

IN THE SUPREME COURT OF PAKISTAN

PRESENT: Mr. Justice Gulzar Ahmed

## Civil Petition No. 3122/2017

(On appeal against the judgment dated 07.07.2017 passed by the Islamabad High Court, Islamabad, in W. P. No. 4815/2016)

Malik Ameer Haider Sangha and another                      Petitioners

## Versus

Mrs. Sumaira Malik, etc. Respondents

For the Petitioners: Kh. Haris Ahmed, Sr. ASC  
Mr. Mehr Khan Malik, AOR

For Respondents No. 1 & 2: Mr. Mubeen uddin Qazi, ASC  
Mr. Tariq Aziz, AOR

For Respondents No. 3 & 4: Nemo

For Respondent No. 5: Mr. Abid Hussain, DRO, Khushab

For Respondent No. 6: Mr. Abdul Hameed Sumbal, R.O.

For Respondent No. 7: Mr. Israr Ahmed, Presiding Officer

For Respondent No. 8: Mr. Muhammad Arshad, D.G. (Law)  
Mr. Muhammad Ishaq, Director  
Protocol, ECP

Date of Hearing: April 19, 2018

## JUDGMENT

**Qazi Faez Isa, J.** The petitioners and the private respondents were elected on the basis of adult franchise as members of District Council, Khushab. Thereafter petitioners and respondents No. 1 and 2 separately contested as joint candidates for the posts of Chairman and Vice Chairman of District Council, Khushab. The Chairman and Vice Chairman were to be elected by the members of the District Council pursuant to the election schedule notification dated December 1, 2016 issued by the Election Commission of Pakistan ("**the Election Commission**"). The

following extract from the said election schedule, which is relevant to the present case, is reproduced hereunder:

8.	Poll Date	22.12.2016
9.	Consolidation and Declaration of Results by the Returning officer by	23.12.2016
10.	Issuance of Notification of the Returned Candidates by ECP	28.12.2016
11.	Oath of Elected Members	31.12.2016

2. Out of sixty-five votes that were cast the petitioners received thirty-two and respondents No. 1 and 2, thirty three votes, thus respondents No. 1 and 2 won the elections by one vote. Mr. Israr Ahmed, the Presiding Officer, who conducted the elections, noted that the secrecy of the ballot was compromised as five members/voters had disclosed who they had voted for. He brought this violation of secrecy to the notice of the Returning Officer by writing to him on the same day (December 22, 2016). Petitioner No. 1 also submitted a separate written complaint, which included the same allegation of violation of secrecy, to the Returning Officer, on December 22, 2016 at 1 p.m. The petitioners' complaint stated that ten members/voters first showed their marked ballot papers to the respondents No. 1 and 2 and then proceeded to put them in the ballot box. Since no action on their complaint was taken either by the Presiding or Returning Officers the petitioners submitted a petition under section 26 of the Punjab Local Governments Act, 2013 ("**the Act**") read with the Punjab Local Government (Conduct of Elections) Rules, 2013 ("**the Rules**") to the Election Commission.

3. The Election Commission, with a majority of three to one, vide order dated December 28, 2016, set aside the election held on

December 22, 2016 and directed, "*that re-poll be conducted.*" Respondents No. 1 and 2 assailed the order of the Election Commission in the Islamabad High Court and in their writ petition also sought a direction that they be notified by the Election Commission that they had won the elections. The writ petition was contested by the petitioners and by the Election Commission. Through the impugned judgment dated July 7, 2017, the High Court allowed the writ petition and set aside the order of the Election Commission dated December 28, 2016. In allowing the petition the learned single Judge of the High Court held that the Election Commission could not have ordered re-poll as it did not have such power, particularly when the dispute was one, "*which could not have been resolved without recording of evidence*". It was further held that the petitioners could have challenged the elections by filing an election petition (under section 38 of the Act) to be decided by the notified election tribunal. The learned Judge referred to section 103AA of the Representation of the People Act, 1976 in support of his findings and observed that unlike the said provision, the Act did not confer either power or jurisdiction on the Election Commission to order a re-poll.

