

IN THE SUPREME COURT OF PAKISTAN  
(APPELLATE JURISDICTION)

**PRESENT:** MR. JUSTICE MIAN SAQIB NISAR, HCJ  
MR. JUSTICE UMAR ATA BANDIAL  
MR. JUSTICE IJAZ UL AHSAN

**CIVIL APPEAL NO.1042 OF 2018**

(Against the order dated 10.8.2018 of the  
Election Commission of Pakistan, Islamabad  
passed in Case No.3(1)/2016-GA)

Shaukat Ali

...Appellant(s)

**VERSUS**

E.C.P. through its Secretary, Islamabad & others

...Respondent(s)

For the appellant(s):	Mr. Gohar Ali Khan, ASC
For ECP:	Mr. M. Arshad, D.G. Law, ECP
On Court's notice:	Mr. Sohail Mahmood, DAG
Amicus Curiae:	Mr. Bilal Hassan Minto, ASC
For private respondent(s):	Not represented
Date of hearing:	26.9.2018

**JUDGMENT**

**MIAN SAQIB NISAR, CJ.-** The Appellant contested General Elections held on 25<sup>th</sup> May 2018 on the ticket of Pakistan Tehreek-e-Insaaf (PTI) from PK-23 Shangla-1 (District Shangla) KPK. There were 135 polling stations in that constituency according to the final polling scheme notified by the Election Commission of Pakistan (ECP) for 200,525 registered voters---113,827 male, and 86,698 females. The turnout in the Elections was approximately 34.82% as the count provisionally compiled on 26-07-2018 showed that a total of 69,827 votes were cast. The appellant was shown as having secured the highest votes i.e. 17399.

2. An application for recount was submitted to the ECP by Respondent No.12 (Muhammad Rishad Khan) who had secured 15533 votes. The application was allowed and after recount the final consolidated result on Form.49 was issued on 29-07-18 showing 17712 as the Petitioner's votes and 16007 as the Respondent's. A further application was then made to the ECP by Mr. Wali Khan, brother of Respondent No.12, alleging that women had been restrained from casting their votes which had resulted in less than 10% turn out for women (i.e. 5.02%) and therefore the poll being null and void notification declaring the Appellant as the returned candidate should not be issued. After hearing the contesting parties, the ECP allowed the application on 10-08-18 and directed a re-poll in the whole constituency under Section 9(1) of the Election Act 2017. This appeal was filed against the said order of the ECP dated 10-08-18 detailed reasons for which were filed in this court at a later stage through CMA- No: 7708 of 2018.

3. On 04-09-2018 when this appeal came up for hearing, Syed Iftikhar Gillani Sr. ASC appearing for the Appellant contended that Section 9(1) of the Act was ultra vires Articles 8(2) (c) and 25 (2) of the Constitution. When confronted that this ground was not taken before the ECP or in the memo of appeal he urged that since the ground related to the vires of a statutory provision and interpretation of the Constitution, it could be raised at any time.

4. Notices were issued to the ECP and the Attorney General for Pakistan in terms of Order XXVIIA Rule 1 of the Code of Civil Procedure and Mr Bilal Hasan Minto, ASC was appointed *amicus curiae*. No order staying the elections was passed and the appeals were later fixed for today i.e. 26-09-18.

5. Mr. Gohar Ali Khan ASC, appearing for the Appellant has submitted that since re-election has already taken place in PK 23 Shangla 1 and the Appellant has been returned again, this time with women voter turnout of 13.75%, therefore the appeal has become infructuous.

Be that as it may, counsel for the Appellant and the *Amicus Curiae* were asked to make their submissions on the questions of law involved as we consider it appropriate to settle the issue regarding the vires and interpretation of Section 9(1) *ibid*.

6. Counsel for the Appellant has raised two arguments. Firstly, that Section 9(1) read with its explanation permitting re-poll when women turnout is less than 10 % offends Article 4 (2) (c) which guarantees everyone equal protection of the law and also Article 25 (2) which states that there shall be no discrimination on the basis of sex. Secondly, he submitted that Section 9 (1) which permits the ECP to order re-poll if women turn out is less than 10 % in a constituency may result in the election being held again and again *ad infinitum* which makes the provision absurd.

7. Learned *amicus curiae* submitted the view that the general clause regarding equal protection contained in Article 4 is to be read in light of and in consonance with Article 25 which is the specific article dealing with equal treatment and safeguards against discrimination. He pointed out that sub-article (3) of Article 25 clearly allows for positive discrimination in favour of women and that taking of measures in an effort to ensure adequate participation of women in elections would be covered by sub-article (3) *ibid* and therefore section 9 (1) is *intra vires*.

