

JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT, PESHAWAR.

JUDICIAL DEPARTMENT

COC No: 163-P/2018 in W.P N0-51-P/2018.

JUDGMENT

Date of hearing...09.05.2018.Announced on 17.05.2018.

Petitioner (s) (Baldiv Kumar) By Mr.Mohib Jan Salarzai,
Advocate.

Respondent (s) (Asad Qaiser Speaker Provincial Assembly)
By Qazi Muhammad Anwar, Advocate,
and Syed Qaiser Ali Shah, AAG,

(Arbab Jandad Member Provincial Assembly) By Mr. Ghulam
Mohyuddin Malik, Advocate.

(Shah Farman, Member Provincial Assembly) in person.
(Mehmood Bateni, Maulana Lutfur Rehman, and Mufti Fazal
Ghafoor, Members Provincial Assembly) By Mr. Muhammad
Muazzam Butt, Advocate.

YAHYA AFRIDI, CJ:

Petitioner Baldiv

Kumar through the instant petition, seeks to initiate
contempt proceedings against the six named
respondents for non-compliance of orders of this
Court dated 08.02.2018, passed in Writ Petition N0-
51-P/2018, which were in terms that;

*“The worthy Speaker of the Khyber
Pakhtunkhwa Provincial Assembly shall
issue order of production of the
petitioner in order to administer Oath as
Member Provincial Assembly of Khyber
Pakhtunkhwa on minority seat in term
of Article-65 of the Constitution in the
first coming Session of the KPK
Provincial Assembly, if it is not already
in Session. The petitioner shall also be
entitled to cast his vote for election of
Senate in the forth coming Senate*

Election, and the worthy Speaker shall issue production order, on the day of Senate Election in order to make the presence of petitioner for the purpose.”

2. Before this Court consider the aforementioned directions of this Court and the response thereto by the named respondents, it would be pertinent to first appreciate that the jurisdictional contours of Courts in relation to matters arising out of or in relation to *proceedings* of Parliament has always been contested by the legislature. The legislative bodies have jealously guarded their claim to be the sole and exclusive judge of its own privilege, proceedings, and orders, while on the other hand, the Courts have considered the same to be justiciable. This contest for turf was first dilated upon by the English Courts in **Thorpe’s case (1452)**. After centuries of judicial deliberations, a general principle evolved in terms that;

“matters relating to internal proceedings of the legislative body, beginning and terminating within the walls thereof to be non-justiciable, while any action of the legislature affecting the rights of a person exercisable outside the parliament to be justiciable.”

3. The above principle has been preserved in the successive Constitutions of our country, as reflected in Article-56 and Article-111 of Constitution of 1956 and Constitution of 1962, respectively. Finally, Article-69 of the Constitution of 1973, expressly enshrines the said principle, which reads;

- “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.”*

4. When we canvas through the judicial precedents on the issue in hand, it is noted that the election of the Speaker was declared non-justiciable by a majority decision in *Ahmad Saeed Kirmani's case* (PLD 1956 Lahore-807). However, with time the judicial inclination tilted in favour of assuming jurisdiction, and the action of the Speaker regarding resignations of members was declared justiciable in

Fazalul Quader Chaudhury's case (PLD 1966 SC-105). This view was further confirmed in *Farzand Ali's case* (PLD 1970 S.C 98), *Muhammad Anwar Durrani's case* (PLD 1989 Quetta-25), *Muhammad Naeem Akhtar's case* (1992 CLC 2043), *Mining Industries Pakistan's case* (PLD 2006 Quetta-36).

Similarly, the ruling of the Speaker of the National Assembly was also declared justiciable, declaring the same to be out side the scope of *proceedings* provided under Article-69 of the Constitution in *Muhammad Azhar Siddiqui's case* (PLD 2012 S.C 774). In addition, even the administrative actions of the worthy Speaker have also been declared justiciable in *Shamsuddin's case* (1995 PLC (CS)-8).

Interestingly, a writ of *mandamus* was also issued directing the worthy Chairman to produce a member to exercise his right of vote in the Senate by full Bench of the Sindh High Court in *Asif Ali Zardari's case* (PLD 1999 Karachi-54), wherein it is held that;

“It is only an exercise of power, which has a nexus with regulating of procedure or the conduct of business or maintaining of order in the Parliament which is, thus made immune, though subject to time honoured constrains. In other words, the concept of internal

proceedings also comes into play while construing the extent or expanse of such powers and that, necessarily, is circumscribed by “formal transaction of business” concomitant to such internal proceedings.”

