

Stereo. HCJDA 38.
Judgment Sheet
IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

....

ICA No.29 of 2024

Abdul Rehman Khan Kanju

Versus

Rana Muhammad Faraz Noon and two others

JUDGMENT

Date of hearing: **16.04.2024.**

Appellant by: Mr. Muhammad Nawazish Ali Pirzada, Advocate.

Respondents by: Malik Zafar Iqbal Awan, Additional Advocate General.

 Mr. Tahir Mehmood Mufti, Deputy Attorney General.

 Mr. Mazhar Hussain Kharal, Assistant Advocate General.

 M/s Mughees Aslam Malik, Shafqat Hussain Thaheem, Sardar Ashiq Hussain Baloch, Maher Ahmad Nawaz Sial, Rana Muhammad Iqbal Noon and Rana Arif Kamal Noon, Advocates for respondent No.1.

 Muhammad Jaffar, Assistant Director (Law) on behalf of Election Commission of Pakistan.

ASIM HAFEEZ, J. This Intra Court Appeal is directed against the order of learned Single Judge-in-Chambers, dated 05.03.2024 (identified as an “**impugned order**”), whereby constitutional petition bearing W.P No.1333 of 2024/BWP, preferred by respondent No.1, against the order of Election Commission of Pakistan dated 22.02.2024 (for the purposes of this appeal, deemed as an “**original order**”), was accepted and original order, including notice dated 25.02.2024 for attending

recount of votes, were declared lacking in jurisdiction and of no legal effect.

2. Matter-in-issue relates to the election for National Assembly constituency, NA-154, Lodhran-I, held on 08.02.2024, whereby respondent No.3 statedly secured 134,937 votes against 128,438 votes, secured by the appellant. Returning Officer delivered Final Consolidated result – [Form-49] – to the Election Commission on 09.02.2024. Appellant was the runner-up candidate. It is the case of the appellant that he had submitted application on 09.02.2024, for seeking recount of votes of all the polling stations of the constituency, which was neither considered nor decided, and appellant had to approach the Election Commission. Record depicts that Returning Officer had indicated factum of application for recount of votes to the Regional Election Commissioner, Multan, through correspondence of 10.02.2024, contents whereof, for quick understanding, are reproduced hereunder,

No. 41/RO/ADC(F&P)/LD
OFFICE OF THE
RETURNING OFFICER
NA-154 (LODHRAN-I)/ADC(F&P) LODHRAN
Dated: 10.02.2024

To,

*The Regional Election Commissioner (Multan),
Election Commission of Pakistan.*

Subject: **APPLICATION UNDER SECTION 95 READ WITH ALL OTHER ENABLING PROVISIONS OF ELECTIONS ACT, 2017 AND ELECTION RULES, 2017 THEREUNDER.**

Reference: *The application (enclosed) received dated 09.02.2024 on the subject cited above regarding recounting of votes of all polling stations in NA 154, Lodhran-I by the contesting candidate Mr. Abdul Rehman Khan Kanju.*

It is apprised that the applicant has sought recounting of votes of his constituency. However, at the time of receipt of his application, the electoral record of the constituency NA-154 had already been handed over to the office of Regional Election Commissioner, Multan.

Therefore, the above mentioned request can only be entertained if the undersigned is given access to the electoral record. It is therefore prayed that the necessary permission may please be granted to access the said record as per provisions of the relevant law(s).

Announced:
Dated: 10.02.2024

Returning Officer
NA-154, Lodhran-I

Copy to:

Mr. Abdul Rehman Khan Kanju, the applicant and candidate for NA-154.

Record reflects that on 11.02.2024, Regional Election Commissioner, Multan Division, responded to the Returning Officer; contents of the correspondence read as,

No.F.I(19)/2024-Elec/REC

OFFICE OF THE
REGIONAL ELECTION COMMISSIONER,
MULTAN DIVISION

Multan the 11thFebruary 2024.

To.

The Returning Officer NA-154 Lodhran-I/ ADCR(F&P) Lodhran,

Subject: APPLICATION UNDER SECTION 95 READ WITH ALL OTHER ENABLING PROVISIONS OF ELECTIONS ACT, 2017 AND ELECTION RULES, 2017 THEREUNDER.

Reference your letter No.41/RO/ ADC(F&P)/LD dated 10-02-2024 regarding the subject cited above.

