

JUDGMENT SHEET

IN THE LAHORE HIGH COURT LAHORE
JUDICIAL DEPARTMENT

W.P.No.30623 of 2019

Mian Tariq Mehmood

Versus

Election Commission of Pakistan & others

J U D G M E N T

Date of Hearing.	01-02-2023
PETITIONER BY:	Mr. Jahanzeb Sakhera, Advocate.
RESPONDENTS BY:	Mr. Mubin ud Qazi, Advocate for respondent No.3. Mr. Asad Ali Bajwa, D.A.G.

Shahid Karim, J:- This constitutional petition brings a challenge to the judgment dated 13.3.2019 passed by the Election Commission of Pakistan (ECP).

2. The facts are admitted on all hands. The purported reference was filed by respondent No.3 before ECP under various provisions of law, none of them seems to be applicable nor has any relevance to the case in hand. The first reference was made to Article 218 of the Constitution of Islamic Republic of Pakistan, 1973 ("the Constitution") which is a general Article prescribing powers of ECP under the Constitution. Certain provisions of Representation of the People Act, 1976 ("ROPA") have also been invoked. Suffice to say that these provisions are non-applicable since the purported reference was filed on 01.02.2018 when the Elections Act, 2017 (Act, 2017) had been promulgated and thereby

ROPA had been repealed. (See section 240(2) of the Act, 2017.

3. The observation of ECP in paragraph 8 of the impugned order is based on an erroneous view of section 6, General Clauses Act. The effect of repeal is that it will only save pending proceedings and any proceedings commenced after the enactment of Act, 2017 will be governed by the new law and the provisions of old law cannot be invoked. This will, however, not have any impact since substantially, the offences under both the laws are in *pari materia* under which the petitioner in Reference before ECP sought a declaration of guilt regarding those offences. The following was the prayer made in the Reference:

"In view of the submissions made above, the petitioner seeks gracious relief from this Hon'ble Authority, to the effect that:

- (i) *A declaration may graciously be issued to the effect that the Resp. No.1/Mian Muhammad Tariq Member of the Provincial Assembly of Punjab from PP-113 Gujrat-VI, is guilty of committing corrupt practice under sec. 78(3)(d) read with Sec. 82 and 94 of ROPA, 1976 as well as Secs. 167(a), 173(d), 174, 190 of the Elections Act, 2017, for submitting false declarations/statements of assets and liabilities (assets/income from employment and business in Spain) in his nomination papers as well as in the yearly returns required to be submitted under Sec. 42-A of ROPA 1976 read with Sec. 137 of the Election Act, 2017, for his both terms i.e., years 2008 to 2013 and 2013 to 2017.*
- (ii) *Criminal proceedings may please also be directed to be initiated against the Resp. No.1/Mian Tariq Mehmood under Sec. 82 read with Sec. 42-A(4) of ROPA, 1976 read with Sec. 137(4) of the Election Act, 2017, for committing the offence of corrupt practice, for submitting false declarations/statements of assets and liabilities in the yearly returns required to be submitted under Sec. 42-A of ROPA, 1976 read with Sec. 137 of the Election Act, 2017, for the years 2008 to 2013 and 2013-17. Consequently, the Resp. No.1/Mian Tariq Mehmood may please also be declared disqualified under Sec. 100 ROPA, 1976 read with Sec. 232 of the Election*

Act, 2017, besides disqualification incurred on the basis of being a dishonest person.”

4. As will be seen in the following paragraphs, ECP granted a relief which is diametrically opposed to one sought by the respondent No.3. It made an order of disqualification against the present petitioner which is, doubtless, outwith the powers of ECP. While reading the impugned order, one cannot help being aghast at the audacity of overreach by ECP.

5. The only provisions which were remotely relevant for the purposes of decision of the Reference were Sections 137 (4) and 190 of the Act, 2017 which provide that:

“137(4) (4) Where a Member submits the statement of assets and liabilities under this section which is found to be false in material particulars, he may, within one hundred and twenty days from the date submission of the statement, be proceeded against for committing the offence of corrupt practice.”

190. Cognizance and trial.—(1) Notwithstanding anything contained in any other law but subject to section 193, an offence under this Chapter shall be tried by the Sessions Judge and any aggrieved person may, within thirty days of the passing of the final order, file an appeal against the order in the High Court which shall be heard by a Division Bench of the High Court.

