

P L D 2018 Supreme Court 788

Present: Mian Saqib Nisar, C.J., Umar Ata Bandial and Ijaz ul Ahsan, JJ

Dr. FARHAT JAVED SIDDIQUE and 15 others---Petitioners

Versus

GOVERNMENT OF PAKISTAN and others---Respondents

Constitution Petitions Nos. 74 to 79 of 2015, 49 to 56 of 2016 and 2 of 2018 and Civil Misc. Applications No.4292 of 2017 and 162 of 2018).

Elections Act (XXXIII of 2017) ---

---S. 94---Constitution of Pakistan, Art. 17---Overseas Pakistanis---Entitlement to vote in General and Local Bodies Elections---Overseas Voting Solution (Internet Voting)---Overseas Pakistanis had been conferred with the right to vote as per Art. 17 of the Constitution---Where the right of Overseas Pakistanis to vote already existed as per the law and was duly recognized, it must necessarily be given due effect---Supreme Court observed that prima facie the mechanism of Internet Voting was found to be safe, reliable and effective for being utilized in a pilot project--Supreme Court directed that the results of the bye-elections (for the year 2018) and the vote count of the votes cast by the Overseas Pakistanis through the Internet Voting mechanism shall be kept separately and also secret till the time that the Election Commission was satisfied about the technical efficacy, secrecy and security of the votes cast by Overseas Pakistanis through the Internet Voting system; that in case such determination, made on the basis of reasons, was in the negative and the Election Commission was not satisfied about the integrity, safety and reliability of the systems and the votes cast through the same, the Election Commission shall exclude the segregated votes cast by Overseas Pakistanis from the official result of the bye-elections---Constitutional petitions were allowed accordingly.

Ch. Nasir Iqbal and others v. Federation of Pakistan the Secy. Law and others PLD 2014 SC 72 ref.

Anwar Mansoor Khan, Senior Advocate Supreme Court and Faisal Fareed Hussain, Advocate Supreme Court for Petitioners (in Const. P.2 of 2018).

Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioners (in Const. P.74-79/15, 49-56 of 2016).

Solicitor Daud Ghaznavi, Petitioner in person (in Const.P.79 of 2015).

Khalid Javed Khan, Attorney General for Pakistan for Respondents/on Notice:

Syed Nayyar Abbas Rizvi, Addl. Attorney General assisted by Barrister Asad Rahim Zikriya Sheikh, DAG for Respondent/on Notice.

Babar Yaqoob Fateh, Secy. ECP and M. Arshad, D.G. Law for ECP.

Usman Yousaf Mobeen, Chairman, Zulfiqar Ali, D.G. Projects, Saqib Jamal, Director, Legal and M. Ali, D.G. Legal for NADRA.

Dates of hearing: 15th August, 2018 (Islamabad) and 17-8-2018 (Lahore).

ORDER

MIAN SAQIB NISAR, C J.--The present petitions were filed by, inter alia, certain Overseas Pakistanis prior to the General Elections held on 25.07.2018 with the prayer that they (Overseas Pakistanis) be entitled to vote in the General as well as Local Bodies Elections. Pursuant to the order dated 29.01.2018 whereby this Court directed the National Database and Registration Authority (NADRA) with the assistance of the Election Commission of Pakistan (ECP) to develop a system to provide Overseas Pakistanis with an effective right to vote, an extensive exercise was undertaken. As a result Overseas Voting Solution (Internet Voting) (I-voting) was developed. Various presentations were given to this Court to seek validation of the said system. A third party technical audit of the I-voting system was also sought and a report was produced in this regard. While there were certain technical and security apprehensions about allowing Overseas Pakistanis to vote via the internet, the said report was generally positive and encouraging. Be that as it may, in order to ensure that no disruption of any kind was caused to the General Elections 2018, particularly by an overseas voting mechanism which had never been tried or tested before, this matter was postponed to after the said elections. The instant matter has now been revived by this Court.

2. Learned counsel for the petitioners argued that on account of the provisions of Section 94 of the Elections Act, 2017 (the Act), it is obligatory for ECP to enable Overseas Pakistanis to exercise their right to vote. It can discharge such obligation by framing the necessary rules under Section 239 of the Act. In response, ECP filed its para-wise comments along with the proposed rules for enabling Overseas Pakistanis to cast their votes through internet. The learned Additional Attorney General for Pakistan has candidly stated that the right to vote of Overseas Pakistanis is enshrined in Article 17 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution). It has been spelt out very clearly in the judgment of this Court reported as Ch. Nasir Iqbal and others v. Federation of Pakistan thr. Secretary Law and others (PLD 2014 SC 72). According to him, it is only an appropriate mechanism system and procedure which needs to be put in place by ECP in exercise of its rule making power to determine how this right to vote shall be exercised in practical terms.