As per contents of your letter the recounting application of the candidate has been rejected and consolidation of result has been completed by you. Resultantly the polling record has been consigned in the Strong Room of Election Commission of Pakistan established in office of the Regional Election Commissioner, Multan Division, Multan on 10-02-2024 at 3:00 AM. Once the final consolidation of result has been made then the recounting powers of Returning Officer under Section 95 cannot be exercised, and seeking asses to polling record seems irrelevant here. So the asses to polling record consigned in the Strong Room can only be provided in presence of any recounting order from any competent forum.

(Ch. Nadeem Qasim)
Regional Election Commissioner,
Multan Division, Multan

Copy forwarded for information to:-

1. *The Provincial Election Commissioner, Punjab, Lahore.*
2. *The District Returning Officer, Lodhran.*
3. *The District Election Commissioner, Lodhran.*

And thereafter, the Returning Officer submitted report vide communication dated 16.02.2024, contents whereof are reproduced hereunder,

No. 46/RO/ADC(F&P)/LD
OFFICE OF THE
RETURNING OFFICER
NA-154 (LODHRAN-1)
Dated: 16.02.2024

To,

1. *Mr. Nisar Ahmed Durrani, Member,
Election Commission of Pakistan.*

2. *Mr. Babar Hassan Bharwana,
Member, Election Commission of Pakistan.*

Case No. 7(160)/2024 LAW-111 (GE)

In Ref: PETITION/ APPLICATION UNDER SECTION 95(5) AND ALL OTHERS ENABLING PROVISIONS OF ELECTION.

I have been directed vide order dated 14.02.2023 to file a report as a Returning Officer of NA-154, Lodhran-1. As per the Form-49, the

Petitioner, Abdul Rehman Khan Kanju secured 128,438 votes, and the returned candidate, Rana Muhammad Faraz Noon secured 134,937 votes. The difference in the vote count is less than 5%.

It is stated that although the application for recount was received at my office before consolidation, I was not able to pass an order on the same immediately, because of law and order situation created by the returned candidate Rana Muhammad Faraz Noon. Hence, I was unable to pass an order on the recount application which should have been done as per Section 95 of the Election Act. However, subsequently, I referred the same to the Regional Election Commissioner, Multan vide my letter dated 10.02.2024. I am able and willing to recount the votes if an appropriate order is passed by the Honorable Commission.

Returning Officer
NA-154, Lodhran-I

CC:

1. The District Returning Officer, Lodhran.
2. The District Election Commissioner, Lodhran

[Emphasis supplied]

Notably, appellant, on 11.02.2024, had submitted application for recount of the votes of entire constituency to the Election Commission, primarily invoking section 95(5) and all other enabling provisions of the Elections Act, 2017 and Election Rules, 2017. Notwithstanding exchange of correspondences between Returning Officer and office of Regional Election Commissioner, Election Commission, on 16th February 2024, issued Notification No.F.2(5)/2024-Cord (1), declaring and directing publication of name of respondent No.1 as returned candidate to the National Assembly of Pakistan. Request for recount of votes was entertained, after Notification of 16th February 2024, by Election Commission, purportedly in exercise of jurisdiction under Article 218(3) of the Constitution of Pakistan 1973 ('Constitution'), and other enabling provisions, vide original order [passed on 22.02.2024]. Reasons extended were that it was a fit case for the recount of votes, whereupon Returning Officer was directed to do the needful within one week, upon notice to the parties. In essence, original order is central to the controversy, paragraphs 4 and 5 thereof read as,

"4. The Commission is constituted under Article 218(2) of the Constitution of Islamic Republic of Pakistan and is charged with the duty to organize and conduct elections and to make such arrangements that elections are conducted honestly, justly, fairly and in accordance with law and corrupt practices are guarded against. The Commission after due consideration is of the opinion

that it is a fit case of recounting. Therefore, we in exercise of powers under Article 218(3) of the Constitution of Pakistan 1973 and all other powers enabling in this behalf for free and just decision in the matter order recount and direct the Returning Officer concerned that he shall carry out the recounting of votes of this constituency in the presence of all the parties strictly in accordance with law. Returning Officer is further directed to complete the process of recounting within one week and thereafter result be communicated to this Commission.