8. Regarding the second contention of the counsel for the Appellants, the *amicus curiae* stated that in the context of low turnout of

women, re polling may only be ordered under Section 9 (1) when from facts apparent on record and after inquiry---if deemed necessary---the ECP concludes that there existed an agreement restraining women from voting and because of that agreement the results of poll (at specific polling stations or the entire constituency) have been materially affected. He further submitted that the explanation clause to Section 9(1) states that the ECP may presume that women voters were prevented from casting their votes through an agreement only *if* the female turnout is less than 10 % in the entire constituency and the use of the word "may" as opposed to "shall" implies that the ECP would have to provide reasons for making the a presumption, i.e reasons in addition to the turnout being less than 10 %. He submitted that, in the context of voting by women, what emerges from reading the entire section is, that if it is found on the face of record or from an inquiry that women have been restrained through an agreement materially affecting the result of a poll at certain polling stations or the entire constituency; OR, if valid reasons exist for making a presumption under the explanation clause when women turn out is less than 10% in the constituency; then, it is of no consequence that polling in specific polling stations or the entire constituency will have to be held again, or multiple times---as long as the provisions of Section 9 (1) are attracted. Section 9 (1) is meant, inter alia, to safeguard or enable the exercise of a constitutional right by women and the inconvenience of multiple re-polls cannot be a counter veiling consideration especially when sub article (3) of Article 25 specifically mandates such a safeguard. In regard to the validity of positive and beneficial provisions favouring women he referred to Musarrat Uzma Usmani Vs. Government of Punjab (PLD 1987 Lahore 178) and

**Shireen Munir and others Vs. Government of Punjab through Secretary Health, Lahore (PLD 1990 SC 295).**

9. Learned Amicus Curiae, submitted, lastly that in the present case, the reasons provided by the ECP in para 5 of its order were that in the sister constituency of Shangla 2 in the same district with similar cultural background women turn out had been 17.28% and that this was sufficient reason to presume that women in Shangla 1 had be restrained through an agreement materially affecting the result. In the present case, the reasons given by the ECP in its order stood vindicated because in the re-poll which have already been held, the women turn out increased to 13.75%.

10. Having considered the above submissions, we are inclined to generally agree with the submissions made by the learned amicus curiae. It is apparent from Section 9(1) of the Election Act that it affords women special treatment stating as follows:

***“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."*

Clearly, it is a provision consciously designed for a society in which several practices depriving women of their legitimate legal rights are commonplace. This is also recognized by the Constitution, Article 25 whereof provides as follows:

*"25. Equality of citizens. — (1) All citizens are equal before law and are entitled to equal protection of law.*

*(2) There shall be no discrimination on the basis of sex.*

*(3) Nothing in this Article shall prevent the State from making any special provision for the protection of women and children."*

Clause (3) unequivocally allows for special provisions to be made for the benefit of women as an exception to the general rule of equal treatment contained in this article (or in Article 4). We do not think that this clear provision admits of any debate as regards the permissibility of positive discrimination in favour of women but for authority, reference may be made to this court's decision in **Shirin Munir's case (PLD 1990 SC 295)** which held that not only were women entitled to compete on equal merit

with boys in co-educational medical colleges on all seats (as opposed to reserving only a few seats for women which practice was under challenge in this case) but that it was also perfectly permissible under Article 25 (3) to have medical colleges admitting only women.

11. In the present case the right involved is a very precious right guaranteed directly by the Constitution i.e. the right to vote; and we find that the safeguards provided in respect of women by Section 9 (1) are permissible under Article 25 (3) and hence, *intra vires*.

12. As regards the Appellant's argument that one of the consequences of giving effect to the provisions of Section 9 (1) regarding women's turnout may result in infinite rounds of elections we feel that that is only a theoretical possibility. It is a theoretical possibility just like one that may arise by virtue of Article 223 (3) of the Constitution which permits a person to contest elections from multiple constituencies, in fact, from all 266 seats, and if he/she wins from all 266 seats a reelection on 265 of them will automatically have to be held again. Then, in the next round, if another person does exactly the same i.e. contests from all 265 seats, the whole exercise will have to be repeated for another 264 seats and so on and so forth. In the case of Section 9(1) of the Election Act the possibility of infinite rounds of elections is actually far less because this provision does not permit automatic re-poll at all. The main section requires re-poll, on satisfaction based on facts apparent on record or an inquiry—if necessary---that women were restrained through an agreement which materially affected the result of the election whereas the explanation permits the making of a presumption that women were restrained through an agreement if the turnout of women in the entire constituency is less than 10 %. The re-poll under the explanation is not automatic and reasons have to be provided by the ECP which, in the

present case, were not only provided, but were also vindicated in the re poll when women turnout rose from 5.02% to 13.75% which also seems to suggest that the spectre of a possible re-poll may actually act as a deterrent for the practice of restraining women from participation in polls. Of course, if the turnout had again been less than 10 %, the ECP would have been entitled to make the said presumption again but would have had to support it by fresh reasons.

13. It is clear then, that each time the ECP invokes its power under the explanation it will have to provide reasons for its order which, in any case, would be justiciable before the court of competent jurisdiction.

14. With the above observations, this appeal is disposed of.

CHIEF JUSTICE

JUDGE

Islamabad, the  
26<sup>th</sup> of September, 2018  
Not Approved For Reporting  
Waqas Naseer/\*

JUDGE