

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.28985 of 2024

Salman Akram Raja

Versus

Election Commission of Pakistan through Chief Election Commissioner & others

JUDGMENT

Date of Hearing.	27-05-2024
PETITIONERS BY:	Mr. Sameer Khosa and Ms. Momal Malik, Advocates.
RESPONDENTS BY:	Mr. Asad Ali Bajwa, D.A.G. Mr. Sikandar Bashir Mahmood, Advocate for respondent-ECP with Mr. Khurram Shahzad, Addl. D.G Law, Mr. Haroon Kasi, Director (Law), Ms. Bushra Rasheed, Deputy Director (Law and Mr. Imran Arif Ranjha, Advocate, Legal Advisor for ECP.

Shahid Karim, J:-. The question at the heart of these constitutional petitions (**W.P No.28985 of 2024 & W.P No.31120 of 2024**) critically interrogates the meaning of section 140 of the Elections Act, 2017 (“the Act”).

2. The narration of facts would lend actuality to the analysis. The general elections to the National and Provincial Assemblies were held on 8th of February, 2024. On 14th of February, 2024 the Election Commission of Pakistan (ECP) wrote a letter to all the High Courts through the Registrars with the following request:

“I am directed to draw your attention to Section-140 of the Elections Act, 2017 and to request that the matter may be placed before the Hon’ble Chief Justice with the request for the provisions of a list of Honourable serving Judges of the Hon’ble High Courts for their appointment as Election Tribunals for hearing & decision of election petitions filed under Section 139 of the Election Act, 2017. It is also requested that a panel of Hon’ble serving Judges may be provided for the appointment of required number of Election Tribunals by the Commission at the principle seat and benches of the Hon’ble High Courts”

3. The letter set out above makes a request to Honourable Chief Justices of the four provincial High Courts “for the provision of a list of honorable serving Judges of the High Courts for their appointment as Election Tribunals”. Further that “it is also requested that a panel of honorable serving Judges may be provided for the appointment of required number of Election Tribunals by the Commission at the Principal Seat and the Benches of the honorable High Courts”. The letter does not spell out the required number of Election Tribunals which, in the estimation of ECP, were necessary to be appointed for different provinces to decide election petitions filed under Section 139 of the Act. In the context of the Lahore High Court (LHC), the Hon’ble Chief Justice nominated two Honourable Judges for disposal of election petitions vide letter dated 20th of February, 2024. These were notified by ECP on 20.02.2024 without demur. It will be noted that ECP did so on the recommendations of the Chief Justice and proceeded to appoint the two Judges to act as Election Tribunals. There was no further communication by ECP to its request made on 14.02.2024 for a panel of Judges to be provided for being appointed as Election Tribunals. By notification dated 7.3.2024 the Registrar of Lahore High Court assigned the areas to the Election Tribunals for the trial and disposal of election petitions. In respect of Principal Seat and Rawalpindi Bench, a Judge was assigned the territorial jurisdiction to adjudicate and decide the election petitions.

4. On 4.4.2024 another letter was addressed by the Registrar Lahore High Court to the Joint Provincial Election

Commissioner at Lahore regarding appointment of Election Tribunals in addition of the two Election Tribunals appointed vide notification dated 20.02.2024. Six Judges of Lahore High Court were nominated by the Chief Justice for their appointment as Election Tribunals. The areas of their jurisdiction were also mentioned in this letter regarding disposal of election petitions at the Principal Seat and Benches. ECP did not act on the letter of 4.4.2024 until 26.04.2024 when it proceeded to appoint two further Election Tribunals out of the six names in the letter of 4.4.2024. In the Notification of 26.04.2024 the territorial jurisdiction of the Election Tribunals so appointed was also determined by ECP. On the same date, that is, 26.04.2024 ECP addressed a letter to the Registrar Lahore High Court intimating regarding Notification of the Judges to act as Election Tribunals. Apart from varying the territorial jurisdiction assigned to these Judges from the one which was proposed by the Chief Justice (as also notified on 07.03.2024 by LHC), ECP made further request to the Chief Justice to "**provide panel of honourable sitting Judges to the Election Commission of Pakistan for their appointment as Election Tribunals for the trial and disposal of election petitions pertaining to National/ Provincial Assemblies' Constituencies of the Rawalpindi and Bahawalpur Divisions**". Thus, ECP not only declined to nominate the names recommended by Chief Justice in full but also unilaterally changed their territorial jurisdiction regarding trial and disposal of election petitions. Therefore, only two Judges out of the six nominated by the Chief

Justice Lahore High Court were notified as Election Tribunals by ECP. Simultaneously, a request was made for a panel of sitting Judges of Lahore High Court to be provided to ECP for their appointment as Election Tribunals. This aspect of the matter was one of the main planks of challenge by the learned counsel for the petitioners.