5. Relist for 04.03.2024.”

[Emphasis Supplied]

3. It is apprised that pursuant to original order notices dated 25.02.2024 were issued by the Returning Officer to the parties, indicating factum of recounting exercise on 26.02.2024. Recounting was carried out. Respondent No.1 submitted review petition against original order, which, as per statement(s) made at the bar, was withdrawn and instead W.P. No.1333 of 2024/BWP was preferred, which came up for hearing on 26.02.2024, when interim injunction was granted, whereby operation of original order and notice(s) issued were suspended. Record depicts that Returning Officer concluded exercise of recount of votes and submitted report to the Election Commission, in terms whereof appellant secured highest number of votes. Constitutional petition was heard and accepted vide impugned order. Instant appeal is preferred by the appellant, wherein, impugned order was suspended, through interim injunctive order. Election Commission issued Notification dated 22.03.2024, declaring appellant as a returned candidate, and withdrew earlier Notification dated 16.02.2024, declaring it *ab-initio* – effect of subsequently issued Notification was subjected to the outcome of instant Appeal. Respondents are on notice. Appeal is heard at length.

Objection qua maintainability of appeal:

4. At the outset, learned counsels for respondent No.1 pleaded that appeal is not maintainable in terms of proviso to subsection (2) of section 3 of Law Reforms Ordinance, 1972 (referred as “**Ordinance**”) because remedy of review was available before Election Commission, under clause (b) of

Section 8 of the Elections Act, 2017 (“**Elections Act**”). It is alternatively argued that if exercise of jurisdiction, by Election Commission while passing original order, was purportedly claimed to have had exercised under subsection (1) of section 9 of the Elections Act, still remedy of appeal is available before the Hon’ble Supreme Court in terms of subsection (5) of section 9, *ibid*. Following decisions are relied upon, including an unreported decision of Hon’ble Supreme Court of Pakistan passed on 13.03.2024, in C.P.L.A No.1800-L of 2023, titled “National Bank of Pakistan through its President, Head Office, Karachi, etc. v. Muhammad Adeel”, and other cases are reported as “Sonia Raza V. Election Commission of Pakistan and others (2018 CLC 1966), Ejaz Ahmed Sandhu and another V. Election Commission of Pakistan through Chief Election, Commissioner, Islamabad and others (2018 SCMR 1367), Muhammad Mamoon Tarar V. Election Commission of Pakistan and others (2016 CLC 1708), Syed Arif Raza Rizvi V. Messrs Pakistan International Airlines through Chairman/M.D., Karachi (PLD 2001 Supreme Court 182), Bartha Ram V Lala Mehar Lal Bheel and another (1995 SCMR 684), Muhammad Abdullah V. Deputy Settlement Commissioner, Centre-I, Lahore (PLD 1985 Supreme Court 107) and Mst. Karim Bibi and others V. Hussain Bakhsh and another (PLD 1984 Supreme Court 344).

Submissions in support of maintainability:

5. While controverting objection to maintainability, learned counsel for appellant submits that no final / conclusive order was passed by the Returning Officer, who actually failed to decide application for recount of votes. And no remedy of review was available under clause (b) of section 8 of Elections Act, in absence of any order by Returning officer. Adds that order of 22.02.2024 was an interim order, simply directing recount of votes, and Election Commission retained seisin over the *lis*, and proceedings were kept pending for 04.03.2024. Learned counsel emphasized that assumption and exercise of

jurisdiction by the Election Commission stood justified and validated under the scope of subsection (1) of section 9 of Elections Act, and since no final / conclusive order, by way of declaration envisaged, was made therefore, remedy of appeal under subsection (5) of section 9 of Elections Act is also not available - being pre-mature in absence of any conclusive declaration by the Election Commission. While explaining the import and significance of subsection (1) of section 9 of Elections Act, learned counsel states that gross illegalities were found in the process of consolidation of votes, whereby Returning Officer, notwithstanding that the conditions prescribed under sub-section (5) of section 95 of Elections Act were available, had failed to undertake an exercise of recount of votes, which apparent inaction constitutes patent violation of the Elections Act and Election Rules, providing justification for exercise of jurisdiction by the Election Commission.

6. **On Merits;** Learned counsel for the appellant emphasized that non-performance of statutory duty by Returning officer constitutes infraction of gross scale, which was rightly rectified by Election Commission. Explains that application for recount was submitted within the timelines provided in section 95(5) of Elections Act, which fact was acknowledged by the Returning officer while exchanging correspondence(s) with Regional Election Commissioner – refers to report submitted vide letter of 16.02.2024 - text of the correspondences referred were reproduced in paragraph 2 of this decision. Further submits that under section 9(1) of Elections Act, Commission is entitled to undertake summary inquiry, who adds that illegalities committed were apparent on the face of the record and upon satisfying itself, Commission assumed and exercised jurisdiction under subsection (1) of section 9 of Elections Act. It is emphasized that recount of votes can be ordered by the Election Commission even under section 9(1), *ibid*, and outcome of exercise of jurisdiction cannot be restricted to ordering polls void or directing re-