3. There are no two opinions about the fact that a citizen's right to vote is sacrosanct and paramount. Article 17 of the Constitution reads as under:-

"17. Freedom of association. (1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating

in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law.
"

In Ch. Nasir Iqbal's case (supra) this Court interpreted Article 17 ibid and held that:-

"6. Under Article 17 of the Constitution every citizen has the right to vote to participate in the governance of the country through their chosen representatives...

8. It is to be noted that there is no distinction between the citizens living within Pakistan or outside the country, with regard to the right to vote in terms of the Article 17 of the Constitution...It warrants to mention that the right to vote has not been denied to the overseas Pakistanis, who are as much important as those living inside the country, but only the facilities to vote, which provides the sense of ownership and participation in the governance of the country, has not been extended to them...

9. It must be clarified here that the overseas Pakistanis, as noted hereinabove, enjoy the right to participate in the election process in terms of Article 17 of the Constitution being dignified citizens of the country, though residing outside its territory, as such they cannot be denied the same rights on technical grounds, i.e. logistic arrangements made outside the country for casting their votes.

13. ...Article 17 of the Constitution continues to insist upon the Federal Government to extend the facility of voting to overseas Pakistani in the election of the Parliament as well as Local Bodies."

[Emphasis supplied]

It is pertinent to note that after the aforementioned judgment was passed, no concrete steps were taken to actualize this right to vote for Overseas Pakistanis and enable them to participate in the electoral process while working/residing outside the territorial boundaries of Pakistan. However, subsequently the Act was promulgated on 02.10.2017. Section 94 thereof deals with voting by Overseas Pakistanis as follows:-

"94. Voting by Overseas Pakistanis.-(1) The Commission may conduct pilot projects for voting by Overseas Pakistanis in bye-elections to ascertain the technical efficacy, secrecy, security and financial feasibility of such voting and shall share the results with the Government, which shall, within fifteen days from the commencement of a session of a House after the receipt of the report, lay the same before both Houses of Majlis-e-Shoora (Parliament).

(2) In this section, 'Overseas Pakistani' means a citizen of Pakistan under the Pakistan Citizenship Act, 1951 (II of 1951) or holder of National Identity Card for Overseas Pakistanis under the National Database and Registration Authority Ordinance, 2000 (VIII

of 2000) who is working or residing abroad permanently or temporarily for not less than six months."

[Emphasis supplied]

The rulemaking power in this regard is vested with the ECP as contemplated by Section 239 of the Act which is reproduced as under:-

"239. Power to make rules.-(1) The Commission may, by notification in the official Gazette and publication on the website of the Commission, make rules for carrying out the purposes of this Act.

(2) The Commission shall make the Rules under subsection (1) subject to prior publication and after hearing and deciding objections or suggestions filed within fifteen days of the publication."

[Emphasis supplied]

4. Overseas Pakistanis have been conferred with the right to vote as per the interpretation of Article 17 of the Constitution undertaken by this Court in Ch. Nasir Iqbal's case (supra). Thus where the right of Overseas Pakistanis to vote already exists as per the law and is duly recognized, it must necessarily be given due effect. For this reason, the word 'may' appearing in Section 94 of the Act is to be read as 'shall' and to this end, the only step which the ECP has to take is with regard to adoption of a suitable and effective mechanism and procedure by making appropriate rules under Section 239 of the Act. Accordingly, Section 94 of the Act makes it mandatory for ECP to conduct pilot projects enabling Overseas Pakistanis to vote in the upcoming bye-elections. It is worth mentioning that the phrase 'pilot projects' in terms of Section 94 supra does not mean that the votes cast by Overseas Pakistanis through i-voting in the bye-elections, would be treated as mock votes in mock elections, or that the votes cast under such pilot projects would be invalid, rather they are to serve as a sample and if successfully accomplished, or if some technical problems or issues come to fore after removing the same, that this exercise of enabling Overseas Pakistanis to vote may then be replicated on a larger scale, i.e. for future General Elections. Besides, there is a safety net contained in the proviso to Rule 84-C(2) of the proposed rules for overseas voting. This allows ECP to direct exclusion of overseas votes from the final count if it is of the opinion that the technical efficacy, secrecy and security of voting has not been maintained or has for any reason been compromised. This clearly suggests that overseas votes are to be included in the result of the bye-elections unless excluded by the ECP for valid reasons. The purpose of such 'pilot projects', as has been made clear by Section 94 supra, is to ascertain the technical efficacy, secrecy, security and financial feasibility of such voting after which the ECP is required to prepare a report and submit it to the Government which in turn shall lay it (report) before both the Houses of Parliament within fifteen days from the commencement of a session of a House after the receipt of the report.

5. According to the notification dated 17.08.2018 issued by the ECP regarding the programme of the next bye-elections for 2018, it is declared that bye-elections for 37 constituencies (both National and Provincial) are to take place on 14.10.2018. To our mind, undoubtedly these and subsequent bye-elections (if any) are visualized, and fall within the

meaning of, 'bye-elections' as contemplated by Section 94 of the Act for the pilot projects that ECP has to conduct in order to enable Overseas Pakistanis to exercise their right to vote. As already observed Overseas Pakistanis are clearly entitled to vote in the General Elections; they are therefore equally entitled to vote in bye-elections that are held to fill vacancies which have or will occur. The system so tried, tested and perfected can then be deployed in the next General Elections.

