

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.16416 of 2024

Ch. Bilal Ejaz

Versus

Election Commission of Pakistan & others
J U D G M E N T

Date of Hearing.	16-04-2024
PETITIONERS BY:	Sardar Latif Khan Khosa and Rana Usman Ghani, Advocates.
RESPONDENTS BY:	M/s Waqas Ahmad Mir and Ch. Imran Raza Chadhar, Advocates for respondent No.3. Mr. Asad Ali Bajwa, D.A.G. Mr. Hassan Ijaz Cheema, A.A.G. Mr. Imran Arif Ranjha, Legal Advisor for E.C.P with Bushra Siddique Ch. Deputy Director (Law) ECP.

Shahid Karim, J:-. This constitutional petition brings a challenge to the order dated 11.03.2024 (**the Impugned Order**) passed by the Election Commission of Pakistan (ECP). In conclusion, it was held that:

“15. Likewise, this Commission is bound to conduct and hold free, fair and just election in term of Article 218 and 222 of the Constitution and to fulfill end of justice may exercise its inherent power in term of section 4 of the Election Act, 2017, in any matter pending before it, at any stage, even after consolidation of result is concluded.

16. As the reasons, given by the concern R.O for non-recounting of votes are not appealable to prudent mind and we also cannot appreciate that any order be passed by any election officer under pressure on cost of legal rights already accrued to a party, therefore keeping in view, the reasons mentioned herein above, we accept this petition only to the extent of re-counting of specific polling stations and consequently set aside the impugned order dated 10th February, 2024 according.

17. The concern R.O is directed to arrange for re-counting of votes of specified polling stations mentioned in the list Annexed (A) attached here to this order and conclude the require proceeding of re-counting within 10 days positively but strictly in accordance with prescribed law and rules and thereafter the conclusion of proceeding, what may be the result of recount, follow the law accordingly.”

2. These proceedings before the Election Commission of Pakistan (**ECP**) arose out of an appeal filed by respondent No.3 to challenge the order dated 10.02.2024 passed by the Returning Officer of NA-81 in respect of general elections held on 08.02.2024. Respondent No.3 had filed an application for recount of the ballot papers of certain polling stations which was dismissed by the Returning Officer on 10.02.2024 in the following terms:

“Whereas, Mr. Azhar Qayyum Nahra candidate NA 81 Gujranwala-V has submitted an application wherein he has submitted that polling staff has illegally declared his votes in connivance with his rival candidate. Due to this illegal act he has lost his seat. He has requested to order recounting of his votes as per law.

And whereas, the undersigned has perused his record and the evidence put forth by the applicant. However, the applicant has failed to substantiate his claim.

Now, therefore I Muhammad Naveed Haider, Returning Officer NA-81, Gujranwala-V hereby dismissed his application being devoid of facts.”

3. As explicated, respondent No.3 filed an appeal against the said order passed by the Returning Officer. It is common ground that an appeal is not competent before ECP but that aspect of the matter should not detain us any further as ECP treated the petition one under Section 8 of the Election Act, 2017 (**“the 2017 Act”**). While doing so, the provisions of Articles 218 and 222 of the Constitution of Islamic Republic of Pakistan, 1973 (**“the Constitution”**) and section 4 of 2017 Act were also stated to be engaged in the order passed by ECP.

4. The facts are refreshingly simple and may be stated briefly. The petitioner and respondent No.3 were candidates in the general elections for the seat of National Assembly from NA-81 Gujranwala-V held on 08.02.2024. The petitioner participated as an independent candidate and was

declared as a returned candidate. He won the elections with a majority of 117,717 votes in the provisional consolidated result undertaken by the Returning Officer. The final consolidation proceedings were held and a notification regarding the petitioner as a returned candidate to the National Assembly of Pakistan was issued on 16.02.2024 by ECP. As stated above, respondent No.3 had filed an application on 09.02.2024 for recount of the ballot papers to the Returning Officer. That application was decided on 10.02.2024. A further petition to ECP was brought and decided by the impugned order passed on 11.03.2024. By that time not only the notification in respect of the petitioner as a successful candidate had been issued on 16th February, 2024, the Election Tribunals had also been notified vide notification dated 20.02.2024 for determination of post-election disputes under Article 225 of the Constitution. Pursuant to the orders passed by ECP on 11.03.2024, a recount was held and respondent No.3 was declared as the successful candidate. Consequently, revised Forms 47, 48 and 49 were issued by respondent No.2 and a notification dated 18.03.2024 was also issued by ECP.