poll(s). Elaborates that, in wake of the failure of the Returning Officer to exercise jurisdiction vested under section 95(5) of the Elections Act, appellant cannot be left remediless, and Election Commission, in the circumstances, had justifiably exercised jurisdiction to ensure fairness and justness in the conduct of elections. Further submits that remedy of constitutional petition was not available to respondent No.1, who could prefer appeal before Hon'ble Supreme Court once conclusive declaration was made by the Election Commission under Section 9(1) of Elections Act. Submits that Court(s) are not competent to call into question legality of any action taken by the Election Commission in good faith – refers to section 236 of the Elections Act.

Arguments on behalf of Election Commission:

7. Learned counsel for the Election Commission defended the original order on the strength of assumption and exercise of jurisdiction in terms of section 9 of the Elections Act, who elaborated that subsection (4) of section 9, *ibid*, confers concurrent jurisdiction unto Election Commission, as available to the Election Tribunal(s), which *inter alia* included power to direct recount of votes. Objects to availing of remedy of judicial review jurisdiction by respondent No.1 on the premise that only appeal could be filed before Hon'ble Supreme Court of Pakistan in terms of subsection (5) of section 9 of Elections Act against the original order. Learned counsel is asked to read original order of 22.02.2024 and explain proximity between original order and incidence of jurisdiction extended under section 9 of the Elections Act and how same was exercisable in wake of specific and timebound remedy of seeking recount under sub-section (6) of section 95 of Elections Act. Learned counsel for the Election Commission failed to persuade us that original order manifests exercise of jurisdiction under section 9 of the Elections Act.

8. **On merits:** Learned counsel for respondent No.1 emphasized that Election Commission had no jurisdiction to order recount of votes once declaration of returned candidate was made in accordance with section 98 of the Elections Act. Adds that no jurisdiction is vested in the Election Commission to direct recount of votes under sub-section (6) of section 95 of the Elections Act after conclusion of consolidation proceedings and dispatch of electoral record by Returning Officer to the Regional office of the Election Commissioner. Adds that mal-intent of the Commission is evident from the conduct demonstrated, in particular when original order was passed without any notice to respondent No.1 – reference is made to the text of original order to show absence of any reference to the presence of respondent No.1 or any of its election agent / representative. Further submits that upon issuance of the Notification of returned candidate on 16th February 2024 there was no justification for ordering recount on 22.02.2024, which conduct is unlawful, contrary to the mandate of law and otherwise denudes Commission's claim of acting justly and fairly. Submits that no remedy was available to respondent No.1 under the Elections Act, against the order of 22.02.2024 and in these circumstances review petition against said order was withdrawn and constitutional petition was filed, wherein precise question was seeking of declaration against exercise of jurisdiction by the Election Commission, not otherwise available or extended under the Elections Act upon lapse of time and happening of an event- declaration of returned candidate.

9. Exercising the right of rebuttal, learned counsel for the appellant contends that respondent No.1 was duly represented at the time of recount of votes on 26.02.2024, before the Returning Officer. Adds that respondent No.1 was aware of the proceedings and order passed by the Election Commission, who opted to file review petition against the order of 22.02.2024 and withdrew it, upon invoking constitutional jurisdiction. Refers

to section 235 of the Elections Act to emphasize that absence of the candidate does not invalidate the act or thing required or authorized by the Act to be done in presence of the candidate. Relied upon the case of Sonia Raza V. Election Commission of Pakistan and others (2018 CLC 1966) in the context of failure of Returning Officer to act accordingly.

10. Both learned counsels respectively placed reliance on the ratio laid down in the case of Zulfiqar Ali Bhatti V. Election Commission of Pakistan and others (Civil Appeal No.142 of 2019 and Civil Petition No.1369 of 2019) by reading various paragraphs, each seeking support from the judgment in its own manner and context.

11. Heard. Record Perused.

12. It is appropriate to examine the scope of relevant provisions of Elections Act while considering the question of maintainability of instant appeal. To facilitate adjudication, sections 8, 9 and 95 of the Elections Act are relevant and reproduced hereunder, which read as,

“Section.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.

Section 9. Power of the Commission to declare a poll void. — (1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll at one or more polling stations or in the whole constituency including implementation of an agreement restraining women from casting their votes, it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in

the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections.