5. The letter of 26.04.2024 was responded to by Registrar Lahore High Court and the following observations are set out below:

“...Moreover, as per our record, no such precedent is found where Election Commission of Pakistan demanded such ‘panel’ in the past and the same was provided by this Court. You are therefore, required to provide any past practice/precedent whereby in General Elections or Bye-Elections, any such ‘panel’ was specifically required and also insisted upon by the Election Commission of Pakistan and the same was provided by this Court. Your response in this regard is required within two days positively to avoid any further unnecessary delay in this matter.”

6. In a nub, the Registrar who without a shadow of doubt acted on behalf of the Chief Justice Lahore High Court, stated that no criteria had been mentioned in the Notification of 26.04.2024 on the basis of which two Judges out of the six Judges of the Court had been appointed as Election Tribunals. It was made clear that there was no lawful basis for a panel of Judges to be provided to ECP for appointment as Election Tribunals. Lastly, a reference was made to the large number of election petitions which were required to be decided and that the number of Election Tribunals did not commensurate with the number of election matters which were brought before Lahore High Court. This letter was replied on 6.5.2024 containing ECP’s countervailing argument regarding provision of a panel of sitting Judges to

be a *sine qua non* for the process of meaningful consultation to take place. While this correspondence was being exchanged between ECP and Lahore High Court, on 09.05.2024 the following Notification was issued:

"In continuation of this Commission's earlier notification of even number dated 26th April 2024 and in pursuance of the provisions of Section 140 of the Elections Act, 2017, the Election Commission of Pakistan has been pleased to further notify that the Election Petitions pertaining to the National/ Provincial Assembly Constituencies of Rawalpindi and Bahawalpur Divisions, shall be tried and heard by the already notified Election Tribunals, at Lahore and Multan respectively, as were notified vide notification No.20 T & Coord. Dated 07-03-2024 of Lahore High Court, Lahore. i.e Election Petitions pertaining to the constituency of Rawalpindi division to Mr. Justice Sultan Tanveer Ahmad and Election Petitions of the constituencies of Multan and Bahawalpur divisions to Mr. Justice Sardar Muhammad Sarfraz Dogar, in addition to their already assigned areas, with immediate effect and till further orders by the Commission."

7. The Notification set out above assigned the election petitions relating to National/ Provincial Assemblies' constituencies of Rawalpindi and Bahawalpur Divisions to be tried and heard by the already notified Election Tribunals on 7.3.2024. Once again, a letter was written to the Secretary ECP by the Registrar Lahore High Court rebutting the stated position of ECP regarding a panel of Judges to be provided and questioned the observations that such a panel was recommended in the past for ECP to consider and appoint Election Tribunals at its whim and choice. Further response was given on 16.05.2024 by ECP.

8. It can be culled out from the narration of facts brought forth above that ECP and the Hon'ble Chief Justice Lahore High Court have been engaged in a consultative process and it is common ground between the parties that consultation has been taking place between the two and it cannot be

contended that the process of consultation has been absent in the entire process of appointment of Election Tribunals. Thus, the issue relating to consultation or lack of it would not exercise any gravitational pull and the only question that now remains to be decided by this Court is whether the consultation should be construed in such a manner that paramountcy is given to the nominations made by the Chief Justice. This further begs the question whether ECP has the discretion in the matter to take a stance contrary to the nominations made by the Chief Justice and not only appoint Judges of its own choosing as Election Tribunals as also proceed to assign them areas of jurisdiction within which they shall try and decide election petitions.

9. Learned counsel for ECP raised three threshold objections which will be dealt with at the outset.

10. The first relates to the hearing of these petitions by this Bench as one of the names nominated by the Chief Justice as Election Tribunals comprised this Bench as well. This objection should receive a short shrift. The issue engaged in these petitions is a matter of public importance and does not relate to my private matters nor do I derive any personal benefits so as to attract the doctrine of recusal and bias. At best, the Chief Justice may choose to withdraw my name as the nominated Election Tribunal on the ground that I have heard these petitions. Further any of the parties to this litigation may raise their objections to the hearing of election petitions if these are fixed before the Election Tribunal comprising this Bench and if at all such a situation arises. In

any case, the learned counsel to his credit made a flanking rather than a frontal attack on the basis of this objection.

11. The second objection relates to the standing of one of the petitioners Mr. Salman Akram Raja to file and maintain his petition as an Election Tribunal has already been nominated and notified for the adjudication of election petitions at the principal seat. There is no contention that the said petitioner does not have a right to the hearing of his election petition by a particular Election Tribunal and this would be within the discretion of the Hon'ble Chief Justice in accordance with the areas assigned to different Election Tribunals.

