HIGH COURT OF SINDH AT KARACHI

Const. Petition No.D-425 of 2009

Present: Mr. Justice Anwar Zaheer Jamali, Chief Justice
Mr. Justice Muhammad Karim Khan Agha

Dates of hearing : 01.4.2009, 02.4.2009 and 10.04.2009

Petitioner Humayun Muhammad Khan through Mr. Khalid Jawed Khan and Mr Ziaul Haq Makhdoom, advocates.

Respondent No.1 Government of Sindh through Mr. Muhammad Yousuf Leghari, Advocate General Sindh.

Respondent No.2 The Town Municipal Administration through Mirza Nazim Baig, advocate.

Respondent No.3 The Election Commission of Pakistan through Mr. Ataur Rehman, Asst. Election Commissioner, Regional Office, Karachi.

Respondent No.4 The Town Council (Keamari Town) through Mr. Abrar Hassan, advocate.

J U D G M E N T

MUHAMMAD KARIM KHAN AGHA, J., The petitioner is duly elected Nazim, Keamari Town, Karachi, who was elected after securing highest votes, out of 104 total votes, in the local bodies election held on 06.10.2005 by respondent No.3.

2. The petitioner alleges that since his election as Nazim, his political rivals have been trying to disrupt the smooth performance of his duties as Town Nazim amongst other by filing false and frivolous complaints before different authorities, which were eventually dismissed.

3. According to the petitioner, he has been serving his area and the people with great dedication, commitment and irrespective of political affiliations. His services have been repeatedly acknowledged by the people at large as well as his colleagues in the Council. He has drawn the Court's attention to the meeting of the Town Council, Keamari, Karachi, held on 30.01.2009, which was attended by all the members of the Town Council, who, in this meeting, highly appreciated the

services rendered by the petitioner and all the members reposed their trust and confidence in the petitioner. They acknowledged that due to the petitioner's untiring efforts, Keamari Town has been made a model Town in Karachi.

4. The petitioner claims that due to political rivalry opposite party has launched a campaign against him and his supporters and have harassed and intimidated them, threatened their lives and in some cases kidnapped the members of the Council and offered them huge sums of money in order to change their loyalties.

5. On account of such pressure, the petitioner alleges that members of the Council were persuaded to file motion for recall of the petitioner from the office of Town Nazim. The petitioner filed a Suit against such action for Declaration and Permanent Injunction, which is pending before this Court. According to the petitioner, a Town Nazim can be recalled by initiating the procedure provided in Section 63 of the Sindh Local Government Ordinance, 2001 **("Ordinance, 2001"),** which procedure, the Petitioner claims mandatory, but seriously flouted and misinterpreted in the instant case.

6. On 14.03.2009 through the electronic media, the petitioner came to know that four motions for recall against him were filed by eight members of the Town Council being proposers and seconders. On 16.03.2009 the petitioner came to know that these motions were brought on 11.03.2009 and pursuant to these motions, an urgent meeting of the Council was called on 14.03.2009. This meeting was held on 14.03.2009 about which the petitioner was not given any notice.

7. That meeting proceeded in the absence of the petitioner. According to the petitioner, in the said meeting, false and baseless allegations were levelled against him. The petitioner also came to know that on 14.03.2009 Town Municipal Officer of TMA, Keamari, Karachi, addressed a letter to the Provincial Election Commissioner with the request that further action may be taken as required under subsection (4) of Section 63 of Ordinance, 2001.

8. According to the Petitioner the same Taluka Council, consisting of 13 members, who had earlier moved the motion to recall him under Section 63(1) of Ordinance, 2001, intend through, their interpretation of S.63 (4), also to be the body which shall vote for his removal.

9. In a nutshell, the case of the petitioner is that:

I) The action taken against him was mala-fide on account of political rivalry, as revealed by the speedy removal process.

II) That he was not given a right to be heard.