5. Primarily, the petitioner contended before ECP that since a notification under Section 98 had already been issued and the petitioner had taken oath of membership of the National Assembly, the petition filed by the respondent No.3 had become infructuous and ECP was denuded of its powers to proceed to determine the issues raised in that petition. In short, the submission was that the necessary jurisdictional facts did not exist for ECP to exercise its powers under any of the provisions of the 2017 Act.

6. A reading of the impugned order would show that ECP primarily relied upon section 8 of the 2017 Act to upend the order passed by the Returning Officer and to direct recount of ballot papers. Section 8 provides that:

“8. Power of Commission to ensure fair election.— Save as otherwise provided, the Commission may—

- (a) stop the polls at one or more polling stations at any stage of the election if it is convinced that it shall not be able to ensure the conduct of the election justly, fairly and in accordance with law due to large scale malpractices, including coercion, intimidation and pressures, prevailing at the election;*
- (b) review an order passed by an officer under this Act or the Rules, including rejection of a ballot paper; and*
- (c) issue such instructions, exercise such powers and make such consequential orders as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly, fairly and in accordance with the provisions of this Act and the Rules.”*

7. Thus, the only issue before this Court is regarding true construction to be put on section 8 of the 2017 Act and as to whether the said provision could be invoked by ECP in directing the recount of ballot papers by setting aside the order passed by Returning Officer. Section 8, it can be seen, confers general powers on ECP to ensure fair elections and is couched in the same terms as Article 218 of the Constitution. This begs the question: Does section 8 confer a regulatory blank check on ECP to pass any order in its discretion under any circumstances? The arguments in this Court of learned counsel for respondent No.3 (and ECP) centered on clause (b) of section 8 which empowers the Commission to review an order passed by an officer under this Act or the rules including rejection of ballot papers. Clause (c) would also be engaged in the matter which confers power on the Commission to issue instructions and exercise such powers and make such consequential orders as may in its opinion be necessary for the conduct of just and fair elections. There is no contention that the powers

conferred upon ECP by section 8 are broad-based and does clothe ECP with necessary armoury of powers to ensure fair elections. These powers, however, are circumscribed by other provisions of the 2017 Act and cannot be so conferred as to encroach upon the powers conferred upon other bodies established by the provisions of the 2017 Act. Superior courts have generally construed such powers to mean that they must not be extended in such a way that ECP may have unbridled and unstructured powers to intervene at any stage of the elections at its whim. The principles gleaned from different judgments of the superior courts are that the powers of ECP in this regard are circumscribed and derived powers.

8. Two facts will exercise a gravitational pull on the decision of the present case. One regarding the notification issued in respect of the petitioner as a successful candidate on 16.02.2024 by ECP and second, a notification regarding constitution of Election Tribunals on 20.02.2024 would also be a relevant factor.

9. Section 8 of the 2017 Act came under discussion before the Supreme Court of Pakistan in *C.P No.142 of 2019 Zulfiqar Ali Bhatti v. Election Commission of Pakistan and others* in which the Supreme Court of Pakistan alluded to the true construction to be put on Article 218 (3) of the Constitution as well as section 8(c) of the 2017 Act. The relevant portions are set out below:

“18. Thus, we can safely conclude on the question of the status of the general power of the Election Commission under Article 218(3) of the Constitution vis-à-vis a law enacted by the Parliament, that this power operates in the area uncovered by such law. Alike is the scope and applicability of the powers of the Election Commission under Section 8(c) of the Elections Act, which is also

evident from the opening words of Section 8, “**Save as otherwise provided**”. These words indicate that if something otherwise is provided in the Elections Act, then this Section will not apply. Further, the amplitude of the power of the Election Commission under this Section, like its general power under Article 218(3), is extended to the performance of its executive duty to “conduct the election” and thus it can be exercised only at any stage of the election process, **not after the completion thereof**.