12. The third objection relates to passing of an order under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 (“**the Constitution**”) in respect of the acts of the High Court which are judicial or administrative in nature. This was argued on the basis of a judgment of the Supreme Court of Pakistan reported as Gul Taiz Khan Marwat v. The Registrar, Peshawar High Court (PLD 2021 Supreme Court 391) which prohibits the filing of a constitutional petition in respect of actions taken by a High Court whether in its judicial or administrative capacity and it was laid down that no directions under Article 199 of the Constitution could be issued to a Judge of the High Court in both capacities. There can be no dispute regarding the holding of the Supreme Court in the case referred by learned counsel for ECP but the precedent has no relevance to the facts of present cases. Here, the Court is engaged in the construction of section 140 of the Act and the refusal of ECP

to act upon the nominations made by the Hon'ble Chief Justice Lahore High Court. These are two materially distinct propositions and one cannot be confused with the other. In essence, the actions of ECP are under challenge and upon which this Court will render its ruling. ECP is a person performing functions in connection with the affairs of the Federation and so is caught by the jurisdiction of this Court.

13. Learned counsel for the petitioners based his arguments on the concepts of independence of judiciary and the absence of any requirement in law as well as the Constitution for a panel of Judges to be sent to ECP for their appointment as Election Tribunals.

14. Section 140 of the Act provides that:

“140. Appointment of Election Tribunals.— (1) For the trial of election petitions under this Act, the Commission shall appoint as many Election Tribunals as may be necessary for swift disposal of election petitions.

(2) An Election Tribunal shall comprise—

(a) in the case of an election to an Assembly or the Senate, a person who is or has been a Judge of a High Court; and

(b) in the case of an election to a local government, a District and Sessions Judge or an Additional District and Sessions Judge.

(3) The Commission shall appoint a sitting judge as Election Tribunal in consultation with the Chief Justice of the High Court concerned.”

15. Section 140 requires unpacking in order to arrive at the true construction to be given to this provision and in particular sub-section (3). The appointment of Election Tribunals is a power conferred upon ECP by section 140 and there is no cavil with this argument. The arguments in this Court on behalf of ECP centered on the word “appoint”

from which it was sought to be deduced by the learned counsel that the entire discretion to appoint an Election Tribunal would vest in ECP to the exclusion of all others and this must be read as conferring primacy in the matter on the acts of ECP and thus the Chief Justice Lahore High Court has misconstrued that the nominations so made must be notified and appointed. This argument is remarkably cramped and would have the effect of nullifying the effect of sub-section (3) of section 140 of the Act. In order to render a harmonious interpretation the entire section 140 will have to be read holistically.

16. In my opinion, sub-section (3) refers to a stage prior to appointment of Election Tribunals by ECP and that stage contemplates the appointment of a sitting Judge as Election Tribunal in consultation with the Chief Justice of the High Court concerned. Therefore, the consultative process has to precede the appointment to be made by ECP. This brings us to the next question as to what precisely is meant by consultation with the Chief Justice of the High Court concerned.

17. The word “consultation” has received judicial interpretation in the seminal case of Al-Jehad Trust through Raeesul Mujahideen Habib-ul-Wahab-ul-Khairi and others v. Federation of Pakistan and others (PLD 1996 Supreme Court 324). It is presumed that the Parliament was aware of the interpretation put on the word ‘consultation’ by the superior courts and in particular by the Supreme Court of Pakistan in Al-Jehad Trust. By now, the term ‘consultation’ has morphed into a term of art and use of this term has a

definite and precise meaning which has to be attributed to it in the context of Al-Jehad Trust case. Not only that the Parliament is presumed to be aware of it but also ECP must have a fair idea of what is meant by the Parliament when it uses the term ‘consultation’ in any statutory instrument. This is also a canon of construction vouched by authority.

18. This canon of interpretation has been described as prior-construction canon in *Reading Law: The Interpretation of Legal Texts* by Antonin Scalia and Bryan A. Garner. It states the rule as follows:

“If a statute uses words or phrases that have already received authoritative construction by the jurisdiction’s court of last resort, or even uniform construction by inferior courts or a responsible administrative agency, they are to be understood according to that construction.”

While stating the rule, the treatise relied upon *Shapiro v. United States* 335 U.S. 1, 16 (1948) (per Vinson, C.J) which held that:

“In adopting the language used in the earlier act, Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment.”