III) That his proposed removal was in breach of required procedure under Section 63 of Ordinance, 2001 and in particular that he could not be recalled by the Taluka Council, which consisted of only 13 members but that he could only be removed from his office by way of recall by 2/3rd members of the total membership of the same electoral college, who had elected him to office, namely the Union Council and this was the proper interpretation of Section 63(4) of Ordinance, 2001

10. He has prayed this Hon'ble Court as under:

i) Declare that the recall motion can only be approved and passed against the petitioner/Town Nazim by a secret vote of 2/3rd majority of the total membership of the Union Councils i.e. electoral college comprising of 104 members.

ii) Declare that the "Council" referred to in sub-section (4) of Section 63 of the SLGO, 2001, is the electoral college of the petitioner comprising of the total members of the Union Councils comprising 104 members and not the Town Council/Respondent No.4.

iii) Declare that the recall motion cannot be moved or initiated unless prior opportunity/notice is served on the petitioner.

iv) Declare that 'reason to believe' envisaged in Section 63(1) of SLGO requires existence of objective and verifiable reasons duly supported by existing material/documents/evidence on record justifying such adverse allegations on the grounds stipulated in the said provision.

v) Declare that the proposed motions(s) of recall against the petitioner are arbitrary, illegal, mala fides and of no legal value whatsoever.

vi) In the alternative, declare sub-section 4 of Section 63 of the SLGO, 2001, to be ultra vires the Constitution of Pakistan, 1973.

vii) Grant permanent injunction prohibiting the respondents, its officers, etc. from giving effect to the recall motions against

the petitioner or from placing the same for vote before the respondent No.4 or from removing the petitioner from the office of Town Nazim, Keamari.

viii) Any other and additional relief as this Hon'ble Court may deem proper in the circumstances of the case.

11. On the other hand, Mr. Muhammad Yousuf Leghari, Advocate General, Sindh for respondent No.1 and Mr. Abrar Hassan, learned counsel for respondent No.4 refuted the contentions made by the petitioner.

12. According to the respondents, they have not been in breach of Section 63 of Ordinance, 2001 in connection with recall of the petitioner as Nazim. They pointed out that the process required under Section 63(1) of Ordinance, 2001 was that the Council was entitled to move a motion in the Taluka Council through Naib Taluka Nazim for recall of Taluka Nazim and that the same body under Section 63(4) of Ordinance, 2001, through a secret ballot, conducted by the Returning Officer, nominated by the Chief Election Commissioner by 2/3rd majority, could remove the petitioner from the office and that the procedure was being complied with. Finally, they rejected the contentions of learned counsel for the petitioner that recall of a Nazim under Section 63 of Ordinance, 2001 was a mala-fide process and asserted that the petitioner through prior notice was not denied his opportunity of being heard.

13. During the course of arguments, learned counsel for the petitioner underlined the manner in which Section 63 of Ordinance, 2001 had not been complied with and how it had been misinterpreted. Conversely, the respondents in their submissions asserted that Section 63 of Ordinance, 2001 had been fully complied with.

14. In order to review the various arguments of the parties and for ease of reference Section 63 of Ordinance, 2001, as relied upon by the Petitioner and as reproduced by the petitioner in his petition and which contains the procedure for the [Recall] of a Taluka Nazim i.e. the Petitioner, is set out below in its entirety:-

Section 63. Recall of Taluka Nazim (1) If in the opinion of a member of the Taluka Council, there is a reason to believe that the Taluka Nazim is acting against the public policy or the interest of the people or is negligent or is responsible for loss of opportunity to improve governance and the delivery of services, he may, seconded by another member of the Council, give a notice to move a motion in the Taluka Council through Naib Taluka Nazim for recall of Taluka Nazim.

(2) On receipt of notice referred to in sub-section (1), the Naib Taluka Nazim shall summon a session of the Taluka Council not earlier than three days but not later than seven days, if the Taluka Council is not already in session.

(3) Where the Taluka Council is already in session, the motion referred to in sub-section (1) shall be taken up for deliberations on the next day from its receipt by the Naib Taluka Nazim.

(4) [where the motion referred to in sub-section (1) is approved by two-third majority of the votes of the total membership of the Council, through a secret ballot to be conducted by the Returning Officer nominated by the Chief Election Commissioner, the Taluka Nazim shall cease to hold office forthwith and the notification shall be issued in this behalf by the Chief Election Commissioner accordingly.]