19. In other words, we can say, the general power under Article 218(3) of the Constitution and Section 8(c) of the Elections Act can be exercised by the Election Commission within two parameters: (i) during the election process, which starts with the issuance of the election programme and culminates with the publication of the name of the returned candidates in the official gazette, and (ii) when there is no express provision in the law enacted by the Parliament to deal with the matter or issue that arises during the performance of constitutional duty of conducting the elections honestly, justly, fairly and in accordance with law.

20. In the present case, the Election Commission passed the impugned order after the consolidation of the final result of the poll by the Returning Officer under Section 95 and the publication of the name of the appellant as a returned candidate in the official gazette under Section 98 of the Elections Act, when the election process has been completed...

21. The second limitation on the exercise of its general power by the Election Commission under Article 218(3) of the Constitution read with Section 8(c) of the Elections Act is, however, found attracted. The matter of directing a re-poll or a fresh poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act. There are three provisions in the Elections Act that deal with this matter in relation to the duty and power of the Election Commission to “conduct the election”, which are Sections 9, 88 and 121 of the Elections Act. As the matter of directing a re-poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act, the Election Commission was not justified to invoke and exercise its general power under Article 218(3) read with Section 8(c) of the Elections Act in the present matter.”

10. The distilled essence of the observations reproduced above is that the Supreme Court was of the clear opinion that exercise of powers by ECP both under Article 218 of the Constitution as well as section 8 of the 2017 Act could be done at any stage of the election process but not after its completion. The completion of election process, in turn, would be the issuance of notification regarding returned

candidates in the official gazette under Section 98 of the 2017 Act when the election process would be deemed to have been completed. This is also mentioned in paragraph 20 of the Supreme Court's judgment. In a nub, ECP would become *functus officio* in all such matters after which the issues can only be raised through an election petition before the Election Tribunal. This rule not only applies to ECP but also to this Court while exercising its constitutional jurisdiction under Article 199 of the Constitution. Significant observations have been made by Supreme Court of Pakistan in *Zulfiqar Ali Bhatti* regarding interpretation of the words "**save as otherwise provided**". It will be noted that section 8 starts with these words which evidently mean that if there is anything specifically provided in the statute itself, the Commission will constrain itself and not exercise jurisdiction in respect of such matters under the cloak of section 8 and the powers conferred thereby. Doubtless, ECP misdirected itself in law by relying upon section 8 of 2017 Act in this case which fed through the rest of the decision-making process.

11. Section 95 of the 2017 Act is relevant for our purposes to critically interrogate the issue that the 2017 Act contains specific provisions regarding conferment of powers on ECP directing the Returning Officer to recount the ballot papers.

Section 95 provides that:

"95. Consolidation of results.—(1) Immediately after announcement of provisional results, the Returning Officer shall give the contesting candidates and their election agents a notice in writing of the day, time and place fixed for the consolidation of the results, and, in the presence of such of the contesting candidates and election agents as may be present, consolidate in the prescribed manner the Results of the Count furnished by the Presiding Officers,

including therein the postal ballots received by him before the time fixed for the consolidation of results:

Provided that presence of not more than one agent of each candidate shall be allowed.

(2) Before consolidating the Results of the Count, the Returning Officer shall examine the ballot papers excluded from the count by the Presiding Officer and, if he finds that any such ballot paper should not have been so excluded, count it as a ballot paper cast in favour of the contesting candidate for whom the vote has been cast.

(3) The Returning Officer shall also count the ballot papers received by him by post in such manner as may be prescribed and include the votes cast in favour of each contesting candidate in the Consolidated Statement except those which he may reject on any of the grounds mentioned in section 90.