In England, the prior-construction canon is called “the rule of Ex-parte Campbell” after an 1870 case [1870] L.R. 5 Ch. App. 703. in which Lord Justice James declared:

“Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them.”

This rule has been relied upon by our courts, too.

19. In Al-Jehad Trust, the following question was formulated:

"For the present the most important and pivotal question for consideration is the concept of "consultation" provided in the Constitution for the appointment of the Judges as mentioned in the Articles 177 and 193 thereof. More thought? provoking question is whether the "consultation" envisaged in the Constitution in respect of appointment of the Judges is institutionalised, participatory and binding or mere a formality.

20. By way of historical facts, it may be stated that Articles 177 and 193 of the Constitution, were materially different prior to the amendments made through the Constitution (Eighteenth Amendment) Act, 2010. Priorly, the President appointed the Judges to the superior courts in consultation with the Chief Justice of Pakistan and the Governor of the Province. The issue fell for determination before the Supreme Court of Pakistan in Al-Jehad Trust as to whether there was in fact consultation between the President and the consultees and also what was the status of consultation and the views in consequence thereof of the Chief Justice of Pakistan with regard to the question of appointment. After framing the question set out above the Supreme Court of Pakistan went on to deal with the issue by stating that:

"Consultation" in the scheme as envisaged in the Constitution is supposed to be effective, meaningful, purposive, consensus-oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and Chief Justice of a High Court as to the fitness and suitability of a candidate for judgeship?? is entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President/Executive.

81. If the Chief Justice of the High Court and the Chief Justice of Pakistan are of the opinion that a particular candidate is not fit and capable to be appointed as Judge of the High Court, then acting against the expert opinion would not be proper exercise of power to appoint him as a Judge on the ground that the President/Executive has final say in the matter. It is not correct interpretation to say that because word "consultation" is used, which is different from 'consent', opinion of Chief Justice can be ignored...

82. We are interpreting the word 'consultation' to widen and enlarge its normal scope for the reasons, firstly, that

the Constitution-makers have not debated this word 'consultation' and fixed its parameters. Secondly, we would like to assign meaning to 'consultation', which is consistent and commensurate with the exalted position of Judiciary as is envisaged in Islam. Thirdly, we would like to give positive interpretation to 'consultation' which promotes independence of Judiciary. Executive may have the last word and may issue notification of appointment, but cannot give loose interpretation to the word 'consultation' to ignore or brush aside expert opinion of Chief Justice of the High Court and the Chief Justice of Pakistan. Fourthly, the President is administered oath by the Chief Justice of Pakistan as required under Article 42 of the Constitution and the Chief Justice of Pakistan administers oath to other Judges of the Supreme Court and Chief Justice of Province administers oath to Judges of his High Court as contemplated under Articles 178 and 194 respectively, which shows that both the Chief Justices are tends of their institutions and their opinion in their own field of expertise should not be treated lightly particularly when they are Constitutional consultees and the appointments are also being made of the Judges within the Constitutional scheme.

21. It was held that the consultation has to be effective, meaningful and purposive. More importantly, the Supreme Court clearly stated that the opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to the fitness and suitability of a candidate for being appointed as a Judge was entitled to be accepted in the absence of very sound reasons to be recorded in writing by the President/Executive. Moreover, the opinion of the Chief Justice could not be ignored and this was evident from the use of the word "consultation". This was held notwithstanding the fact that the power to appoint vested in the President and this aspect on which much emphasis was laid by learned counsel for ECP was squarely dealt with in Al-Jehad Trust while holding that though the Executive may have the last word and may issue Notification of appointment, but this had to give way to the interpretation regarding the word 'consultation' put by the Supreme Court and cannot ignore the opinion of the Chief Justice of

Pakistan or the High Court as the case may be. In conclusion, it was held that:

"(i) The words "after consultation" employed inter alia in Articles 177 and 193 of the Constitution connote that the consultation should be? effective, meaningful, purposive, consensus oriented, leaving no room for complaint of arbitrariness or unfair play. The opinion of the Chief Justice of Pakistan and the Chief Justice of a High Court as to-the fitness and suitability of a candidate for judgeship is entitled to be accepted in the absence of very sound reasons to be recorded by the President/Executive.

(ii) That if the President/Executive appoints a candidate found to be unfit and unsuitable for judgeship by the Chief Justice of Pakistan and the Chief Justice of the High Court concerned, it will not be a proper exercise of power under the relevant Article of the Constitution.

(xiii)That since consultation for the appointment/confirmation of a Judge of a Superior Court by the President/Executive with consultees mentioned in the relevant Articles of the Constitution is mandatory any appointment/confirmation made without consulting any of the consultees as interpreted above would be violative of the Constitution and, therefore, would be invalid.

