

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No.1131/2021

Syed Yousaf Raza Gillani

Versus

Federation of Pakistan through Secretary, Ministry of Law and
Justice & 5 others

Petitioner by : Mr Farooq H. Naek, Sr. ASC.
Mr Javed Iqbal Wains, Advocate.
Raja Shakeel Abbasi, Advocate.
Barrister Usman Waleed, Advocate.

Date of Hearing : 24-03-2021.

ATHAR MINALLAH, C.J.- Senator Syed Yousaf Raza Gillani (*hereinafter referred to as the "Petitioner"*) has invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (*hereinafter referred to as the 'Constitution'*), challenging the process of election to the post of the Chairman of the Senate of Pakistan and the rejection of seven votes by the Presiding Officer, namely, Senator Syed Muzaffar Hussain Shah, in particular. The Petitioner asserts that he was nominated as a joint candidate of the Pakistan Democratic Movement (*hereinafter referred to as "PDM"*) to contest the election against respondent no.6 i.e. Senator Mohammad Sadiq Sanjrani. It is the case of the Petitioner that the PDM had the required numerical strength to elect a Senator as Chairman of the Senate but the rejection of seven votes deprived

the majority of its constitutional right. It has been alleged that the Presiding Officer was biased and that the seven votes were rejected malafidely and illegally. The seven voters, all of whom were worthy members of the Senate, had stamped the respective ballot papers on the printed name of the Petitioner instead of the space in front of it. It is an admitted position that the election process was held under Article 60 of the Constitution read with the Rules of Procedure and Conduct of Business in the Senate, 2012 (*hereinafter referred to as the "Rules of 2012"*). The procedure governing the election to the office of the Chairman of the Senate of Pakistan has been described under rule 9 of the Rules of 2012. It is noted that the entire election process was held and regulated internally by the Majlis-e-Shoora (Parliament) without the involvement of any other outside entity such as the Election Commission of Pakistan.

2. Mr Farooq H. Naek, learned Sr. ASC, has been heard at length. He was asked to assist this Court regarding two crucial questions, whether the validity of the election to the office of the Chairman of the Senate could be called into question and whether any other adequate remedy was available to the Petitioner under the Constitution to remedy the alleged wrong without involving the judicial branch of the State. He has contended that the election process impugned by the Petitioner does not fall within the ambit of the bar contained under Article 69. He has also argued that no adequate remedy is provided under the law to remedy the alleged wrong. Reliance has been placed on the cases titled '*Asif Ali Zardari v. Federation of Pakistan and others*' [PLD 1999 Karachi 54] and

'*Muhammad Azhar Siddique and others v. Federation of Pakistan and others*' [PLD 2012 SC 774]

3. It is noted that this Court has to answer two fundamental questions i.e. whether the bar contained under Article 69 is attracted and whether the Petitioner has an adequate remedy under the law.

(a) The validity of proceedings of the Majlis-e-Shoora (Parliament) and its justiciability.-

4. Article 50 of the Constitution provides that there shall be a Majlis-e-Shoora (Parliament) of Pakistan, inter alia, consisting of two Houses to be known respectively as the "National Assembly" and the "Senate". All decisions are taken by a majority of the members present and voting. Article , read with the Rules of 2012, describes the manner and procedure regarding election to the office of the Chairman of the Senate of Pakistan. Article 69 explicitly bars the jurisdiction of the court and the same is reproduced as follows.-

"69. Courts not to inquire into proceedings of Majlis-e-Shoora (Parliament).

- (1) *The validity of any proceedings in Majlis-e-Shoora (Parliament) shall not be called in question on the ground of any irregularity of procedure.*
- (2) *No officer or member of Majlis-e- Shoora (Parliament)] in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in Majlis-e-Shoora (Parliament), shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.*

(3) *In this Article, Majlis-e-Shoora (Parliament) has the same meaning as in Article 66.*"

5. The above constitutional provision is one of the privileges, powers and immunities of the Majlis-e-Shoora (Parliament) expressly guaranteed under the Constitution. Article 67 empowers the House to make rules for regulating its procedure and the conduct of its business. The other powers and privileges are described under Article 66; (i) subject to the Constitution and to the rules of procedure, every member is guaranteed freedom of speech while the exceptions are described under Article 68, (ii) no member can be made liable for any proceedings in any court in respect of anything said or any vote given by him / her in the Majlis-e-Shoora (Parliament), (iii) no person can be made liable in respect of the publication by or under the authority of the Majlis-e-Shoora (Parliament) of any report, paper, votes or proceedings.