(5) where the motion fails in the Taluka Council, the proposer and seconder of such motion shall lose their seats both as [members of the Taluka Council and Naib Union Nazim, if any one of them is also a Naib Union Nazim].

(6) The Taluka Nazim shall have the right to appear before the Taluka Council and address it in his defence.

(7) No motion for recall of Taluka Nazim shall be moved during the first six months of assumption of office of Taluka Nazim nor shall such motion be repeated before the expiry of one year from the rejection of previous motion."

[It is to be noted that as subsection (5) has been omitted by a Sindh Local Government Amendment Ordinance, subsections (5),(6) and (7), as mentioned above, should be read as subsections (6),(7) and (8) respectively]

15. With regard to Section 63 (1) of Ordinance, 2001 the petitioner referred to the words "reason to believe", which, according to him, meant that the reasons should be recorded in writing to avoid the section from being abused by non-speaking whimsical opinions. The respondents, however, did not consider that the section required any such written reasons to be given.

16. Learned counsel for the respondents reluctantly conceded that there may have been a breach of Section 63(2) of Ordinance, 2001, as the Naib Taluka Nazim had summoned the Taluka Counsel earlier than the 3 days' period required by this subsection.

17. Section 63(4) of Ordinance, 2001 was the next section, which was hotly disputed between the parties and can be regarded as being the crux of the matter between them. However, for the reasons mentioned below, this section as set out in the Petition, will not be delved into at this stage.

18. In this case the only other relevant sub-section of Section 63 is sub-section (7) which specifically gives the petitioner the right to be heard. According to the respondents, the petitioner had notice of the meeting and, therefore, had an opportunity of being heard but did not avail himself of the opportunity, as such, there was no breach of this provision.

19. However, after the end of his arguments, and almost at the end of the Respondents' arguments, in an unexpected turn of events, the petitioner drew the Court's attention to the fact that the basis for which he had originally challenged Section 63 of Ordinance, 2001 may not have been correct. This is because the key section on which his arguments revolved around in the Ordinance namely Section 63(4) of Ordinance, 2001 had been inserted by an Ordinance passed by the Governor of Sindh under Article 128 of the Constitution, which provided that such Ordinance would lapse after a period of 90 days and in such circumstances the original wording of Section 63(4) of Ordinance, 2001 will now hold the field.

20. When asked to clarify this position, the learned Advocate General Sindh confirmed that the Ordinance in question is dated 04.08.2007 and, therefore, it lapsed on 03.11.2007. He conceded that the Ordinance had not been continued by any other law and, therefore, he agreed with the learned counsel for the Petitioners that the original wording of Section 63(4) of Ordinance, 2001 now held the field.

21. On the other hand, Mr. Abrar Hassan, learned counsel for respondent No.4, referred to Article 268 of the Constitution and, in particular, Article 268(7). According to him, this Article of the Constitution gave a legal cover to the Ordinance and, therefore, it continued to be in force.

22. In the face of Article 128 of the Constitution, we find little merit in the contention of Mr. Abrar Hassan on his reliance on Article 268 which is only a transitionary provision and would, if his argument was accepted, make Article 128 of the Constitution redundant in many cases.

23. A close review of Section 63 (which the petitioner placed reliance on in his Petition) and the now revived Section 63 reveals that it is the same as the revived Section 63, except that the original Section 63(4) & (5) have now been revived and thus its revival does not make the earlier submissions of learned counsel redundant in respect of Section 63(1), (2), (3) and (7) as these remain unchanged.

24. As such, our decision will be guided by reference to the original wording of Section 63 of Ordinance, 2001, which along with Section 62 now stands revived and in particular will consider Section 63(4) of Ordinance, 2001.

25. We have reviewed the Court record, in detail, and have carefully considered the arguments of the learned counsel for the respective parties.

26. The case turns on the interpretation of Section 63 of the Ordinance, 2001. Section 63 has already been set out above, however, for ease of reference we set out the revived Section 63(4) and (5) which will now be applicable to this case.