(2) The proceedings against a person for being involved in corrupt or illegal practice may be initiated on a complaint made by a person or by the Commission but if a complaint made by the person proves to be false, based on bad faith or is made for any ulterior motive to provide benefit to another person, the complainant shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to fifty thousand rupees or with both.

(3) The Commission may direct that the summary trial of an offence under this Act may be conducted in accordance with the provisions of Chapter XX of the Code.

6. A reading of the two provisions set out above would show that section 137 deals with submission

of statements of assets and liabilities and it obliges every member of an Assembly and Senate to submit to the Commission before a certain date a copy of the statement of assets and liabilities including assets and liabilities of his spouse and dependent children. This shall be published by the Commission through a press release and in case of default by any of the members the names shall be published by the Commission. Sub-section (3) grants to the Commission the power to suspend the membership of a member of an Assembly and Senate who fails to submit the statement. The only power which may be attracted under the circumstances is couched in sub-section (4) which provides that if a member submits the statement of assets and liabilities under Section 137 and which is found to be false in material particulars, he may within 120 days from the date of submission of the statement be proceeded against for committing the offence of corrupt practice. Sub-section (4) does not provide the authority in which this power vests. It merely provides that the member who has given a false statement in material particulars may be proceeded for committing the offence of corrupt practice. Contrary to this the ECP in the impugned order made the following declaration:

"11. We have examined the case at the touch stone and we find ourselves unable to decline the prayer of the petitioner on the basis of material available on record. Any refusal on our part to avoid or evade such an exercise would constitute a departure from the law. Resultantly, instant

petition is accepted under Article 218 (3) read with Article 62(1) (f) and Article 63 of the Constitution and respondent No.1 is declared disqualified from having been member of Provincial Assembly Constituency PP-113 Gujrat-VI against general elections 2013. The notification be issued accordingly. These are the detailed reasons of our short order of even date.”

The above conclusion was preceded by the observations that the petitioner has made false declaration in the nomination form. He was disqualified on that basis.

7. The entire reliance of ECP, it can be seen from the portion which has been reproduced above, is upon Article 218 of the Constitution read with Article 62(1)(f) and Article 63 of the Constitution and proceeded to declare the petitioner disqualified from being a member of the Provincial Assembly from the Constituency PP-113 Gujrat-VI. Article 218 provides that:

“218(1) For the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, a permanent Election Commission shall be constituted in accordance with this Article.

(2) The Election Commission shall consist of—
(a) the Commissioner who shall be Chairman of the Commission; and
(b) four members, each of whom has been a Judge of a High Court from each Province, appointed by the President in the manner provided for appointment of the Commissioner in clauses (2A) and (2B) of Article 213.

Explanation.—“senior civil servant” and “technocrat” shall have the same meaning as given in clause (2) of Article 213.

(3) It shall be the duty of the Election Commission to organize and conduct the election and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.”

8. Article 218 constitutes ECP for the purpose of elections to both houses of Majlis-e-Shura (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law. The ECP in the impugned order has invoked to its aid clause (3) of Article 218 to make a declaration that the petitioner was disqualified from being a member of the Provincial Assembly. This power cannot be culled out from clause (3) of Article 218 and such an action by ECP must be discountenanced. Clause (3) of Article 218 merely casts a duty on ECP to organize and conduct elections and to make arrangements to ensure that the elections are conducted justly and fairly and in accordance with law. During the course of conduct of the elections it must also guard against corrupt practices. By no stretch of imagination it has empowered ECP to entertain a reference such as one in the present case and to embark upon an inquiry to disqualify a member of the Assembly or the Senate. Such a course is impermissible to ECP and would nullify the intent that permeates the relevant provisions not only of the Constitution but also of the Act, 2017. Further it is a fallacy on the part of ECP to have relied upon Articles 62 and 63 as conferring power on ECP to make a declaration of the kind which has been done through the impugned order. Articles 62 and 63 merely prescribe the qualifications and disqualifications of a person from being elected or

chosen as and from being a member of the Parliament and a Provincial Assembly and no more. The procedural requirements for doing so and the power which comes to vest in a Court or other Tribunal to set in motion the proceedings for doing so must be prescribed in law. Clause (2) of Article 63 clearly provides that if any question arises whether a member of the Parliament (or a Provincial Assembly) has become disqualified from being a member of that Assembly, the Speaker or the Chairman shall refer the question to ECP which shall be decided within ninety days from the receipt of the reference from the Speaker or Chairman of the Senate. The only time that ECP can proceed to adjudicate upon such a controversy is when a reference is received from either the Speaker or the Chairman of the Senate. Apart from this ECP is not vested with any power to broach the subject of disqualification on any reference filed by a private person which exercise will be *ultra vires* the Constitution as well as the Act, 2017.