(4) The ballot papers rejected by the Returning Officer under subsection (3) shall be mentioned separately in the consolidated statement.

(5) Before commencement of the proceedings, the Returning Officer shall recount the ballot papers of one or more polling stations if a request or challenge in writing is made to that effect by a contesting candidate or his election agent and—

(a) the margin of victory between returned and runner up candidates is less than five percent of the total votes polled in the constituency or eight thousand votes in case of National Assembly constituency and four thousand votes in case of a Provincial Assembly constituency, as the case may be, whichever is less; or

(b) the number of votes excluded from the count by the Presiding Officer are equal to or more than the margin of victory:

Provided that the Returning Officer shall recount only once.

(6) The Commission may, before conclusion of the consolidation proceedings and after notice to the contesting candidates], for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations.

(7) If there is a difference between the Results of the Count received from the Presiding Officers and the results of the recount, the Returning Officer shall record the difference and details thereof:

Provided that where the Returning Officer has recounted the votes under sub-section (5) or sub-section (6), the consolidation proceedings shall be completed within—

(a) seven days after the polling day in the case of elections to the National Assembly; and

(b) five days after the polling day in the case of elections to a Provincial Assembly.

(8) The Returning Officer shall, within twenty four hours after the consolidation proceedings, send to the Commission signed copies of the Consolidated Statement of the Results of the Count and Final Consolidated Result together with Results of the Count and the Ballot Paper Account, as received from the Presiding Officers, and shall retain copies of these documents for record.

(9) After consolidation of results, the Returning Officer shall give to such contesting candidates and their election agents 3 [and accredited observers] as are present during the consolidation proceedings a copy of the Consolidated Statement of the Results of the Count and the Final Consolidated Result sent to the Commission against proper receipt.

(10) On receipt of documents under sub-section (8), the Commission shall, within fourteen days from the date of the poll, publish the documents on its website.

12. Section 95 relates to consolidation of results and confers powers on the Returning Officer to do so immediately after announcement of provisional results. While doing so and before commencement of consolidation proceedings sub-section (5) confers upon the Returning Officer the power to order recount of ballot papers of one or more polling stations if a request or challenge in writing is made to that effect by a contesting candidate. This is the power which was exercised by the Returning Officer while passing the order dated 10.02.2024. Sub-section (6) is crucial in the present context and confers a power on ECP to direct the Returning Officer to recount the ballot papers before conclusion of consolidation proceedings. The intention, in my opinion, is clear and unequivocal. Firstly, a specific provision exists in the 2017 Act conferring powers on ECP to order the recount of ballot papers. Second and more importantly it has to be done before conclusion of the consolidation proceedings. If this power is not exercised by ECP within the contours mentioned in sub-section (6) of section 95, it cannot thereafter proceed to exercise such

power on the misplaced notion that it can do so by invoking provisions of section 8 of the 2017 Act. In such matters, therefore, ECP is constrained by section 95(6) and cannot exceed the jurisdiction so conferred. In the impugned order, although ECP refers to the provisions of section 95(5) but ignored sub-section (6) of section 95 which relates to the powers of ECP. ECP went wrong and committed an error by stating in paragraph 14 of the impugned order that notwithstanding the provisions of section 95 (6) of the 2017 Act, the Commission may exercise “its inherent power to rectify any injustice committed during course of election”. This view is a violation of law and must be discountenanced. It cannot be sustained in view of the holding of the superior courts in different cases. It was unfortunate, in my opinion, for ECP while passing the impugned order to ignore the judgments of the superior courts in this regard and in particular the judgment by the Supreme Court of Pakistan in *Zulfiqar Ali Bhatti*.

13. Two salutary principles of construction would be engaged at this juncture. The first is that the policy of a law has to be kept in view in making any decision by authorities entrusted with statutory discretions. This would include taking into account considerations of public policy. In the case of 2017 Act, the policy of law is to empower ECP “to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.” (Article 218(3) of the Constitution). This is the theme at the heart of the 2017 Act and permeates through its length and breadth. But ECP is not the only authority tasked with duties and obligations under 2017 Act.