> **"63(4)** If the motion referred to in sub-section (1) is approved by majority of the votes of its total membership through a secret ballot, the Election Authority shall cause a vote to be cast by the members of Union Councils in the District."
>
> **"63(5)** Where the motion is approved by a simple majority of the members of the Union Councils of the Taluka present and voting , the Taluka nazim shall cease to hold office from the date of notification to be issued in this behalf by the Election Authority"

27. In our view, no subsection of a section can be read in isolation to the whole section and likewise no section can be read in isolation to the whole scheme of an Act. The Act, as a whole and its various sections and subsections and their interplay, must be viewed in their entirety. In this regard we rely on the case of AYAZ HUSSAIN v. PROVINCE OF

SINDH (PLD 2005 Karachi 384). For convenience sake, we reproduce relevant portion, available at page 390, as under:-

> "Every section must be considered as a whole and self-contained, with the inclusion of saving clauses and provisos. 'It is an elementary rule,' says Subbarao, J. 'that construction of a section is to be made of all the parts together and that' it is not permissible to omit any part of it. Subsections in a section must, therefore, be read as part of an integral whole and as being inter-dependent, each portion throwing light, if need be, on the rest, and harmonious construction should be placed on their for the purpose of giving effect to the legislative intent and object so also, sentence should be construed in its entirely in order to grasp its true meaning."

28. Each case, however, will turn on its own particular facts and circumstances. Section 63(1) of Ordinance, 2001 provides as under:

> **"Section 63. Recall of Taluka Nazim (1)** If in the opinion of a member of the Taluka Council, there is a reason to believe that the Taluka Nazim is acting against the public policy or the interest of the people or is negligent or is responsible for loss of opportunity to improve governance and the delivery of services, he may, seconded by another member of the Council, give a notice to move a motion in the Taluka Council through Naib Taluka Nazim for recall of Taluka Nazim."

29. The key to this section is whether a member of a Taluka Council has to give written reasons for his opinion or whether he can simply make bald assertions. Under Section 63(7) of Ordinance, 2001, the Taluka Nazim shall have the right to appear before the Taluka Council and address it in his defence. Under Section 63(2) of Ordinance, 2001, on receipt of notice, referred to above in sub-section (1) of Section 63, the Naib Taluka Nazim shall summon a Session of the Taluka Council not earlier than three days but not later than seven days, if the Taluka Council is not already in Session.

30. The interplay of these various subsections would, therefore, indicate that the Nazim could be called by the Taluka Council within such time frame in order to defend himself against the opinion of the member and seconder, who have moved a motion against him. (or under Section 63(3) the very next day if the Council was already in session)

31. In order for the Nazim to effectively defend himself it is only fair that he be given the reasons as to why this motion is being moved against him. This is more so based on the facts and circumstances of this case when only two months earlier the council had paid him glowing tributes on his performance as Nazim. The Nazim was entitled to know on what basis his performance had deteriorated in the last two months to one of near excellent to one of no confidence.

32. We, therefore, hold that, based on the facts and circumstances of this case, the Petitioner should have been afforded due opportunity of hearing by the Council to answer the charges levelled against him in the recall motion. Reliance is placed on the case of SADIQ HUSSAIN v. FEDERATION OF PAKISTAN (2008 YLR Page 152), wherein at page 156 it was observed as follows:-

> "The validity of the exercise of power by the concerned Income Tax Officer or the fact that such action had been taken by him in good faith, would always be open to question unless the material upon which such action had been taken was disclosed to the assessee. Failure to disclose such material to the assessee would render such action completely arbitrary and discriminatory because conclusions would be drawn by the Income Tax Officer or the Regional Commissioner of Income Tax, himself without being supported by any evidence. The contention that enquiry was to be conducted by the Income Tax Officer could not by itself cloths such action with validity."

33. Section 63(2) of Ordinance, 2001 provides as under:-

> "On receipt of notice referred to in sub-section (1), the Naib Taluka Nazim shall summon a session of the Taluka Council not earlier than three days but not later than seven days, if the Taluka Council is not already in session"

34. The importance of this subsection has been highlighted above, namely that the Nazim may have as little as minimum 3 days in order to prepare to defend himself. This time period must be strictly complied with especially where the time limit is so short and it ties in with the Nazim's

right to be heard. Section 9 of the General Clauses Act, makes it clear that the time limit in this case was not complied with.