9. A reference may also be made to Chapter IX which relates to the resolution of election disputes. Section 139 provides that:

139. Election petition.—(1) No election shall be called in question except by an election petition filed by a candidate for that election.

(2) In this Chapter—

(a) ‘corrupt or illegal practice’ means a ‘corrupt practice’ or an ‘illegal practice’ as defined in Chapter X;

(b) ‘petitioner’ means the candidate who has filed an election petition; and

(c) ‘*respondent*’ means a person joined as respondent in the election petition under section 143.

10. This provision has been enacted pursuant to the mandate of Article 225 of the Constitution which provides that:

“225. No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament).”

11. It indubitably follows that under the law no election shall be called in question except by an election petition filed by a candidate for that election. Thus, the Constitution and the law have circumscribed the powers of ECP as well as the Courts to adjudicate election disputes. It cannot be left to the whimsical discretion of ECP to do so on an application filed by a private person which will not only impinge upon the rights of the members of the Parliament, Provincial Assembly or Senate but also will have the unpalatable effect of stifling the democratic process where members of the Parliament, Provincial Assembly and Senate will be subjected to undue harassment and frivolity at the hands of unscrupulous persons who may bring motivated petitions before ECP.

12. The controversy whether Article 218(3) of the Constitution does clothe ECP with such powers has been laid to rest by Supreme Court of Pakistan in Muhammad Salman v. Naveed Anjum (2021 SCMR 1675) where it was stated that:

"...It is contended that it is inherent in the jurisdiction and powers conferred by Article 218(3) on the Commission, and the constitutional duty so cast on it, that it be empowered to adjudicate on whether a candidate (or member of the legislature) is qualified (or, by extension, disqualified) in terms of Articles 62 and/or 63 respectively. Now, this question is one that can be raised on an independent, standalone basis, or it can be part of an election dispute. Learned counsel submitted that in either case, the Commission had inherent jurisdiction and powers under Article 218(3). Thus, in the present case, it was fully empowered to consider and decide the applications filed by Mr. Qureshi and Mr. Anjum, independently of section 9 or any other provision of law.

24. When put this way, the submissions require us to consider Article 218(3) without taking into consideration any statutory provision at all such as, e.g., section 9 or section 103AA. Such an exercise does, one must confess, take on a certain air of abstractedness. The reason is that inevitably the jurisdiction of the Commission to consider questions of qualification or disqualification is not invoked in terms of Article 218(3) alone. Rather, it is inextricably interlinked with statutory provisions (especially those just mentioned), and the Commission itself tends to consider the matters before it in such terms. Indeed, that is how it treated the appellant's case in the impugned order. In order to consider the position under Article 218(3) on a standalone basis, i.e., on the constitutional plane alone, as we are invited to do, requires us then to look at the other relevant provisions in the Constitution in this regard.

25. Now, the Constitution itself confers a jurisdiction on the Commission with regard to the disqualification of members of the Federal and Provincial legislatures. This is contained in clauses (2) and (3) of Article 63 (read, as appropriate, with Article 113), which provide as follows:

"(2) If any question arises whether a member of Majlis-e-Shoora (Parliament) has become disqualified from being a member, the Speaker or, as the case may be, the Chairman shall, unless he decides that no such question has arisen, refer the question to the Election Commission within thirty days and should he fail to do so within the aforesaid period it shall be deemed to have been referred to the Election Commission.

(3) The Election Commission shall decide the question within ninety days from its receipt or deemed to have been received and if it is of the opinion that the member has become disqualified, he shall cease to be a member and his seat shall become vacant."