4. Khawaja Haris Ahmed, learned senior counsel representing the petitioners, pointed out that petitioner No. 2, Haji Muhammad Ameer Kalasi, had died after filing this petition and that his right to sue expired with him. However, since petitioner No. 1, Malik Ameer Haider Sangha, had also assailed the impugned judgment the matter still required adjudication. The learned senior counsel referred to Articles 140, 218, 219(d), 222, 225 and 226 of the Constitution of the Islamic Republic of Pakistan ("**the**

**Constitution")** and contends that the Election Commission is a constitutional body, and the Constitution mandates the Election Commission to organize and conduct elections, including local government elections, and to make such arrangements as are necessary to ensure that the elections are conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against. He states that a secret ballot is mandated in Article 226 of the Constitution and section 18 of the Act, therefore if secrecy of the ballot is violated the elections cannot be categorized as having been held in accordance with the law. He further states that the learned Judge of the High Court had failed to appreciate that the Election Commission is constitutionally mandated to organize and conduct elections, which conclude only after the Election Commission issues the notification of the returned candidate. He states that before the issuance of such notification, and on the very day of the poll, the Presiding Officer and a petitioner had submitted written complaints to the Returning Officer stating that the secrecy and sanctity of the ballot had been violated, however, since the Returning Officer failed to act, the petitioners were constrained to file a petition before the Election Commission. It was stressed that this was done before the issuance of the requisite notification by the Election Commission. The Election Commission decided the petition by a well reasoned order, and did so before issuance of the said notification. He further states that the learned Judge of the High Court did not hold that the petitioners and the Presiding Officer had falsely contended that secrecy of the ballot was violated, but had allowed the petition on the ground that the Election Commission did not have jurisdiction to order a re-poll

and that the dispute could only be resolved by an Election Tribunal. The learned senior counsel states that an election petition can be filed after the official notification of the results is issued by the Election Commission. He refers to sections 14 and 18 of the Act and rules 62 and 78 of the Rules to say that the Election Commission retains jurisdiction till such notification is issued, and, even if it be presumed that these provisions do not specifically empower the Election Commission to order a re-poll it is implied therein. Furthermore, the Constitution requires the Election Commission to conduct elections honestly, fairly and justly and in order to do so the Election Commission also has the power to order a re-poll. The learned counsel cites the following judgments on the rationale and significance of a secret ballot: Mukhtar Hussain Shah v Wasim Sajjad (PLD 1986 Supreme Court 178), Muhammad Anwar Butt v Election Tribunal (1987 SCMR 933), Abdul Majeed Khan v District Returning Officer (2006 SCMR 1713), Jamal Shah v Election Commission (PLD 1966 Supreme Court 1), Jamal Shah v Nasrullah Khan (PLD 1965 Election Commission 89), Attaullah v Government of Balochistan (PLD 2014 Balochistan 206), Abdul Rasool Mengal v Chief Election Commissioner (2009 CLC 196), Muhammad Aslam Bhootani v Deputy Speaker, Balochistan Provincial Assembly (PLD 2013 Balochistan 66), Muhammad Salah-ud-Din v Government of Pakistan (PLD 1990 Federal Shariat Court 1) and Nadeem Aftab Sindhu v F.O.P. (PLD 2013 Lahore 405). With regard to the scope of the Election Commission's powers the learned counsel relies upon the following cases: Workers' Party Pakistan v Federation of Pakistan (PLD 2012 Supreme Court 681), Raja Aamer Zaman v

Omar Ayub Khan (2015 SCMR 1303), In re: Complaint of malpractices in constituency No. NA-57, Sargodha-V (PLD 1977 Journal 164), Darayus Pestonji v Nam Singh (1998 CLC 921), Muhammad Rizwan Gill v Nadia Aziz (PLD 2010 Supreme Court 828), Province of Sindh v M.Q.M. (PLD 2014 Supreme Court 531), Muhammad Ashraf Warriach v Muhamamd Nasir Cheema (2016 SCMR 998), Imran Khattak v Sofia Waqar Khattak (2014 SCMR 122), Mohinder Singh v Chief Election Commissioner (AIR 1978 Supreme Court 851), Election Commission of India v Shivaji (AIR 1988 Supreme Court 61), N. P. Ponnuswami v Returning Officer, Namakkal (AIR 1952 Supreme Court 64), Fakhar Imam v Chief Election Commission of Pakistan (PLD 2008 Supreme Court 730), Bartha Ram v Mehar Lal Bheel (1995 SCMR 684), Nayyar Hussain Bukhari v District Returning Officer, NA-49 (PLD 2008 Supreme Court 487) and Muhammad Mamoon Tarar v Election Commission of Pakistan (2016 CLC 1708).