22. Ajmal Mian, J. also alluded to the undisputed position that act of appointing of a Chief Justice or a Judge in the superior courts is an executive act. But went on to agree with the conclusions drawn by the Chief Justice in Al-Jehad Trust that the views of the Chief Justice of the High Court concerned and the Chief Justice of Pakistan cannot be rejected for extraneous considerations and if the executive wished to disagree it had to record strong reasons which will be justiciable. Further another crucial aspect was flagged. It was that if the Chief Justice of the High Court concerned and the Chief Justice of Pakistan did not find a person fit to be appointed as a Judge of a High Court that person cannot be appointed as it will not be a proper exercise of power to appoint under the Articles of the Constitution.

23. Learned counsel for ECP contended that this case was in the paradigm of appointment of Judges to the superior courts. This is an erroneous view of Al-Jehad Trust and the interpretation put on the word ‘consultation’ was intended to apply in all matters where the word was used in all future statutory instruments. Such a contention would offend the intention of the legislature as well while enacting subsection (3) of section 140 of the Act while using the word ‘consultation’ which has become a well-worn term over the years since its exposition in Al-Jehad Trust. Likewise, ECP’s view on the issue is a misdirection of law which feeds through the rest of the decision-making process.

24. We now advert to Sh. Ria ul Haq and another v. Federation of Pakistan through Ministry of Law and others (PLD 2013 Supreme Court 501) in which the Supreme Court not only reaffirmed the rule but was more emphatic in its application. It said that:

“58. On having discussed the cases supra it is concluded that Service Tribunals (Federal and Provincial) falling in the category of Court capable to exercise judicial powers are bound to follow the principle of independence judiciary for the purpose of ensuring enforcement of fundamental rights of access to justice under Article 9 of the Constitution, thus, are required to be separated from the Executive under Article 175(3) of the Constitution. These listed constitutional objects ought to have been redressed by the Legislature in making suitable amendments in the law governing the Tribunals and the rules framed thereunder to the extent as noted hereinabove, any of the provisions of the law contrary to the fundamental and constitutional provisions if any.

59. To make the Chairman and the Members of the Service Tribunal independent, it is necessary to make their appointment with the meaningful consultation of the Chief Justice i.e. for the purpose of Federal Service Tribunal, with the Chief Justice of Pakistan and for Provincial Service Tribunals, with the Chief Justice of the respective High Court. It is to be noted that compliance of such condition seems to be necessary, because if the Chairman has to be appointed amongst the sitting Judges of a High Court, without consent of the Chief Justice, judicially and

administratively, no Judge of the High Court can relinquish the post of Judge of High Court without the approval of the concerned Chief Justice as he has to discharge his function as a Judge of High Court under the administrative control of the Chief Justice. Similarly, a person qualified to be the Judge of High Court, either a District Judge or an advocate, has to be appointed with the meaningful consultation of the Chief Justice of the High Court because the District Judge, if is allowed to hold the charge of Provincial Service Tribunal, can only be released, if permission is granted by the Chief Justice. As far as the appointment of an advocate who is qualified to be the Chairman of a Tribunal or the Member is concerned, his performance or capability can only be evaluated during the period when he had been practicing law because a person who had obtained enrollment but had never appeared before the High Court or Supreme Court cannot claim to have legal experience.

60. *As far as a sitting Judge of the High Court acting as Chairman of the tribunal is concerned, there is no difficulty in determining the tenure during which he shall hold the charge in addition to his own functions, simultaneously performing as a Judge of the High Court and the Chairman of the Tribunal. Preferably, it would be appropriate and in the interest of institution if a sitting Judge is not asked to perform his duties as Chairman of a Federal or Provincial Service Tribunals. However, appointments for the position of Chairman can conveniently be made from amongst the Judges who had been a Judge of the High Court. If a retired Judge of the High Court is to be appointed as Chairman of the Tribunal, selection should be made in consultation with the Chief Justice of the High Court in the case of a Provincial Service Tribunal and in consultation with the Chief Justice of Pakistan in the case of Federal Service Tribunal, who may nominate a retired Judge... “*

Therefore, the Executive cannot be allowed to interfere in the process of appointment of such important functionaries of Tribunals i.e. Chairman, who is required to be appointed independently because while discharging its functions the tribunal does not act as an executive body rather performs judicial functions. If such a body/tribunal is not in a position to enforce Fundamental Rights, including the right to have access to justice because of the reason that when the appointments have to be made, they remain at the mercy of the executive, which is itself a litigant party in most of the cases before the Tribunal, and no hope can be pinned on such a tribunal to discharge its functions independently.”