6. The question of internal proceedings was examined by the august Supreme Court in the case of '*Lt. Col. Farzand Ali and others vs. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore*' [PLD 1970 Supreme Court 98]. The august Supreme Court affirmed the earlier view taken in the cases of '*Pakistan vs. (1) Ahmad Saeed Kirmani (2) Ch. Fazal Elahi, (3) Secretary, West Pakistan Legislative Assembly, (4) Mumtaz Hassan Qizalbash*' [PLD 1958 Supreme Court (Pak) 397] and '*Badru Haque Khan vs. (1) The Election Tribunal, Dacca, (2) The Chief Election Commissioner and (3) Jamalus Sattar Rahman*' [PLD

1963 SC 704]. While referring to the former judgments the august Supreme Court observed in the context of Article 89 sub article (1) of the Constitution of 1956 as follows.-

"This Court was of the opinion that the principle was too broadly stated by the High Court and was apt to lead to dangerous misconceptions. But this Court itself did not attempt to lay down in what particular circumstances proceedings within an Assembly could possibly fall within the jurisdiction of the Courts, except to point out that matters which fell squarely within the definition of internal proceedings of the House would not be subject to scrutiny by the Courts. It was said that whatever can be "fairly described as internal proceedings relating to the proper business of the House would be wholly outside the corrective jurisdiction of the High Court."

7. After examining the precedent law from other jurisdictions and quoting with approval the test indicated by Sir Erskine May in his treatise titled 'Parliamentary Practice', the apex Court observed and held as follows.-

"It will be observed that in none of these cases had any attempt been made to define as to what constitute "internal proceedings" but this much is clear that they do not extend to anything and everything done within the House. Thus as a general rule a criminal act done in the House would perhaps not be outside the course of criminal justice (vide observations of Stephen, J. In Bradlaugh v.

Gossett). The test indicated by Sir Erskine May in his book on Parliamentary Practice is as to whether what is said or done "forms part of a proceeding of the House in its technical sense, i.e. the formal transaction of business with the Speaker in the Chair or in a properly constituted committee". It would be neither possible nor desirable to attempt any exhaustive classification of the matters that may be comprised within the term "internal proceedings" but it will be sufficient for my purpose to indicate that whatever is not related to any "formal transaction of business" in the House cannot be said to be a part of its "internal proceedings".

8. The Hon'ble Hamoodur Rahman, C.J, as he was then, concluded as follows:-

"In this view of the matter, while I am prepared to concede that all that fairly concerns the internal proceedings of the House relating to its proper business is immune from challenge in Courts, I am not in a position to agree that a question relating to the title of a person to be a Member of the House or to continue to sit therein is a question pertaining to the internal proceedings of the House."

9. In the case of '*Muhammad Azhar Siddiqui and others vs. Federation of Pakistan and others*' [PLD 2012 Supreme Court 774], the provisions of Article 69 of the Constitution were elaborately examined by the august Supreme Court in the context of a ruling of the Speaker under Article 62 (2) *ibid*. To the extent of the ruling of the Speaker given under Article 62(2) it was held that the same was

not part of the parliamentary process as the Speaker was performing an administrative task of determining whether a question of disqualification had arisen or not and, thus, it was held that the bar, under Article 69, did not cover such an act of the Speaker. However, the apex Court reaffirmed the earlier laid down principles and law relating to the bar in respect of 'internal proceedings' of the Parliament. It is, therefore, obvious that the proceedings or acts falling under clauses (1) or (2) of Article 69 are not subject to judicial review. The Rules of 2012, constituting Committees or the formal transaction of business of the House in relation to election to the post of Chairman of the Senate falls within the ambit of the expression "proceedings" for the purposes of Article 69 and consequently the bar of jurisdiction contained therein is attracted in the case in hand.