Explanation. — If the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes and may declare, polling at one or more polling stations or election in the whole constituency, void.

(2) *Notwithstanding the powers conferred on it by sub-section (1), the Commission may order filing of complaint under this Act before a court of competent jurisdiction against persons who entered into the agreement referred to in sub-section (1).*

(3) *Notwithstanding the publication of the name of a returned candidate under section 98, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any.*

(4) *While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure.*

(5) **Any person aggrieved by a declaration of the Commission under this section may, within thirty days of the declaration, prefer an appeal to the Supreme Court.**

Section 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 sub-section (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 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".

[Emphasis supplied]

13. **Context of controversy:** Defining context and scope of instant decision is essential to dispel post-decision misconceptions and to insulate parties-in-interest from misconceived assumptions, conjectured inferences and preconceived prejudices in the context of availability of

statutory remedy for bringing election disputes before the Election Tribunal(s) under section 139 of the Elections Act, in line with the mandate of Article 225 of the Constitution.

We are not deciding an “election dispute” nor same, in any manner and to any extent, is subject matter of present adjudication. Fundamentally the question posed for determination is the scope and extent of the jurisdiction vested in the Election Commission, after issuance of Notification of the Returned candidate under section 98 of the Elections Act – context being the specificity of remedy in terms of subsection (6) of section 95 of the Elections Act.

14. Anatomy of submissions made and context thereof need a quick re-cap – to identify self-destructive pleas. Different provisions of Elections Act were, selectively and carefully picked, by each set of the counsels representing the parties, to support respective viewpoint without appreciating scope, relevance and applicability thereof in the context of this case.

Learned counsel for the appellant largely borrowed support from clause (3) of Article 218 of Constitution and enabling provisions of Elections Act and Election Rules, with sharper focus on subsection (1) of section 9 of the Elections Act – when questioned that whether any declaration, as envisaged under referred section 9(1), *ibid*, was made by the Election Commission, learned counsel cautiously emphasized that order of 22.02.2024 [impugned through constitutional petition No.1333of 2024/BWP] was an interlocutory order and Election Commission retained seisin over the proceedings, initiated through application for recount of votes. This argument is ingeniously made to counter objection of maintainability of appeal – because if order of 22.02.2024 was treated as declaration issued under sub-section (1) of section 9 of the Elections Act, then instant appeal is hit by the *proviso* to sub-section (2) of section 3 of the Ordinance – [statutory remedy of appeal was provided under subsection (5) of section 9 of

Elections Act.] And in same breath, learned counsel for the appellant argued that since application for recount of votes, moved by the appellant was not decided by the Returning Officer, therefore, even otherwise remedy of review under clause (b) of section 8 of Elections Act was also not available. And learned counsel for respondent No.1 contested maintainability of the appeal by referring to remedy of review under clause (b) of section 8 and appeal under subsection (5) of section 9 of the Elections Act without appreciating that if remedy under section 9(5) of Elections Act was available, why constitutional petition was filed by respondent No.1 and not appeal was preferred before the Hon'ble Supreme Court of Pakistan, if at all jurisdiction exercised was covered under section 9(1) of Elections Act. Likewise, learned counsel for the Election Commission negated submissions of learned counsel for appellant – who futilely tried to convince us that order of 22.02.2024 was manifestation of exercise of jurisdiction under section 9(1) of Elections Act. Learned counsel attempted to bring order of 22.02.2024 within the scope of powers under subsection (4) of section 9 of Elections Act – overlooking the fact that vide order of 22.02.2024 recount was directed, and neither poll was declared void, nor re-poll ordered.

15. We repeatedly asked counsels representing Election Commission and appellant that under what authority of law / provision of Elections Act, Election Commission could direct recount of votes after declaration of retuned candidate was issued on 16.02.2024, in exercise of powers under section 98 of the Elections Act, learned counsels seek refuge behind subsection (3) of section 9 of the Elections Act and emphasized that notwithstanding the publication of name of returned candidate under section 98 of Elections Act, Commission may exercise powers conferred in terms of subsection (1) before the expiration of sixty days after such publication. Argument manifests conspicuous failure to appreciate scope and extent of powers envisaged under sections 8, 9 and 95 of the Elections

Act, limitations prescribed for exercise of jurisdiction under each provision of law, timeframe provided for invoking variously available remedies and permissible outcome provided with respect to each of the remedy. Learned counsels misconstrued and over-stretched scope of each of the remedy(ies) and extent of jurisdiction, lawfully exercisable by Election Commission. Both learned counsels fail to appreciate ratio settled in the case of 'Zulfikar Ali Bhatti', wherein while dilating upon powers claimed under Article 218(3) of the Constitution, it was observed in paragraph 15 of the decision that,

15 - However, where the law enacted by the Parliament does not cover an unforeseen matter or issue that may arise during the election process, the Election Commission its general power under Article 218(3) of the Constitution in the same manner as all other discretionary powers are exercised, that is, fairly, reasonably and judiciously in accordance with the principles of equity, justice and good conscience.