25. Firstly, such Tribunals were held as courts exercising judicial functions. Secondly, the consultation with Chief Justice and its binding nature was tied in with the fundamental right of access to justice. Thirdly, sound reasons were given for conferring primacy to the Chief

Justice's word. This precedent settles the cardinal feature of independence of judiciary in all such matters.

26. We will now apply the exposition of the word 'consultation' made in Al-Jehad Trust to the facts of the present petitions. There is a cluster of missive referred to above (and regarding which the parties are on common ground). It is evident that ECP and Chief Justice Lahore High Court engaged in a meaningful consultation which had a purpose. But the fact remains that the Chief Justice Lahore High Court through the Registrar was categoric in assertion of the primacy attached to the nominations made by Chief Justice of a High Court in such matters.

27. At the time of appointment of the Election Tribunals initially on 20.02.2024 no further correspondence was exchanged with the LHC for appointment of more Election Tribunals and the two Honourable Judges who were recommended for being appointed were so appointed as Election Tribunals by ECP. This is despite the fact that on 15.02.2024 a letter had been written by ECP to the Chief Justice Lahore High Court for nomination of nine sitting Judges for their appointment as Election Tribunals. ECP sat in a state of inertia in the matter until the letter of 4.4.2024 written by the Registrar to ECP nominating six more Judges to be appointed as Election Tribunals. It is evident from the letter of 4.4.2024 that it was merely nominating more Judges on the request made earlier by ECP on 15.02.2024. Once again, ECP did not act promptly and a Notification was issued on 26.04.2024. Through this Notification, ECP without any rhyme or reason, selected two Judges from the

six nominated by Lahore High Court and assigned them their areas of jurisdiction as well. Thus, ECP not only chose to ignore the nominations made by Lahore High Court but also conferred jurisdiction upon the Election Tribunals. This was in sharp contrast to the Notification earlier issued on 7.3.2024 by the Registrar Lahore High Court whereby Lahore High Court had assigned areas to the Election Tribunals for the trial and disposal of election petitions. Once ECP had accepted the power of Lahore High Court to assign areas to Election Tribunals in the case of the Notification dated 7.3.2024, it was unreasonable and irrational on the part of ECP to have usurped that power and confer it upon itself to assign the areas within which the Election Tribunals shall perform their duties. Further a letter was addressed on 26.04.2024 which required the Chief Justice Lahore High Court to provide a panel of Judges for their appointment as Election Tribunals. Since a stalemate had admittedly set in the consultation process, ECP took upon itself and assumed the power to assign areas to Election Tribunals while insisting upon a panel of Judges to be provided for their appointment as Election Tribunals. This puts paid to the argument of ECP that consultation is ongoing. In fact the parties have arrived at an impasse. The act of ECP in insisting upon a panel of Judges to be provided not only does not have a legal basis but also creates an unsavory situation. As the statutory wording makes clear, the only condition that the law prescribes is for consultation to be held and not that ECP can assume a dominant position to claim preeminence in the matter. It

does not empower ECP to carve out procedures of its own choosing. This cannot be permitted to be read in section 140(3) and such a wide margin of judgment cannot be afforded to ECP. There is no reasonable and intelligible criteria on the basis of which ECP has selected two Judges out of six nominated by the Chief Justice and has refused to nominate the other four Judges as Election Tribunals. This would have been permissible had ECP conveyed its intention to appoint lesser Election Tribunals than the nine initially recommended for appointment and it had been conveyed to the Registrar Lahore High Court that this would constitute sufficient numbers to deal with and decide election petitions. On the contrary, ECP while appointing two Judges out of six nominated by the Chief Justice, **went on to insist that a panel of Judges be provided for their appointment as Election Tribunals for the trial and disposal of the election petitions pertaining to National/ Provincial Assemblies constituencies of Rawalpindi and Bahawalpur Divisions.** The clear implication was that four other Judges nominated by the Hon'ble Chief Justice did not find favour with ECP for reasons best known to ECP and so the insistence on a further panel of Honourable Judges from which ECP could pick and choose for being appointed as Election Tribunals. This is impermissible to ECP and cannot be countenanced. We must bear in mind that we are concerned with sitting Judge of LHC and ECP is not tasked with determining their fitness and suitability (as in case of Al-Jehad Trust). Thus ECP has no power at all to pick and choose Judges out of a panel which suits its cause. This is

not only offensive but strikes at the concept of judicial integrity and comity. It is egregious and harmful to independence of judiciary and is an expression of lack of trust in the discretion exercised by the Hon'ble Chief Justice. It needs to be clarified here that the position in Al-Jehad Trust that requires reasons to be given in case of dissent by the executive does not apply here for the simple reason that ECP is not competent to proffer any comments on the integrity of a sitting Judge. This is impermissible to ECP.