10. It is also noted that the august Supreme Court has consistently affirmed the principle of trichotomy of powers amongst the organs of the State and in this regard reliance is placed on the case of '*Muhammad Azhar Siddiqui and others v. Federation of Pakistan and others*' [PLD 2012 SC 774] and the relevant portion is reproduced as follows.-

"The principle of trichotomy of powers upon which the scheme of the Constitution is based, envisages three organs of the State, namely, Legislation, Executive and Judiciary, each of whom has to perform its functions within its domain. In line with the said principle, this Court has always performed its functions strictly remaining within the area of its jurisdiction and shown utmost respect to the other organs of the State by not intruding

upon the domain reserved for them. In Al-Jehad Trust v. Federation of Pakistan (PLD 1996 SC 324) the august Supreme Court held as under:-

"...There is no cavil with the proposition that the Legislature has to legislate; the Executive has to execute laws and the Judiciary has to interpret the Constitution and laws. The success of the system of governance can be guaranteed and achieved only when these pillars of the State exercise their powers and authority within their limits without transgressing, into the field of the others by acting in the spirit of harmony, cooperation and coordination. So far the powers of the Judiciary are concerned, we are exactly going to do that and we are going to interpret the relevant provisions of the Constitution within the limits prescribed so that the provisions are harmonized and the Constitution becomes workable."

11. The Majlis-e-Shoora (Parliament) is the supreme legislative organ of the State. It represents the people of Pakistan and maintaining its dignity, respect and independence is of paramount importance and a constitutional duty of other branches of the State. It is the highest forum for, inter alia, resolving national issues and political disputes. The parliamentary privileges, powers and immunities have been expressly incorporated in the Constitution. The language used by the framers of the Constitution is unambiguous and effective in order to prevent a court from encroaching upon the independence of the Majlis-e-Shoora (Parliament). It is based on the principle of constitutional separation between the three branches of the State i.e. the judiciary, legislature and the executive. The

privileges and powers embedded in the Constitution are aimed at protecting the integrity of the parliamentary proceedings so that the Majlis-e-Shoora (Parliament) is enabled to perform its functions with the appropriate degree of independence. The Houses of the Majlis-e-Shoora (Parliament) are empowered to regulate their respective proceedings and the Constitution clearly prevents the courts from inquiring into its validity. Any attempt by a court to interfere in the proceedings of the Houses by calling into question its validity is likely to undermine the dignity, prestige and independence of the Majlis-e-Shoora (Parliament) on the one hand while, on the other, it exposes the apex constitutional legislative forum to undesirable and unwarranted criticism. Any encroachment by the judicial branch in the realm of the validity of proceedings of the Majlis-e-Shoora (Parliament) inevitably has consequences, which adversely affects public interest. It erodes the sanctity of the supreme legislative constitutional forum besides weakening the sovereignty, independence and prestige of the Majlis-e-Shoora (Parliament). Such intrusions by the courts profoundly affects the confidence of the people in the Majlis-e-Shoora (Parliament). Simultaneously, it has consequences for the judicial branch of the State as well because it essentially exposes the courts to deal with matters having political content. In a politically polarized environment, intervention by the courts and that too in disregard to the constitutional privileges, powers and immunities of the Majlis-e-Shoora (Parliament) is likely to have profound ramifications in the context of the confidence of the people relating to impartiality of the judicial branch. The judicial branch is not only to perform its functions impartially but has to be

seen as such by the stakeholders i.e. the people of Pakistan. It is for this reason that courts ought to exercise greater restraint in disputes which could be resolved by the Majlis-e-Shoora (Parliament) itself. An effective, independent and functional Majlis-e-Shoora (Parliament) is the sole panacea for ensuring the well-being and prosperity of the nation. The security and integrity of the State also depends on the institutional strength and sovereignty of the Majlis-e-Shoora (Parliament). Article 69 is, therefore, to be understood and interpreted in this context and on the touchstone of the cardinal principle of constitutional separation of powers between organs of the State.