16. Whether exercise of general power could be claimed in the context of request for recount of votes and especially when process of elections culminated upon publication of the name of returned candidate.

17. Moot question for determination is true character of the order of 22.02.2024 and whether such order could be construed as an order passed in purported exercise of jurisdiction(s) under section 8(b) or section 9(1) of Elections Act. Question of maintainability poses a complex scenario in wake of diverse scope of proceedings envisaged under various provisions of the Elections Act and specific limitations/restraints docketed with each of those provisions – for the purposes of present controversy proceedings under subsection (5) of section 95 of the Elections Act are not in question but proceedings under sub-section (6) of section 95 of the Elections Act. After hearing counsels and perusal of order of 22.02.2024, context of the application requesting Election Commission to direct recount of votes and scope of section 9(1) of the Elections Act, we are convinced that order of 22.02.2024 was not passed in exercise

of jurisdiction under section 9 of Elections Act, reasons being, that firstly, when a specific remedy was provided before Election Commission and opted for seeking recount in terms of subsection (6) of section 95 of Elections Act. And in presence of specific timebound remedy, resort to general powers of Election Commissioner and invocation of jurisdiction under section 9(1) are unwarranted and manifest disregard of Elections Act. And secondly, equally significant, the probable outcome or causation of exercise of jurisdiction under section 9(1) of Elections Act is not a direction, simplicitor, for recount of votes but, subject to the fulfillment of conditions, declaration to declare polls void and ordering of re-poll. In these circumstances, jurisdiction of Election Commission to direct recount of votes cannot be brought within the ambit of section 9 of the Elections Act. There is another anomaly in the submissions of learned counsels for Election Commission and appellant. If power to direct recount is allowed or deemed permissible under section 9(1) of the Elections Act, it implies that such power would be exercised notwithstanding publication of name of returned candidate, till after sixty days of publication of name, which erroneous construction would then render timebound remedy of seeking recount of votes under subsection (6) of section 95 of Elections Act redundant – in terms of subsection (6) of section 95 of the Elections Act Commission could only direct recount of votes before the conclusion of consolidation proceedings and not after conclusion thereof.

Hypothetically speaking, if power of the Election Commission to direct recount of votes is deemed or considered to be covered under section 9(1) of Elections Act, then such construction suggests that the option of seeking recount of votes could be sought even after conclusion of consolidation proceedings, when otherwise the recount of votes under subsection (6) of section 95 of Elections Act could be ordered before the conclusion of consolidation proceedings and not

beyond that. Whether request for recount could be entertained, alternatively by resorting to remedy under section 9(1) of Elections Act? This is an apparent absurdity. Hence, claim of assumption and exercise of jurisdiction by Election Commission, to direct recount of votes by virtue of original order, purportedly under section 9 of Elections Act, is misconceived and is hereby, repelled. In these circumstances, no question of availability of remedy of appeal, under subsection (5) of section 9 of Elections Act against original order arises.

18. Now, we take up the argument made by learned counsel for respondent No.1 that review was available under clause (b) of section 8 of the Elections Act, hence, instant appeal is not maintainable. In the first instance, learned counsel fails to convince us that order of 22.02.2024 manifests exercise of jurisdiction under section 8(b), *ibid* or proximity thereof to proceedings under subsection (5) of section 95 of Elections Act. Argument is rejected on two counts. Firstly, remedy(ies) provided in law for seeking recount of votes are diverse, one is before the Returning officer – explicitly in terms of subsection (5) of section 95 of the Elections Act – and other before the Election Commission under subsection (6) of section 95 of the Elections Act. Both remedies are independent, mutually exclusive and each exercisable in the context of the timelines prescribed, for the purposes of filing application and making of requisite direction. Evidently, application under subsection (5) of section 95 of the Elections Act can be filed with Returning officer, before the commencement of consolidation proceedings and application before Election Commission, in terms of subsection (6) of section 95 of the Elections Act, could, at best, be submitted before the conclusion of consolidation proceedings – since the discretion to decide such application ceases upon conclusion of consolidation. Secondly, perusal of application with Election Commission depicts that neither appellant had questioned alleged inaction on the part of

