PLD 1993 SC Page 473 (Mohammad Nawaz Shareef Versus Federation of Pakistan), in which concept of political justice has been expounded by our Hon'ble Supreme Court. Apart from this, the main object and purpose of Local Government concept is that it is a sphere of government closest to the people. Thus, the Local Government representatives are closest to the communities as they work at grass root level and the main purpose of local government is to empower such representatives of the people at the grass root level. Considering the present set of facts, it would be relevant to reproduce relevant portion from the above cited Judgment of Hon'ble Supreme Court_

“There seems little doubt that the paramount consideration before the Constitution-makers was that no section of the citizenry no matter how small it might be, should be deprived of equal participation in the national life and no one should feel that he has not had a fair deal.”

15. Filling up of indirect seat in M.C. Gambat, that is, election for the reserved seat at this stage with the present party position in M.C. Gambat shall be an exercise in futility for the reason that in case either of the above mentioned political party wins the subject vacant general seat in Ward No.2, or even it is won by some other person/member, it would be the thirteenth seat which in the present peculiar circumstances will be a decider for not only electing indirect members on reserved seats in terms of Section 18-A of SLAGA but subsequent Election of Chairman and Vice Chairman of MC Gambat also. Consequently, the entire composition of M.C. Gambat is bound to be disturbed and

calculation/declaration of share of each political party in terms of the impugned Item No.8 of the subject impugned Notification will be erroneous. This will be prejudicial to every one's interest, including the electors of subject Ward No.2, inter alia, as they would be deprived of electing member on the reserved seats through their duly elected members. In the present circumstances, plea of Petitioner about disfranchisement of voters of subject Ward No.2 cannot be brushed aside. Applicability of above Rule 47 relating to Electoral College has become all the more significant, as it has the effect of disturbing or adversely affecting the final outcome of the elections of Chairman and Vice Chairman, if held earlier as per the present impugned election program / notification dated 03.06.2016. Therefore, we are of the considered opinion that election in respect of the subject Ward No.2 should be held first, before moving further in the election process of electing member of reserved seats. Case law cited by the Petitioner counsel is squarely applicable to the present case, in particular, the principle laid down with regard to political justice. Even If provision of Section 18-A relating to election to the reserved seats provides that, inter alia, election on reserved seats in a Municipal Committee shall be on party basis. Thus proprietary demands that a political party which enjoys a majority in a Municipal Committee should at least be given a fair opportunity to elect a chairman and vice chairman of that Municipal Committee

16. Adverting to the 'anxiety' of Respondents No.3 and 4 with regard to the decision of Hon'ble Supreme Court in the above mentioned Civil Appeals. In this regard, we have already observed

hereinabove that the present dispute was not before the Hon'ble Supreme Court at that relevant time. Though even at that relevant time, the subject General Member Seat of Ward No.2 had fallen vacant, admittedly on account of resignation of present Respondent No.6, but that material fact was never disclosed before the Hon'ble Supreme Court by present official respondents. Secondly, even in the afore referred order of Hon'ble Supreme Court. The official respondents could not justify that why till date the election on the subject vacant seat of Ward No.2, M.C. Gambat was not held, particularly in the present attending circumstances. An overall conduct of Official Respondents No.3 and 4 in the matter does not seem to be bona fide.

17. We cannot constrain ourselves from observing that when the earlier C.P. No.D-2694 of 2016 was disposed of by a consent order, then it was expected from respondent-ECP that it will exercise its constitutional and statutory mandate in a fair, just and reasonable manner and reasonableness in the matter demanded that first the composition of Electoral College (under Rule 47) in MC Gambat should have been completed before issuing the impugned election program. The respondent-ECP by now should have realized that it enjoyed a special constitutional position, which is impliedly clothed with a higher degree of public duty. All its action should manifest transparency, so that no one, in particular, those who wait for an opportunity to malign constitutional institutions for their own vested interest can question the competency of Respondent-ECP.

18. The upshot of the above discussion is that the present petition is accepted only to the extent that the official respondents should first hold election on the subject vacant general seat of Ward No.2 MC Gambat, strictly in accordance with law before moving further in the election process of electing indirect members on the reserved seat. To this extent only, the above impugned Notification No. No.F.6(16)/2015-LGE(S) dated 03.06.2016 is declared to be illegal and without jurisdiction.

19. Parties are left to bear their own costs.

JUDGE

JUDGE