There are others, too. Therefore, ECP must stay its hands after certain events have taken place and give way to other bodies to take charge. The lofty and legitimate aim of holding just and fair elections cannot be taken to confer a *carte blanche* on ECP to expand its powers beyond the statutory realm. A reading of the impugned order passed by the bench of ECP betrays an increased appetite for accumulating power which runs afoul of the intent of the law. In doing so, ECP ignored the holding in *Zulfiqar Ali Bhatti* and a host of precedents handed down by superior courts in placing a construction on Article 218(3) of the Constitution as well as section 8 of the 2017 Act. These precedents have enjoined a restrictive meaning to be given to these provisions so as to balance the place of ECP in the legislative architecture. Recently, this Court while deciding W.P No.30623 of 2019 *Mian Tariq Mehmood v. Election Commission of Pakistan & others*, had this to say regarding the precise sweep of Article 218(3):

“13. In view of the above holding, for all intents, ECP is denuded of any inclination to broaden upon its powers and read into Article 218(3) such expanded powers which do not vest in it. This penchant for broadening of powers is anathema to rule of law and basic foundations of constitutional democracy. We live under a Constitution and all powers flow from it especially those that affect a citizen’s rights. They culminate in an act of authority affecting the legal balance sheet of certain individuals. We have laws which invest a person, or a body of persons, with authority to regulate the behavior of other persons. The repositories of such powers are authorized to impose rights and liabilities and to confer privileges and immunities on certain individuals. It is incredulous to note that ECP chose to exercise jurisdiction over subject-matter while none existed. The essence of any legal system lies in the limitations placed by it upon the exercise of power; no grant of power by Parliament can be totally unlimited.

14. The decision of ECP in this case runs counter to the doctrine of jurisdictional facts. „If a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether they have jurisdiction but cannot give themselves jurisdiction by a wrong decision upon them“. (Per Lord

Goddard C.J in R.V Fulham, Hammersmith and Kensington R.T., Exp. Zerek [1951]2K.B.1, at 6).

The lines which discriminate jurisdictions are fine, but they are clear and distinct, and if they are once effaced, endless and inextricable confusion must be the consequence.’ [Graham v. Maingay (1793) Ridg.L.&S.20,72]

15. That warning (quoted in *Jurisdiction and Illegality* by Amnon Rubinstein, 2007) given at the end of eighteenth century, is particularly apposite nowadays with the growth of new inferior jurisdictions. ECP’s action is a classic case of want of jurisdiction having been taken beyond the sphere allotted to it by law. It is regarded as usurpation of power unwarranted by law. The bounden duty of ECP, under the constitution and law, to determine the jurisdictional facts at the commencement of the inquiry. If they do not exist, ECP must abstain and go no further. In this context it is important that such action must stem from a legal provision and which must be stated clearly in a notice issued to any person. A notice which does not mention the relevant statutory provision under which ECP purports to derive its powers is a nullity and a misdirection of law which then feeds through the rest of the decision-making process. ECP cannot add to its litany of powers at its whims.

16. It is of fundamental importance to emphasis that jurisdiction lies at the foundation of all legal proceedings. If it is not present, the proceeding is void. In the classic words of Chief Justice John Marshall, —we have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the constitution.
[Cohen v. Virginia (1821) 19US(16Wheat)264]

Article 175, Clause (2) provides that:

—175(2) No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law.

17. The above mandate equally applies to executive authorities and high-powered tribunals such as ECP. In administrative law, jurisdiction merely means legal authority or power. (See, *legal control of Government* by Bernard Schwartz and H.W.R Wade, p.210). As Lord Denning said in *R.v Chief Immigration Officer* (1980)3 All ER 373, 379), —No jurisdiction means no power.”

14. In view of the above observations (which echo those made in *Zulfiqar Ali Bhatti*) the reliance of ECP on Article 218 is inapt and disloyal to the language of Article 218 of the Constitution.