5. Mr. Mubeen uddin Qazi, learned counsel representing the contesting respondents, supports the impugned judgment and states that the same is in accordance with the provisions of the Constitution, the Act, the Rules and precedents of this Court. He also refers to Articles 10A, 218(3) and 219 of the Constitution. Therefore, according to the learned counsel, the learned Judge of the High Court was right to hold that the dispute was to be addressed in an election petition filed pursuant to section 35 of the Act read with rule 35(14) of the Rules. The learned counsel also states that after the poll the elections concluded and all that was left to do by the Election Commission was to issue the requisite notification of the returned candidates. The learned counsel states

that the Election Commission does not have any power, either under section 26 of the Act or rule 78 of the Rules to order a re-poll. Reliance was placed by the learned counsel upon the following cases: Raja Aamer Zaman v Omar Ayub Khan (2015 SCMR 1303), Muhammad Mamoon Tarar v Election Commission of Pakistan (2016 CLC 1708) and an unreported judgment dated June 20, 2013 of the Division Bench of the High Court of Balochistan in C. P. No. 411/2013.

6. The Director General (Law) of the Election Commission supported the order dated December 28, 2016 of the Election Commission and referred to the comments filed by the Election Commission before the High Court. In these comments reference was made to Article 226 of the Constitution, which stipulates that all elections under the Constitution, other than those of the Prime Minister and Chief Minister, shall be by secret ballot, therefore if such secrecy is not maintained by the Presiding Officer the, *"genuineness of the elections become doubtful and elections become void"*. The Presiding Officer had written to the Returning Officer that secrecy of the ballot had been violated but no remedial measures were taken, therefore the Election Commission had intervened to fulfill its constitutional duty and had rightly *"directed to hold fresh elections in the background of proved allegation that the secrecy of the ballot was not maintained during the elections."* The comments further stated that the Election Commission was also competent to take action under rule 78 of the Rules, as had been done in this case, and it also has the power to review the order passed by any official conducting elections since they exercised delegated powers of the Election Commission.

7. We have heard the learned counsel for the parties and the representative of the Election Commission. To better understand the respective contentions of the parties and for ease of reference it would be appropriate to set out the constitutional provisions which have been referred to by the learned counsel:

**140A.**

“(1) Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local government.

(2) Elections to the local governments shall be held by the Election Commission of Pakistan.”

**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, one from each Province, each of whom shall be a person who has been a judge of a High Court or has been a senior civil servant or is a technocrat and is not more than sixty-five years of age, to be 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."

**219(d).**

"The Commission shall be charged with the duty of-

(d) the holding of general elections to the National Assembly, Provincial Assemblies and the local government;"

**222.**

"Subject to the Constitution, Majlis-e-Shoora (Parliament) may by law provide for-

- (a) the allocation of seats in the National Assembly as required by clauses (3) and (4) of Article 51;
- (b) the delimitation of constituencies by the Election Commission including delimitation of constituencies of local government;
- (c) the preparation of electoral rolls, the requirements as to residence in a constituency, the determination of objections pertaining to and the commencement of electoral rolls;
- (d) the conduct of elections and election petitions the decision of doubts and disputes arising in connection with elections;
- (e) matters relating to corrupt practices and other offences in connection with elections; and
- (f) all other matters necessary for the due constitution of the two Houses, the

Provincial Assemblies and local governments;

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."

**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)."

**226.**

"All elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot."

8. What requires determination is whether the Election Commission had the jurisdiction or power to order a re-poll before it had notified the election results. And, if it did possess such jurisdiction and power, whether in the facts and circumstances of the case the Election Commission was justified to order a re-poll.