A special type of disqualification, by defection, is

*provided for in Article 63A. Clauses (3) and (4) specifically empower the Commission to rule on the validity of the declaration of defection against a member. (Clause (5) allows for a direct appeal to this Court against the decision of the Commission.) Thus, the Constitution is not silent on whether or when (and if so, under what circumstances) the Commission has the power to consider the issue of disqualification. The question therefore becomes whether this specific conferment of power is exhaustive. In other words, if the Constitution has itself conferred a limited, and not general, power and jurisdiction on the Commission in terms as noted above, can a general power nonetheless be discovered as inhering in Article 218(3)? In our view, the answer ought to be in the negative. The reason is that that would render the relevant provisions of Articles 63 and 63A redundant. These provisions can only be invoked in a special manner and on fulfillment of certain conditions. If a general power inhered in Article 218(3) then the constitutional safeguards contained therein would be rendered meaningless. They could be bypassed at will and at any time. Furthermore, the well known legal maxim, *expressio unius est exclusio alterius*, may also be relevant in the present context. No doubt the maxim must be applied cautiously: it has been said to be a valuable servant but a dangerous master. But even within such limitations it provides a useful aid in addressing the question now under consideration. In our view, to the extent that the Constitution considered it appropriate to itself confer a jurisdiction on the Commission to examine questions of qualification or disqualification on an independent, standalone basis, it expressly provided for the same in the Articles noted above. Anything other than that, unsupported by statute law (i.e., in terms of a jurisdiction conferred by Parliament itself by enacting a law in terms of Article 222) would be beyond the power of the Commission. More particularly, no such power can be discovered in terms of Article 218(3) or said to inhere in the Commission in terms thereof.*

26. *Insofar as the question of qualification or disqualification, arising as part of an election dispute and being considered by the Commission directly in terms of Article 218(3), is concerned, the provisions of Article 225 need to be kept in mind. This provides as follows: "No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament)". To hold that there is an independent power inhering in the Commission in terms of Article 218(3) would trench upon this constitutional provision which, it is to be noted, is cast in strongly negative terms. This indicates that those election disputes as properly come within the scope of Article 225 are to be considered by an election tribunal and not elsewhere and before some other forum such as,*

e.g., the Commission purporting to exercise a jurisdiction said to inhere in it under Article 218(3). It is no doubt for this reason that both in terms of section 103AA and section 9, the Commission was, and continues to be, "deemed to be an Election Tribunal to which an election petition has been presented". And even here, interestingly, the jurisdiction conferred on the Commission came, and comes, with a sunset provision: it must decide the matter within the stipulated 60 days, else "the election of the returned candidate shall be deemed to have become final", subject to a petition (if any) before the election tribunal constituted in terms of section 57 of the 1976 Act and now section 140 of the 2017 Act. (The question, whether a law can at all deem the Commission to be an election tribunal is one that, though interesting, need not trouble us here.)

27. It follows from the foregoing discussion that in our view there is no power or jurisdiction inherent in the Commission itself in terms of Article 218(3) to consider the qualification/disqualification of a candidate/member, whether as an independent, standalone issue or as part of an election dispute..."

And reiterated in C.P No.397 of 2022 in the following words:

"...The Election Commission of Pakistan ("ECP") has, in exercise of its powers under Article 218(3) of the Constitution of the Islamic Republic of Pakistan 1973, ("Constitution") read with Section 8(c) of the Elections Act, 2017, decided upon the matter of pre-election qualification and disqualification of the petitioner, in respect of his election as a member of the National Assembly as well as a member of the Senate. The ECP has declared the petitioner disqualified for both elections on account of his filing a false affidavit as to his citizenship of foreign country under Article 63(1)(c) and 62(1)(f) of the Constitution, and has also withdrawn the notification whereby he had been declared the returned candidate for a seat of the Senate.

3. As per the judgments of this Court, in Muhammad Salman v. Naveed Anjum (2021 SCMR 1675) and Zulfiqar Bhatti v. E.C.P (C.A No.142 of 2019 decided on 02.11.2022), the ECP has no jurisdiction under Article 218(3) of the Constitution read with Section 8(c) or 9(1) of the Elections Act 2017 to inquire into and decide upon the matter of pre-election qualification and disqualification of a returned candidate. Therefore, the decision of the ECP was without jurisdiction....

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

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

Hammersmith and Kensington R.T., Exp. Zerek
[1951]2K.B.1, at 6)

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

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

16. It is of fundamental importance to emphasis that jurisdiction lies at the foundation of all legal

proceedings. If it is not present, the proceeding is void. In the classic words of Chief Justice John Marshall, “*we have no more right to decline the exercise of jurisdiction which is given, then to usurp that which is not given. The one or the other would be treason to the constitution*”.

[*Cohen v. Virginia (1821) 19US(16Wheat)264*]

Article 175, Clause (2) provides that:

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

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

18. I do not find the act of ECP in deciding the petition/ reference filed by respondent No.3 to have any basis in law and the impugned judgment is clearly unlawful and *non-est*. It is liable to be set aside as being without lawful authority. This petition is *allowed*.

(***SHAHID KARIM***)
JUDGE

Approved for reporting.

JUDGE

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Rafiqat Ali