5. The overall picture that emerges from the above judicial pronouncements is that the Courts have strictly interpreted the word *proceedings* provided in Article-69 of the Constitution, and thereby rendering scope for exercising its own jurisdiction. With utmost respect to the judicial trend of the superior Courts, which this Court is constitutionally bound to follow, it is most humbly urged that it is time for the Courts to revisit this crucial issue, and consider not to strictly construe the word *proceedings* provided in Article-69 of the Constitution. This would bolster the principle of *Trichotomy of Power* engrained in the Constitution, and also ensure *political questions* to be resolved outside Courts. Surely, the law enacted by the Parliament would always remain amenable to jurisdiction of the constitutional Courts on the touchstone of violation of Fundamental Rights, as provided in Article-8 of the Constitution.

6. Let us now consider in *seriatim*, each one of the three directions rendered by this Court in W.P N0-51-P/2018 dated 8.2.2018, which in essence directed the worthy Speaker Khyber Pakhtunkhwa Provincial Assembly (“**Speaker**”) to take three distinct steps;

- i. *To issue order of production of the petitioner in order to administer Oath in the first coming Session of the KPK Provincial Assembly, if it is not already in Session.*
- ii. *To allow the petitioner to cast his vote for election of Senate*
- iii. *To issue production order, on the day of Senate Election in order to make the presence of petitioner for the purpose.*

7. When we closely examine the first direction of the Court rendered to the worthy Speaker, it is noted that the same was for the issuance of an *order of production* of the petitioner, who was then an under trial prisoner confined in Central Prison, Peshawar. More importantly, it was a one time direction for the *order of production* of the petitioner to be issued for the on going session of Khyber Pakhtunkhwa Provincial Assembly (“**Provincial Assembly**”), and

in case the same was not in session, then in the next session thereof.

8. It is an admitted position that the worthy Speaker did order the production of the petitioner during the then ongoing Session of the Provincial Assembly, not once but twice, but for the *quorum* thereof, the present petitioner was unable to be administered his Oath, as a member of the Provincial Assembly.

9. In this regard, it was vehemently contended by the worthy counsel for the petitioner that the worthy Speaker was duty bound to have administered Oath to the petitioner on his production in the Provincial Assembly building, without waiting for the Provincial Assembly to be in session, and that too regardless of *quorum*. In response, the learned counsel for the worthy Speaker contended that the petitioner could only be administered Oath, when the Provincial Assembly was in session having the requisite *quorum*.

10. As far as administering oath to the petitioner by the Speaker, the law mandates under Article-65 of the Constitution that;

“A person elected to a House shall not sit or vote until he has made before the House oath in the form set out in the Third Schedule.”
(emphasis provided)

Let it be noted that under Article-127 of the Constitution, the provisions relating to the Parliament, are to be read as reference to the Provincial Assembly.

The above constitutional provision is supplemented by Rule-6 of the Provincial Assembly of Khyber Pakhtunkhwa, Procedure and Conduct of Business Rules, 1988 (“**Rules of 1988**”), which reads;

“Rule-6. Oath and Roll of Member;
A member shall not sit or vote in the Assembly until he has made before the Assembly an oath as required by the Constitution, and he shall also sign the Roll of Members”.
(emphasis provided)

Now, when we review Article-65 of the Constitution, and Rule-6 of the Rules of 1988, it clearly emerges that there are three condition precedents for administering oath to a person, the same are that;

- i. The person has to be elected to the Provincial Assembly,***
- ii. The elected person has to be administered oath before the Provincial Assembly.***
- iii. The oath is as set out in the Third Schedule of the Constitution.***

11. There is no dispute between the parties regarding the first and the last condition stated hereinabove. The only contest between the parties is regarding the second condition, and more particularly, *where* and *when* the said oath was to be administered to the petitioner. As stated earlier, the petitioner insists that the Speaker could administer the oath to the petitioner, once he entered the building of the Provincial Assembly, while the Speaker contends that the oath to the petitioner could only be administered before the Provincial Assembly, when it is in session having the requisite *quorum*.

12. This Court is not in consonance with the argument advanced by the worthy counsel for the petitioner, as the oath to be administered to the elected member has to be made **before** the Provincial Assembly. The word '*before*' provided in Article-65 of the Constitution, clearly reflects the intention of the legislature. To further support the said intention, Rule-6 of the Rules of 1988 also expressly used the word '**before**' the Provincial Assembly. In order to understand the true import of the word '*before*'

contained in Article-65 and Rule-6 *supra*, recourse can be made to the cardinal and well-tested principle of interpretation of statutes which clearly provides that a word used in a statute is to be accorded its ordinary dictionary meaning. Now, let us appreciate the lexical meaning of the word ‘*before*’ as contained in different lexicons;

The Australian Oxford Dictionary.