9. In ousting the jurisdiction of the Election Commission the learned Judge referred to section 103AA of the Representation of the People Act, wherein the Election Commission is given specific powers to declare a poll void and to order fresh elections and held that similar powers are not granted to the Election Commission by the Act. The learned High Court Judge held that the Election Commission did not have the jurisdiction to order a re-poll, and that the controversy (whether the voters had disclosed the candidates they had voted for) could only be resolved once evidence

is recorded by the Election Tribunal in an election petition filed challenging the elections.

10. Article 222 of the Constitution enables the concerned legislature to make laws in respect of election matters, however, this Article concludes by stipulating that, "*no law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission.*" Therefore, we need to examine the powers of the Election Commission. The Election Commission is required to hold local government elections (Articles 140A and 219(d) of the Constitution) and to organize and conduct them by making "*such arrangements as are necessary to ensure that elections are conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against*" (Article 218(3) of the Constitution). The powers of the Election Commission which are mentioned in the Constitution neither stipulate nor require nor are dependant on the legislature granting, amongst others, specific powers to the Election Commission to order a re-poll. Section 103AA of the Representation of the People Act, (which is applicable in respect of elections to the National Assembly and the Provincial Assemblies) grants the Election Commission the specific power to order a re-poll. Much has been made of the fact that such specific power has not been given to the Election Commission by the Act. However, from this it cannot be inferred that the Election Commission does not have such power, particularly when the Constitution gives the Election Commission general and wide powers to conduct elections (as noted above). The Act does grant the Election Commission the power to order a re-poll, not in such specific terms as mentioned in

the said section 103AA, but by exercising general powers granted by the Act and the Rules which bring about the same result. However, before proceeding to determine the scope of such powers it would be appropriate to mention the provisions which mandate a secret ballot.

11. Article 226 of the Constitution requires that, "*All elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot.*" Local governments are mentioned in Articles 140A, 219(d) and 222(f) of the Constitution therefore, the requirement of a secret ballot is equally applicable to local government elections. Section 18(1) of the Act reiterates the constitutional mandate as it stipulates that the, "*election of members of all local governments shall be held through secret ballot.*" It is also a crime to interfere with the secrecy of voting (section 55 of the Act), and punishment of imprisonment extending to six months or fine of up to twenty thousand rupees, or both, is prescribed (section 56 of the Act). If an official, including a presiding officer, "*fails to maintain or aid in maintaining the secrecy of voting*" he too commits an offence (clause (f) of section 57 of the Act), attracting the same punishment as mentioned above. Under rule 26(6) of the Rules presiding officers are required to "*make arrangements at the polling station that every voter may be able to mark his ballot paper in secret before the same is folded and inserted in the ballot box.*"

12. The conduct of elections includes the maintenance of secrecy. If secrecy of the ballot has been breached or elections have not been held honestly or justly or fairly or corrupt practices have

taken place, the Election Commission is fully empowered to take remedial actions. It would be wrong to assume that despite the directives contained in Article 218(3) of the Constitution the Election Commission is helpless or that it can elect not to implement the constitutional mandate. The Act requires the Election Commission to "*conduct the local government elections*" (section 19), without placing any fetters on the powers of the Election Commission to do so. Rule 78 of the Rules elaborates on the general power of the Election Commission, as under:

**78. Powers of Election Commission.** Save as otherwise provided, the Commission may:

- (a) stop the polls 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 the Act or the rules, including rejection of a ballot paper; and
- (c) issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly, and in accordance with the provisions of the Act and the rules."

The above mentioned rule 78 (which mentions the powers of the Election Commission), is drawn up in wide terms and there is no reason for us to exclude therefrom order of a re-poll if elections are not held in accordance with law, mandating secrecy, fairness, justness and/or which are not free from large scale malpractices. The view taken by the learned Judge and advocated by the learned counsel for the contesting respondents, is that the dispute in question could only be agitated in an election petition,

however, overlooking the fact that the Election Commission had intervened before it had issued the requisite notification of the returned candidates, that is before the conclusion of the elections.