Returning officer nor challenged decision of Returning officer, who had dismissed application on 10.02.2024, claimed to be received after dispatch of electoral material to Regional office of Election Commissioner - appellant's case before us that no order was passed by the Returning Officer for recount in exercise of jurisdiction under sub-section (5) of section 95 of the Elections Act. For all intent and purposes application moved by appellant before Election Commission, on 11.02.2024, was simplicitor request for recount of the votes, which proceedings are separate, independent and no remedy is available against any order passed by the Commission. Respondent No.1 fails to substantiate that application for recount of votes to the Election Commission was in fact an application seeking review of the order of the officer in terms of section 8(b) of Elections Act or said proceedings otherwise fall within the ambit of section 8 of Elections Act. This particular feature of the case distinguishes it from the case of SONIA RAZA (supra), wherein order of Returning officer, passed under subsection (5) of section 95 of Elections Act, was successfully challenged through the constitutional provision and question of maintainability of appeal arose in that context – which proceedings are distinct from proceedings subject matter of challenge before learned Single Judge in Chambers – arising out of subsection (6) of section 95 of Elections Act.

19. There is another angle to this debate of maintainability of the appeal in the context of jurisdiction of the Election Commission to review the order of the Returning Officer under clause (b) of section 8 of the Elections Act. If the intention of the legislature was to subject proceedings of consolidation by providing remedy of review against the order of the Returning Officer – perceived interpretation of learned counsel for respondent No.1 – then some restraint on conclusion of consolidation by the Returning officer had to be provided to dilute the effect and mandate of sub-section (8) of section 95 of the Elections Act - which mandated the Returning Officer to

send to the Commission signed copies of the Consolidated Statement of the Results of the Count and Final Consolidation Result along other material, as specified therein, within twenty four hours after the consolidation proceedings. Even otherwise section 8 of Elections Act starts with the phrase ‘*save as otherwise provided, the Commission may....*’’, which suggests that assumption and exercise of jurisdiction by Election Commission under subsection (6) of section 95 of the Elections Act is unaffected by section 8 of Elections Act. In the case of SONIA RAZA (supra) protection extended to other provision of law under section 8 of the Elections Act was not appreciated, which aspect was dealt with in the case of ‘Zulfikar Ali Bhatti’, which relied upon the case of Bartha Ram V. Lala Mehar Lal Bheel and another (1995 SCMR 684) while explaining the import of “save as otherwise provided”. [Paragraph 18 is relevant] and is reproduced hereunder:-

“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”.

There is another aspect. If Election Commission cannot pass order of recount after conclusion of consolidation, how could it review the order, if any passed by Returning Officer under sub-section (5) of Section 95 of Elections Act. Even otherwise Section 8 extends general power to the Commission for ensuring fair elections. There appears no statutory bar on the Returning Officer to wait for the outcome of application, moved with the Election Commission for seeking review of the order of Returning Officer, unless and if so, restrained by the

Election Commission. In this case even the application for recount with Election Commission was submitted after conclusion of consolidation proceedings. It is otherwise an absolute absurdity to assume and construe that power of recount could be exercised, be it the Returning Officer or Election Commission once consolidation of votes was completed – upon issuance of Form-49 – when electoral documents were dispatched to the Commissioner and notification for declaration of returned candidate was made under section 98 of the Elections Act. At that point in time, Election Commission, for the purposes of directing recount of votes, became divested of jurisdiction, otherwise available for recount of votes before the completion of consolidation proceedings. Hence, for the purposes of deciding the question of maintainability of appeal, we hold that proceedings, upon request for recount of votes, before the Election Commission were exclusively for seeking of recount of votes, having no bearing or connection with proceedings under section 8(b) of Elections Act.

20. In view of this narrative, we reject the objection of maintainability of appeal on the premise that constitutional petition has actually arisen out of proceedings – under sub-section (6) of section 95 of the Elections Act 2017 – which proceedings provided for no appeal, revision or review to any Court, Tribunal or Authority against the Original Order – being the order of 22.02.2024.