28. At this juncture, the conduct of ECP comes into sharp focus. In respect of other High Courts, ECP has demonstrated a deference to their judgment. The dissent and insistence on extraneous considerations is peculiar to Punjab. Cloaked in the layers of missive exchanged with LHC, an unmistakable partisan slant is palpable which does not comport with the purpose animating Article 218 of the Constitution.

29. Learned counsel for ECP has drawn the attention of this Court to Articles 219 (c) and Article 222 (Proviso) of the Constitution). These Articles provided that:

219. The 1 [Commission] shall be charged with the duty of-

(c) appointing Election Tribunals.

(222) ...

"but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part.

30. It was contended by learned counsel that no law can be made by the Parliament which will have the effect of taking

away or abridging any of the powers of ECP. This is sought to be read with Article 219(c) which gives power to ECP to appoint Election Tribunals. There is no contention with the primary argument and the underlying purpose for which these two provisions have been provided in the Constitution. It is by now settled that appointment of Election Tribunals is conceded to ECP and one cannot mount a counter argument. But the appointment is again a power of the Executive and in many cases is a ministerial power and cannot be used to nullify the process which must precede the exercise of that power of appointment. This was precisely the case in Al-Jehad Trust and Riaz ul Haq where meaningful consultation was considered an essential condition of appointment and thereafter it was held that the President may appoint the nominations made as a result of consultation and in case there was a disagreement, the opinion of Chief Justice of Pakistan or the High Court concerned would have a binding effect. Doubtless, the Chief Justice of Pakistan or the Chief Justice of the High Court concerned in the matter of appointment of Judges of the High Court cannot be attributed the power to appoint a Judge which is a ministerial act to be accomplished by the Executive after the entire process has culminated. This is the construction to be put on the use of the word “appointing” in Article 219(c) of the Constitution. This argument also raises the inference as if the learned counsel for ECP invites this Court to hold that mention of the word ‘consultation’ in sub-section (3) of section 140 should be rendered meaningless and nugatory and the decision of ECP will prevail under any

circumstances. This is a misconstruction of law and a fallacy which cannot be given credence. This aspect of the matter as to what constitutes appointment has also been dealt with in Al-Jehad Trust and applies on all fours in the present cases. For instance, see Article 193(1) which provides:

“193(1) The Chief Justice and each of other Judges of a High Court shall be appointed by the President in accordance with Article 175A.”

Thus, the Chief Justice and Judges are to be appointed by the President (who has no role in the process) in accordance with Article 175A. Can it be argued by ECP that since the President appoints, so primacy must attach to the selection made by him? Clearly not. Such an argument is untenable.

31. The term ‘consultation’ is a widely used term both in the Constitution as well as various laws. Article 235 of the Constitution requires that the President may impose a financial emergency after consultation with the Governors of the Provinces. In the present Article 175A clause 5 (iv) 2nd proviso requires that Chief Justice of Pakistan shall nominate a former Chief Justice or a former Judge of that Court in consultation with four Member Judges. Similarly, Article 182 authorizes the Chief Justice of Pakistan in consultation with the Judicial Commission for appointment of *ad hoc* Judges. Thus, the term has a wide ranging presence and has been construed in Al-Jehad Trust in the context of appointment of Judges to superior courts which gave an edge to the opinion of the Chief Justice of Pakistan and the Chief Justice of the High Court concerned in view of the exalted position of the judiciary as envisaged in Islam as

also in the light of several provisions of the Constitution which relate to the judiciary guaranteeing its independence.

32. In an election petition it may well be that ECP is a party and many of its acts would be subjected to trial and decision by the Election Tribunals. The purpose of enacting sub-section (3) of section 140 of the Act clearly seems to refer the matter regarding nomination of Judges to an independent arbiter, that is, Chief Justice of the High Court concerned and while the ECP may engage in consultation with the Chief Justice of the High Court regarding matters relating to the number of Election Tribunals to be appointed yet must defer to the opinion of the Chief Justice in the matter relating to nomination of Judges for being appointed as Election Tribunals. This is not a power given to ECP under the law as it stands today. The law now obliges the Election Tribunals to decide the election petitions within 180 days. If the election petition is not finally decided within 180 days (section 148 of the Act) then consequences have been provided one of which is stated in clause ‘d’ of sub-section (6) of section 148:

“if a serving Judge is the Election Tribunal, the Commission shall request the Chief Justice of the High Court that no judicial work other than election petitions should, to the extent practicable, be entrusted to him till the final disposal of the election petitions.”