13. That having determined that the Election Commission has the power to order a re-poll before it has issued the notification declaring the winning candidate/s, it next needs to be examined whether in the facts and circumstances of the case ordering a re-poll was justified. The Presiding Officer was an official designated by the Election Commission to perform duties in connection with the elections, including maintaining the secrecy of the ballot. The Presiding Officer personally observed that a number of voters had breached the secrecy of the ballot and submitted a written complaint. In his complaint he also named the voters who had shown their ballot papers after they had marked them but before they had put them in the ballot box. The person under whose supervision the poll took place himself submitted a written complaint to the Returning Officer which was received by him. Therefore, it is not understandable why the additional need to record evidence by the Election Tribunal, as held by the learned Judge. Since the contesting respondents had alleged that no complaint was submitted by the Presiding Officer, Israr Ahmed, we summoned the official. After the breaking open of the sealed bag in which the said record came, the contents of the bag contained the said complaint on which appeared the signature of the Returning Officer in confirmation of its receipt. Therefore, we conclude without hesitation that there were sufficient grounds before the Election Commission to order a re-poll.

14. The Election Commission is a constitutional body and unless it is shown that the jurisdiction and discretion exercised by it is manifestly illegal, arbitrary or mala fide, its workings should not be interfered with. The Election Commission had ordered a re-poll and its decision cannot be termed illegal, arbitrary or mala fide. The learned Judge of the High Court failed to appreciate that re-polling in this case involved less than a hundred voters and such a re-poll would cost next to nothing. In contrast, in a general elections thousands, if not hundreds of thousands, cast their votes and conducting such an election would entail not only a substantial financial outlay but also the allocation of sizeable human resources. However, elections by a select body, such as in the present case, does not require such financial or human resource outlay. Whilst the considerable resources required and involved in a re-poll in general elections might give pause, however, where the voters are comparably limited this is not a consideration.

15. The Election Commission is constitutionally mandated to ensure that elections are held "*honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against.*" However, there's a growing perception that elections to certain positions/offices, like those of mayor, deputy mayor, chairman, vice chairman, are not held honestly, justly, or fairly and the corrupt practice of vote buying has made inroads into the democratic order. There's a similar perception in respect of other elections where there aren't many voters. For instance, the election of senators, who are elected by the members of provincial assemblies, and the election of Chairman and Deputy Chairman of the Senate, who are elected by the senators. It is critical that those

who represent the people, whether at local government or in the Senate, must be elected honestly, justly, and fairly through a process free from corrupt practices. A person who manipulates the electoral process by buying votes cannot be categorized as a legitimate representative and does not serve the people. The commodification of high positions and offices through voter manipulation and electoral tampering must be stopped.

16. The Election Commission is constitutionally mandated to ensure the integrity of elections. However, when the integrity of the vote is compromised, fresh elections must be held. Particularly when less number of voters make a re-poll logistically feasible and easily implementable. Popular candidates who are not involved in vote buying and malpractice should have no apprehension in a re-election. Therefore, in elections where serious concerns over the integrity of the process have emerged, fresh elections are in the best interest of the people because they ensure maximum transparency, fairness and equal opportunity. Fresh elections would also ensure the integrity of the democratic process.

17. The foundation of a representative democracy rests on a credible electoral process. A democratic facade is not a substitute for democracy. General Zia-ul-Haq held a referendum on December 19, 1984 and obtained 98.5 percent of an affirmative vote, and in General Pervez Musharraf's referendum held on April 30, 2002 he obtained a 97.97 percent affirmation. However, many election observers questioned these results as well as the turnout, which was shown to be greater than the previous seven general elections. Elections must not only be held, but be seen to be held honestly,



justly, fairly and corruption free. One without the other lacks credibility and de-legitimizes the objective.

18. Therefore, for the reasons mentioned above, this petition for leave to appeal is converted into an appeal and allowed; the impugned judgment dated July 7, 2017 of the Islamabad High Court is set aside; the Election Commission is directed to hold election to the posts of Chairman and Deputy Chairman of District Council Khushab and in this regard to issue a fresh election schedule at the earliest since considerable time has already expired. There shall however be no order as to costs.

Judge

Judge

Bench-III  
ISLAMABAD  
(Farrukh)

Announced in open Court at Islamabad on May 8, 2018

Judge

Approved for Reporting