35. Reliance is also placed on the case of MUHAMMAD JAMIL v. MUNAWAR KHAN (PLD 2006 SC 24)

> "As a general proposition, the rule with respect to statutory directions to individuals is the opposite of that which obtains with respect of public officers. When a statute directs things to be done by a private person within specified time and makes his rights dependent on proper performance thereof, unless the failure to perform in time may injure the public or individuals, the statute is mandatory. When an individual is the person not complying, he has no grounds for complaint. Under statutes of procedure, failure to complete required steps within the time specified is fatal to the case."

36. We, therefore, hold that the respondents failed to comply with the time limit prescribed in Section 63(2) of Ordinance, 2001 and, therefore, breached this Section. This, in our view, is a major breach when read in the context of the entire Section 63 as it was tied very closely to the Nazim's one opportunity to be heard prior to his removal under this section. This breach was conceded to by the respondents' counsel during their arguments.

37. Section 63(3) of Ordinance, 2001, is not relevant to this particular case as the Taluka Council was not in Session and had to be summoned under Section 63(2) of Ordinance, 2001. Section. 63(4) of Ordinance, 2001, (as revived) provides that:

> "If the motion referred to in sub-section (1) is approved by majority of the votes of its total membership through a secret ballot, the Election Authority shall cause a vote to be cast by the members of Union Councils in the District."

38. This subsection makes it clear that after the Taluka Council has approved the motion to remove the Nazim by a majority of votes through secret ballot the second stage of the process starts, namely that the Union Councils will vote on the Motion.

39. This is fortified by the now revived Section 63(5) of Ordinance, 2001, which provides that where the motion is approved by a simple majority of the members of the *Union Councils* of the Taluka present and voting, the Taluka Nazim shall cease to hold office from the date of Notification, to be issued in this behalf by the Election Authority (italics added).

40. Thus, when read together Section 63(4) and (5) of Ordinance, 2001, as now revived, make it abundantly clear that the second phase of the removal of a Nazim by recall takes place at the Union Council level rather than at the Taluka Council level. This is entirely logical as in a democratic set up it is usually the appointing authority which is also the removing authority rather than a body which is other than the appointing authority. Since the Ordinance, 2001 is attempting to lay down democratic principles at the grass-root level this is an important consideration to be borne in mind.

41. Accordingly, we find that the removal process is a two tier process starting initially at the Taluka Council level and then finally moving to the Union Council level. This finding is based on a plain reading of the Section and the interplay between its various subsections and is fortified by findings in other cases which were decided prior to the amendment of the now revived Section 63(4) of Ordinance, 2001.

42. Reliance in this regard is placed on 2004 CLC 707, 2007 CLC 1553, 2005 SCMR 186 and PLD 2005 Karachi 384. In the last cited case of AYAZ HUSSAIN v. PROVINCE OF SINDH (PLD 2005 Karachi 384), it was observed as under:

> "For internal recall, if Taluka Council is not already in session, its sessions is required to be summoned not earlier than three days but not later than seven days from the date of receipt of notice to move a motion and the Taluka Nazim is conferred with right to appear and defend himself and the motion is required to be approved by majority of the votes of its total membership through

secret ballot. In case of external recall, if motion fails nothing happens to Zila Nazim whereas if internal recall motion fails, the proposer and seconder of such motion lose their seats both as Union Nazim and Member of Taluka Council. *The provision regarding Election Authority causing the resolution to be voted upon by the Member of Union Council in Taluka* and upon its approval the consequences are the same in respect of external and internal recall motion" (italics added).