33. The above provision confers a power on ECP to request the Chief Justice not to assign judicial work other than election petitions to a serving judge appointed as an Election Tribunal. Thus, not only that ECP will request the nomination of Judges to be appointed as Election Tribunals but shall also make a request to the Chief Justice of the High

Court if the election petitions are not being decided expeditiously and within the time frame provided by law. In respect of assignment of words, the law itself provides dominance to the Chief Justice and merely a request can be made by ECP. This aspect has a close nexus with the unilateral act of ECP to assign areas of jurisdiction to different Election Tribunals. Plainly, the law does not permit the exercise of such power by ECP.

34. The second issue which arises in these petitions relates to the power of ECP to assign area of jurisdiction to the Election Tribunals. This purported power has absolutely no basis and ECP while issuing the Notifications has not relied upon any statutory provision in the Act under which ECP can assign areas of jurisdiction. This is quintessentially a power vesting in the Chief Justice of a High Court and relates to his administrative powers of assigning cases to the Judges of that Court including settling the roster of hearing by the Judges. This cannot be seized by a unilateral act and without any lawful basis. Therefore, the act of ECP in assigning areas to Election Tribunals for the trial and disposal of election petitions is *ultra vires* and without lawful authority.

35. Another factor which compels this Court to hold that the opinion of the Chief Justice must prevail is that, to use an oft-quoted term, he is the master of roster for the High Courts, under the current dispensation. Judges are borrowed by ECP to act as Election Tribunals. Though the Chief Justice is first amongst equals in judicial work, his range of administrative powers is vast and exclusive. ECP cannot

have the luxury of choice of Judges in a situation where LHC is inundated with cases with a huge backlog. The Chief Justice is the best person suited to take a decision regarding which Judges to spare by taking into account various considerations and factors within his peculiar knowledge. ECP cannot, by any stretch of imagination, insist on a particular Judge when the Chief Justice wants that Judge to clear a certain class of cases which he has the capacity to decide expeditiously. It must be borne in mind that Judges of this Court do not merely exercise jurisdiction under the Act but do so under different Federal and Provincial laws for which the Chief Justice decides to assign work. These are matters to which ECP has no access. Telling a chief Justice of a High Court to appoint this and that Judge as Election Tribunal is tantamount to usurpation of the administrative powers of a Chief Justice conferred by the Constitution and law. This also impinges upon the right of access to justice enshrined in the Constitution. Further, if this were conceded to ECP, it would mean that a Chief Justice will be required to act on the direction of ECP. Such a result is unpalatable and unlawful. Let us take a hypothetical example. A situation may arise of a stalemate between ECP and a High Court in such a matter, and ECP appoints Election Tribunals at its discretion (as has been done in the instant case). Notwithstanding the appointment, the Chief Justice of a High Court may direct the office not to assign election petitions to the appointed Election Tribunals. What will the ECP do? Nothing, in my opinion! ECP has no power over the office of a High Court and cannot direct it to

perform functions contrary to the directions of a Chief Justice. Indubitably, therefore, when consultation is provided in law, all other authorities must surrender to the opinion of a Chief Justice as the functions of a Chief Justice invoke a complicated balancing of a number of factors.

36. In view of the above, these petitions are allowed. In conclusion, it is declared that:

- i. *In matters of appointment of Election Tribunals under Section 140 of the Act, the opinion of a Chief Justice of a High Court shall have preeminence over a contrary view of ECP and ECP is bound to appoint Judges nominated by the Chief Justice.*
- ii. *The Notification of 26.04.2024 to the extent that it assigns areas of jurisdiction to Election Tribunals is set aside. The territorial jurisdiction and areas to be assigned is the exclusive domain of the Chief Justice of a High Court. The letter dated 26.04.2024 by ECP is also held to be unlawful being beyond the powers of ECP to require the Chief Justice of LHC to provide a panel of Judges to ECP for their appointment as Election Tribunals.*
- iii. *On the same analogy, the Notification of ECP dated 09.05.2024 is also set aside.*
- iv. *ECP is under obligation to appoint as Election Tribunals all six Judges of this Court as nominated on 04.04.2024 by the Chief Justice unless the Chief Justice withdraws any name or seeks to substitute it. This shall be done and a Notification issued within the next one week as the matter is of some urgency. In case ECP fails to do so, it shall be deemed to have been issued and the office of Lahore High Court shall proceed ahead on the dictum laid down and place the matters before the Hon'ble Chief Justice for*

assigning areas to Election Tribunals including the six nominated on 04.04.2024.

**(SHAHID KARIM)
JUDGE**

Announced in open Court on 29.05.2024

Approved for reporting

JUDGE

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Rafaqat Ali