6. To the aforementioned end, Rules 84-A, 84-B and 84-C of the Election Rules have been framed. According to the Secretary ECP, they provide for a computerized mechanism, i.e. I-voting, to enable Overseas Pakistanis to exercise their right to vote. The proposed rules are reproduced below for ease of reference:-

"84-A. Registration procedure for voting by Overseas Pakistanis.-(1) Where the Commission decides in terms of sub-section (1) of section 94 to make arrangements for voting by Overseas Pakistanis living abroad, it shall hold such voting through internet (I-voting).

(2) Only those Overseas Pakistani voters shall be eligible for voting who possess:

(a) valid National Identity Card for Overseas Pakistanis (NICOP);

(b) valid Machine Readable passport (MRP); and

(c) valid E-mail address.

(3) The Overseas Pakistani voter, desirous to cast his vote through I-voting from abroad, during registration time -period as may be fixed by the Commission, shall access the Overseas Voting System through the internet and shall create an account using following credentials:

(a) Name;

(b) Email address;

(c) Generating password of his choice;

(d) Mobile Phone Number (optional); and

(e) Country of Stay.

(4) A confirmation email of account so created shall be forwarded by the system to the applicant at his given email address and by clicking on the link therein the voter shall be prompted to provide the number of his Machine Readable Passport with its tracking identity and NICOP number along with date of issuance thereof.

(5) Upon completion of proceedings under sub-rule (4), a verification process will be initiated wherein random questions regarding voter's identity information shall be asked

by the System and upon correct reply, a message of "Successfully verified" shall be displayed by the system:

Provided that a confirmation email of account verification shall also be forwarded by the system to the applicant.

(6) In case the voter could not correctly reply first set of questions mentioned in sub-rule (5), the system will allow multiple attempts to correctly reply failing which that NICOP number shall be restricted for further attempts:

Provided that upon successful verification, a unique passcode shall be forwarded to the applicant by the system through email before the polling day:

Provided further that on receipt of list, from the Commission, in respect of Overseas Pakistani voters registered as such, the Returning Officer shall take necessary steps to make sure that no overseas voter so registered for overseas voting is allowed to cast his vote at the polling station in person.

84-B. Voting procedure for Overseas Pakistanis.- On polling day, the voter shall log in to the overseas voting system using his username and password and shall avail the voting option from the system for casting his vote in respect of his National Assembly, or, as the case may be, Provincial Assembly Constituency by entering unique passcode:

Provided that by going through designated list of candidates of selected constituency, the voter shall cast his vote by selecting his desired candidate:

Provided further that upon successful submission of vote, a "confirmation" message shall be displayed on the screen.

84-C. Preparation of results in respect of Overseas voting.-(1) After the polling hours are over, the Commission shall generate the Form-45 (Result of the Count) in respect of the constituency by using Reporting Portal of the Overseas Voting System and send the same to the Returning Officer concerned immediately through quickest means as are available for the purpose.

(2) On receipt of Form-45 (Result of the Count) from the Commission under sub-rule (1), the Returning Officer shall include the results contained therein in the consolidated results of the count as furnished by the presiding officer to be prepared by him under section 95 in such manner as the Commission may determine:

Provided that the Commission may direct for non-inclusion of the result in respect of the Overseas voting during consolidation of results under section 95, if in its opinion, the technical efficacy, secrecy and security of the voting has not been maintained during the said voting."

The ECP and NADRA had given presentations to this Court in the foregoing regard and about third party validation that has also been received from independent experts, regarding the safety, integrity and workability of the system. Based on these representations we prima facie find the

mechanism of I-voting to be safe, reliable and effective for being utilized in a pilot project. We are sanguine that the aforesaid proposed rules shall be incorporated in the Elections Rules, 2017 to enable Overseas Pakistanis to exercise their right to vote in the forthcoming bye-elections. However, we direct the results of the bye-elections and the vote count of the votes cast by the Overseas Pakistanis through the I-voting mechanism shall be kept separately and also secret till the time that ECP is satisfied about the technical efficacy, secrecy and security of the votes cast by Overseas Pakistanis through the I-voting system. In case such determination, made on the basis of reasons, is in the negative and the ECP is not satisfied about the integrity, safety and reliability of the systems and the votes cast through the same; ECP shall exclude the segregated votes cast by Overseas Pakistanis from the official result of the bye-elections in accordance with the proviso to Rule 84-C(2) supra. This safety feature shall ensure that the elections are founded upon verified and authenticated votes only.

7. Before parting we would like to express our appreciation for the dedicated efforts of NADRA and ECP undertaken for this noble purpose of great constitutional importance. The petitions are allowed in the aforementioned terms.

MWA/F-5/S

Petitions allowed