12. The respect, prestige, dignity and independence of the Majlis-e-Shoora (Parliament) is in the hands of the chosen representatives and thus it is their duty to jealously guard against unwarranted intrusions by other branches in its proceedings. Every member solemnly swears to perform functions honestly, to the best of his or her ability, faithfully and always in the interest of the sovereignty, integrity, solidarity, well-being and prosperity of Pakistan. Every word of the oath taken in the name of Allah, the most Beneficent and the most Merciful, has to be given respect. The success, effectiveness and independence of the Majlis-e-Shoora (Parliament) rests on the commitment of the chosen representatives to prevent breaches of the constitutional privileges, powers and immunities embedded in the Constitution. It is an onerous duty of the political leadership and every chosen representative to prevent the judicial branch from exercising the power of judicial review relating

to the proceedings of the Majlis-e-Shoora (Parliament), which are privileged and protected under Article 69 of the Constitution.

13. The grievance of the Petitioner in the matter in hand exclusively pertains to questioning the validity of proceedings of the upper House of the Majlis-e-Shoora (Parliament) and thus it is immune from interference by this Court under Article 69 of the Constitution. The process of election to the office of Chairman of the Senate of Pakistan is definitely not administrative in nature. It is, rather, a formal transaction of business of the upper House and can be fairly described as its internal proceedings. The entire process is thus wholly outside the corrective jurisdiction of a High Court. Even if it was not so, this Court would have exercised restraint because of its deference to the independence, dignity and prestige of the Majlis-e-Shoora (Parliament). The very nature of the composition and status of the two Houses is such that the court has to presume that it has the ability to resolve the most difficult and complex disputes without involving the judicial branch. The Petition is, therefore, not maintainable.

(b) Is there an adequate remedy available to the Petitioner.

14. It is the case of the petitioner that he was a joint candidate of the PDM which commands a majority in the Senate of Pakistan and that he ought to have been declared as a returned

candidate because of the numerical strength. It has been asserted in the memorandum of the petition that the PDM has the support of 51 worthy Senators as against 47 who had supported respondent no.6. It is noted that Article 53(7)(c) of the Constitution is attracted in the case of removal of the Chairman of Senate and the same is reproduced as follows.-

"53. Speaker and Deputy Speaker of National Assembly.

(7) The office of Speaker or Deputy Speaker shall become vacant if:

(c) he is removed from office by a resolution of the Assembly, of which not less than seven days' notice has been given and which is passed by the votes of the majority of the total membership of the Assembly."

15. The Petitioner asserts that, as a joint candidate of the PDM, he has the support of the majority of the worthy members of the Senate. It is thus obvious that the majority cannot only remove respondent no.6 but, simultaneously, elect the Petitioner to the office of the Chairman. If that is the case, then a democratic and adequate constitutional remedy is available to the Petitioner. Adopting such a course of remedy would affirm the support of the majority of the worthy members of the Senate and, simultaneously, enhance the dignity and independence of the Majlis-e-Shoora (Parliament). This Court is satisfied that an adequate constitutional remedy is indeed available for establishing that the seven worthy Senators had actually

intended to cast their votes in favour of the Petitioner. In such an eventuality the judicial branch ought to exercise restraint, notwithstanding the bar contained under Article 69 of the Constitution.

16. For the above reasons, the petition is neither maintainable nor is this Court inclined to exercise its extraordinary jurisdiction under Article 199 of the Constitution by issuing notices. Consequently the petition is accordingly ***dismissed***. This Court expects that, in order to maintain the dignity, integrity and independence of Majlis-e-Shoora (Parliament), the chosen representatives and political leadership will endeavour to resolve disputes without involving the judicial branch of the State, by giving effect to the privileges, powers and immunities prescribed in the Constitution.

(CHIEF JUSTICE)

Approved for reporting.