15. The second rule, vouched by respectable authority, is that a statute has to be read as a whole and not in bits and pieces, divorced from one another. Hence the significance

of the words “save as otherwise provided” used in section 8. Thus, section 8 has to be read in conjunction with section 95(6) of the 2017 Act. The indubitable inference would be that in matters of recount of ballot papers, ECP can only act under Section 95(6) and that too before consolidation proceedings are concluded. If that does not happen, ECP cannot use section 8 to circumvent the law to achieve indirectly what cannot be done directly.

16. There are other compelling reasons which dictate that ECP must act within the periphery of its powers. This is in the context of consolidation of results and the ultimate declaration of results by ECP. Sub-section (7) of section 95 requires that consolidation proceedings by the Returning Officer shall be completed within seven days after the polling day in case of elections to the National Assembly and by sub-section (10), ECP shall within fourteen days from the date of the poll publish the documents on its website. Section 98 relates to declaration of results and provides that:

98. Declaration of results.—(1) On receipt of the Final Consolidated Result from the Returning Officer, the Commission shall, within fourteen days from the date of the poll, publish in the official Gazette the name of the contesting candidate who has received the highest number of votes and stands elected.

(2) The Commission shall also publish in the official Gazette the name of each contesting candidate and the total number of votes received by him as in the Final Consolidated Result.

(3) Every returned candidate shall, within ten days from the poll of an election, submit a return of election expenses under section 134 and the Commission shall not notify in the official Gazette the result of a returned candidate who fails to submit his return of election expenses.

(4) The Commission shall place the documents mentioned in sub sections (1) and (2) on its website within two days from the date of the publication of the name of the returned candidate in the official Gazette.

17. It is evident that on receipt of final consolidated results from the Returning Officer, the Commission shall, within fourteen days from the date of the poll, publish in the official gazette the name of the contesting candidate who has received the highest number of votes and stands elected. This was duly done by ECP in the instant case on 16.02.2024. Thus, ECP carried out its statutory duty under Section 98 of the 2017 Act by declaring the results within the stipulated period of fourteen days from the date of the poll. These provisions are couched in mandatory language and must be complied with. There is no quarrel that ECP fulfilled its duty in this regard and published the name of the petitioner in the official gazette. The impugned order subsequently passed by ECP would be tantamount to review of its own declaration of results in the official gazette and this is an additional reason why ECP should not have exercised its jurisdiction in the present case after declaration of results by it. Suffice to say that ECP does not have power of review. This is precisely the reason why the Commission has been empowered to direct the Returning Officer to recount the ballot papers before conclusion of the consolidation proceedings. The intention of the statute is that all such matters must be dealt with and decided prior to the declaration of results under Section 98 of 2017 Act.

18. Learned counsel for respondent No.3 laid much stress on the report filed by the Returning Officer to ECP and a letter written to the Deputy Superintendent of Police which referred to commotion by a group of political workers who had gathered outside the office of the Returning Officer. Interestingly, ECP relied upon this report to conclude that:

“9. As the local police failed to provide full security of R.O; in order to complete process of re-counting the concern R.O; bowed to the illegal pressure of political workers, who had gathered outside the venue of re-counting and to avoid further hardship rejected the application on the same day for grounds.”

19. It could not be ascertained whether the political workers who had allegedly gathered outside the office of the Returning Officer belonged to the petitioner or supported respondent No.3. Learned counsel for respondent No.3 conceded that this was a factual inquiry and required investigation. Be that as it may, nothing turns upon this aspect of the matter and what has to be seen by this Court is the legality or otherwise of the impugned order passed by ECP.

20. Another factor needs to be flagged here. The impugned order evinces meandering jurisprudence. The exercise of jurisdiction under Article 218(3) of the Constitution and section 8 of the 2017 Act cannot be an open-textured concept. A cluster of orders passed contemporaneously by different benches of ECP (including by the same Member who authored the impugned order) clearly establishes a keen awareness of the limits of ECP's powers and the mandate of law to require ECP to draw a line after a certain stage has come to pass. Sadly the same consistency was lacking in the impugned order and ECP brushed under the carpet the line of decisions which marked a clear departure from the stance taken in the impugned order.