43. In the case of ALI GUL v. FEDERATION OF PAKISTAN (PLD 2005 Karachi 512), again which is a case entirely on point as regards internal recall as then applied to the now revived Section 63 (4), it was observed at page 520 as under:-

> "Regarding Point No.2, it may be stated that perusal of subsection (5) of section 63 of the Ordinance ibid, reproduced above, reflects that were the motion is approved by a simple majority of total members of the Union Council of the Taluka, Taluka Nazim shall cease to hold the office from the day of Notification to be issued in this behalf by the Election Authority. Nothing has been brought on record if after approval of the Internal Recall Motion the same was placed before all the members of Union Council of Taluka which according to Mr. Awan are in all 231 in numbers. Also, neither the notification issued by Election Authority as contemplated by subsection (5) of section 63 of the Ordinance has been produced nor it is the case of respondents that such Notification stood issued."

44. Section 63(7) of Ordinance, 2001, provides as under:

> "The Taluka Nazim shall have the right to appear before the Taluka Council and address it in his defence"

45. Audi alteram partem namely that no one should be condemned unheard is a well settled principle of law. In the case of NAZIR AHMAD PANHWAR v. GOVERNMENT OF SINDH (2005 SCMR 1814), following observation was made by the Supreme Court:-

> "There can be no denial that right to personal hearing to a person against whom an adverse order is to be made to be equated with fundamental right and an adverse order made without affording him an opportunity of personal hearing is to be treated as a void order."

46. There can be no cavil with this proposition of law. This proposition, however, should not be abused by those who seek to rely on it. For example,

a person in full knowledge of proceedings against him should not deliberately avoid appearing before those proceedings with a view to unreasonably delaying or voiding them.

47. It is to be noted that under the said proposition the person against whom an adverse order is made must be "afforded an opportunity" to be heard. This means that he is given notice of the proceedings against him or is otherwise aware of the proceedings against him and he is given an opportunity to associate himself with those proceedings.

48. The right to be heard is not absolute. In RUKSANA SOOMRO v. BOARD OF INTERMEDIATE AND SECONDAY EDUCATION (MLD 2000 page 145) a distinction has been made between cases where the right was statutory and cases where the right was based on principles of natural justice. In cases where the right was statutory it was almost absolute whilst in the cases of natural justice it could be excluded expressly or by implication. Each case will turn on its own facts and circumstances.

49. In this case, there is no evidence to suggest that the petitioner abused his right to be heard. On the contrary the documents, on record, reveal that the Respondents moved with undue haste in order to attempt to remove the Nazim. No sincere efforts were made to afford him the right to be heard. Furthermore, Mirza Nazim Baig, learned counsel for respondent No.2, even admitted in open Court that no notice of the hearing was served on the petitioner. Such denial takes on even more significance in that it is an express term of the section and may be the only opportunity under the section that the Petitioner will have to be heard before he may ultimately be removed.

50. As such we find that the petitioner was not given notice of the proceedings against him under Section 63(1) of Ordinance, 2001, which he came to know about on 14.3.2009, after which time the motion had already been carried and was, therefore, denied the right to be heard.

51. Reliance is placed on the case of ANISA REHMAN v. P.I.A.C (1994 SCMR 2232), relevant portion at page 2239, which is reproduced as follows:-

> "This Court has gone to the extent of pointing out that the mere absence of a provision in statute as to notice cannot override the principle of natural justice that an order affecting the rights of a party cannot be passed without an opportunity of hearing and also held that where the giving of a notice is a necessary condition for the proper exercise of jurisdiction then failure to comply with this requirement renders the order void and the entire proceedings which follow also become illegal."

52. Based on our above interpretation of Section 63 (as revived) of Ordinance, 2001, and how it should be applied, we find that the proceedings so far taken by the Respondents have in nearly all respects almost totally flouted the entire procedure laid down under Section 63 of Ordinance, 2001.

53. It is arguable that some of these breaches may have been of a technical nature but when taken as a whole and based on the facts and circumstances of this case we find that their breach has caused great prejudice to the petitioner.

54. Based on the above findings, we allow this petition and quash the entire proceedings taken against the petitioner to date as being arbitrary and illegal and direct that any proceedings, that may be taken against the Petitioner under Section 63 of Ordinance, 2001, be made strictly in accordance with the Ordinance, 2001 and the Law based on the interpretation of Section 63 of Ordinance, 2001 as laid down in this judgment.

Karachi,
Dated: 15.4.2009