“1. Earlier than the time when (crawled before he walked).
 2. rather than that (would starve before he stole), Prep. 1 a in front of (before her in the queue). B. ahead of (crossed the line before him). C. under the impulse of (recoil before the attack). D. awaiting (the future before them). 2. Earlier than; preceding (lent comes before Easter). 3. Rather than (death before dishonor). 4. A. earlier than the time in question; already (heard it before). B. In the past (happened long before). 2. Ahead (go before). 3. On the front (hit before and behind). Before God a solemn oath meaning ‘as God sees me’.. before time.

Concise Oxford English Dictionary.

1. During the period of time preceding.
2. In front of, in front of and required to answer to (a court of law, tribunal, or other authority).
3. In preference to; with a higher priority.

Chambers 21st Century Dictionary.

1. Earlier than something before noon.
2. Ahead of or in front of someone or something.
3. In the presence of, or for the attention of someone.

4. Rather than or in preference to someone or something.
5. Formal or literacy in the face of something.

(emphasis provided)

Going through the above meanings of the word '*before*', it is safe to conclude that the word '*before*' simply means, "*in front of*" or "*in the presence of*", and this can only be before the members of the Provincial Assembly, when it is in session having the requisite quorum provided under the Rules of 1988. Any other interpretation of the word '*before*' would lead to oath being administered outside the Provincial Assembly building, and this would be an absurd situation, which surely could never be the intention of the legislature.

13. This brings us to the five members of the Provincial Assembly, impleaded as respondents in the instant contempt petition, for their alleged role in stymying the administration of Oath to the petitioner as member of the Provincial Assembly. In essence, the order of the Court was aimed only at directing the worthy Speaker for issuing production *order of the petitioner* for administering him Oath as a member of

the Assembly to enable him vote in the Senate Election. Admittedly, the worthy Speaker issued the *order of production* of the petitioner, and as a result thereof he was brought to the House. Now, what happened after the petitioner was called and he entered the Provincial Assembly building, is beyond the scope of the contempt proceedings, as neither any specific direction was rendered nor are the *internal proceedings* of the House justiciable before this Court under Article 69 of the Constitution.

14. Moving on to the second and third directions given by this Court, it is noted that the petitioner was made eligible to cast his vote in the Senate Election, and the worthy Speaker was further directed to issue *order of production* on the day of Senate Election in order to ensure that the petitioner cast his vote for the said election. As the petitioner had not been administered Oath as member of the Provincial Assembly, he could not sit in the Assembly and possibly participate in the election to the Senate of Pakistan under Article 65 of the Constitution.

15. This being the position, it is but clear that substantial compliance was carried out by the Speaker of Provincial Assembly, and no case for contempt was made out. When the worthy counsel for the petitioner was confronted with this situation, he insisted for issuance of a fresh *order of production* of the petitioner for the purpose of administering him Oath. The request of the petitioner was not positively considered by the worthy counsel for the Speaker, as the petitioner was no more in judicial custody having been acquitted by the worthy Special Judge Anti-Terrorism Court in case FIR No.216 dated 26.4.2016 vide its judgment dated 26.4.2018. It was further contended that the directions rendered by this Court to the worthy Speaker were aimed at ensuring the *order of production* of the petitioner, which was no more required in view of his acquittal in the criminal case.

16. When faced with the above response of the worthy counsel for the Speaker, the worthy counsel for the petitioner insisted that the Speaker ought to summon the Provincial Assembly in order to ensure true compliance of the orders of this Court. This Court

is not in accord with this contention raised by the worthy counsel for the petitioner. Under the law, the summoning of Provincial Assembly is beyond the mandate of authority vested in the Speaker under Rule-12 of the Rules of 1988.

17. What is important to note is that under Article-54 read with Article-127 of the Constitution, the Speaker is bound to summon the Provincial Assembly only on requisition signed by not less than 1/4th of the total members of the Provincial Assembly. In fact, the worthy Governor is vested with the authority to summon the Provincial Assembly under various circumstances provided under Article-109, clause (2) of Article-130 and clause (1) of Article-54 of the Constitution.

18. To conclude, suffice it to state that this Court is exercising its jurisdiction in contempt proceedings, where it is to be seen whether or not the orders passed by this Court have been complied with. This Court cannot traverse beyond the directions, so rendered by it, which in view of the above deliberations have

substantially been complied with by the worthy
Speaker.

Accordingly, the notices issued to the
respondents are hereby recalled.

Announced on:
Dated.17.05.2018.

CHIEF JUSTICE

J U D G E

(K.Ali)
(D.B of Mr. Justice Yahya Afridi, C.J, and Mr. Justice Syed Afsar Shah, Judge)