21. For instance, an order was passed on 12.02.2024 in the case titled *Shahzane Khan v. Returning Officer & other*, an application under Section 95(6) of the 2017 Act. The order

was penned by Justice (R) Ikram Ullah Khan, Member who also authored the instant judgment and was pleased to hold that since Form 49 in terms of section 95 had already been issued by the Returning Officer “this Commission has no any such jurisdiction in view of section 95(6) to make any kind of such direction of re-counting therefore, the prayer of petitioner in this regard is regretted”. Similarly, in an order passed on 20.02.2024 in the case of *Shaheer Dawood Buttv. Returning Officer* written by the Chairman ECP it was categorically held that the Returning Officer was the authority under Section 95 of 2017 Act to allow or disallow the recounting of votes. Further since election tribunals had been appointed under Section 140 and election petitions are being filed under Section 139 of the 2017 Act, the prayer of the petitioner could not be granted. More importantly, it was held by the Bench headed by the Chairman ECP that “moreover the office has also informed that the process of consolidation has been completed by the concerned Returning Officer and therefore the provisions of section 95 (6) also do not attract in this case”. That order went on to state that the notification of the returned candidate had been issued and on this ground too, the provisions of section 95 (6) were not attracted. In another case decided on 19.02.2024 by the same learned Member, that is, Justice (R) Ikram Ullah Khan, in the case of *Sardarzada Mir Saeed Ahmed v. Returning Officer* the learned Member once again alluded to the rule that the matter could not be reviewed under Section 8 of the 2017 Act which needed to be examined by the Election Tribunals appointed under Section 140 of 2017 Act. Additionally, it was held that since the

process of consolidation had been completed, therefore, section 8 could not be invoked. Finally, another order passed by the Chairman ECP has been relied upon dated 20.02.2024 in the case of *Amir Masood v. District Returning Officer* and the same rule was reiterated by the Chairman of the Bench while relying upon the fact that since the Election Tribunals had been constituted, Article 225 of the Constitution clearly provided that no election could be called in question except by way of election petition. It was further stated that since the process of consolidation had been completed by the concerned Returning Officer, therefore, the provisions of section 95(6) were not attracted.

22. A review of the orders which have been referred above clearly shows that ECP and its benches exercising jurisdiction in the matter of adjudication are cognizant of the scope of its powers under Sections 8 and 95 of 2017 Act and have consistently held that these powers could not be invoked once consolidation of result had taken place and notification regarding a returned candidate had been issued. Also ECP has refused to exercise its jurisdiction in all such election disputes where Election Tribunals have been notified which is the case in the instant matter too. It is incredulous indeed that ECP, contrary to its stance in a number of cases, has proceeded to exercise its jurisdiction in the instant matter without adverting to any of the grounds which found favour with the bench in similar cases. The obligation cast upon ECP under Article 218(3) of the Constitution to ensure free and fair election should start with the primary responsibility to make consistent decisions

based on the principles of rule of law and by following the basic tenet that every power has legal limits.

23. Before I tear away myself, it may be stated that the judgments passed by the superior courts are binding on the benches of ECP while adjudicating different complaints which come before those benches. Those judgments have clearly laid down the limits of powers of ECP and in the instant case unfortunately the bench of ECP did not advert its attention to those judgments and, therefore, failed in its constitutional duty. Not only that and as adumbrated, it did not even consider its own views expressed in various orders during the same period.

24. The case law cited by learned counsel for respondent No.3 is not relevant for decision of the controversy in hand and need not be discussed in detail.

25. In sum, the impugned order is without lawful authority and of no legal effect. It is set aside. Consequently, the petition is allowed. The notification dated 18.03.2024 issued by ECP notifying the name of respondent No.3 as the returned candidate is also struck down.

(SHAHID KARIM)
JUDGE

Approved for reporting

JUDGE

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Rafaqat Ali