21. Learned counsel for appellant has repeatedly referred to and read portions from correspondence(s) exchanged between Returning officer and Regional office of the Election Commissioner, we find lot many contradictions therein – Returning Officer in letter of 10.02.2024 alleged that at the time of receipt of application electoral record of constituency NA-154 had already been handed over to the office of Regional Election Commissioner, who took contrary stand exactly after six days, while submitting report dated 16.02.2024, where Returning officer spoke of receiving application before

consolidation. We are unable to lay hands on any material that what prompted Returning officer to take summersault and rebut itself. It is otherwise evident that Returning Officer had dismissed application on 10.02.2024, observing that it was not maintainable because application for recount was filed after the commencement of consolidation proceedings. This dichotomy, which otherwise give rise to factual controversy, need not to be resolved since we are not deciding an election dispute, which is the domain of the Election Tribunal.

22. Now we discuss the merits of appeal in the context of jurisdictional question raised. Both learned counsels have read and relied upon ratio settled in the case of 'Zulfikar Ali Bhatti'. There is no cavil that decision in the case of 'Zulfikar Ali Bhatti' primarily dealt with the order of the Commission, ordering re-poll – passed in exercise of jurisdiction under section 9(1) of the Elections Act and that issue has no commonality with the present matter. Besides other issues, the judgment in the case of 'Zulfikar Ali Bhatti' emphatically settled scope of exercise of jurisdiction by the Election Commission after declaration of returned candidate(s), which observations were made in the context of powers claimed by Election Commission under Article 218(3) of the Constitution and section 8 (c) of Elections Act – paragraphs 19 and 20 of the judgment in the case of 'Zulfikar Ali Bhatti' are relevant for exposing misplaced reliance of the Election Commission on Article 218(3), *ibid*, while directing recount through order of 22.02.2024. Paragraphs 19 and 20 of the case of Zulfiqar Ali Bhatti (*supra*) are reproduced hereunder:-

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.

Applicability of Article 218(3) of the Constitution and Section 8(c) of the Elections Act to the present case

*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. *But as the notification of the appellant as a returned candidate had been issued under the interim order of this Court, the same could not have concluded the election process to create a bar 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. The objection that the Election Commission exercised its power in the present case after the completion of the election process is, therefore, not sustainable.”*

[Emphasis supplied]

[*This is where facts and circumstances differ, because in the case of Zulfiqar Ali Bhatti notification was made on the direction of the court and in the case at hand it was issued by the Election Commission in discharge of obligations under section 98 of Elections Act.]

23. Case of Zulfiqar Ali Bhatti had affirmed illegality of any order of recount after publication of name of returned candidate under section 98 of Elections Act. We are constrained to observe that conduct of the Election Commission is mindboggling, which acknowledged factum of filing of application for the recount after conclusion of consolidation proceedings and proceeded to act as per the mandate of section 98 of the Elections Act, and directed for publication of name of respondent No.1 as returned candidate through Notification on 16.02.2024, thereafter made U-turn and, without ensuring sending of notice / intimation to respondent No.1 proceeded to allow application for recount, passed order of 22.02.2024. This volte-face exposes questionable conduct, besides being grossly violative of the mandate of Elections Law, *per se*. In brief, learned counsels for appellant and Election Commission failed to convince us that direction for recount of votes could be

passed once consolidation proceedings had concluded and declaration of returned candidate had been made under section 98 of the Elections Act.

24. We concur with legal findings recorded in the impugned order, that in view of the facts and circumstances of instant matter, Election Commission erred in law while assuming and exercising jurisdiction, and directing recount of votes after conclusion of consolidation proceedings in violation of subsection (6) of section 95 of the Elections Act. Hence, we declare that assumption of jurisdiction, act of passing of original order and to withdraw the Notification dated 16.02.2024, – issued to declare respondent No.1 as returned candidate and directing for publishing of his name, – after conclusion of consolidation proceedings were without any lawful authority. No illegality is shown or pointed out in the impugned order, calling for indulgence as appellate court.

25. In view of aforesaid, this Intra Court Appeal is, hereby, **dismissed**, order of learned Single Judge-in-Chambers is affirmed, in light of the reasoning narrated hereinabove, and as an effect thereof, conditional Notification, dated 22.03.2024, is rendered ineffective and of no legal effect and Notification dated 16.02.2024 stands resurrected / effective, for all intent and purposes. Any observation made herein is solely for the purpose of deciding appeal and same would not prejudice the right of any party to invoke jurisdiction of the Election Tribunal, qua any election dispute.

(Muzamil Akhtar Shabir)
Judge

(Asim Hafeez)
Judge

Imran/*

Approved for reporting.

Judge

Judge