

IN THE SUPREME COURT OF PAKISTAN
(Review Jurisdiction)

PRESENT:

Mr. Justice Jawwad S. Khawaja
Mr. Justice Gulzar Ahmed
Mr. Justice Sh. Azmat Saeed

CIVIL REVIEW PETITION NO. 94 OF 2014 IN
CIVIL APPEAL NO.31 OF 2014.

*(Against the review of order dated 7.3.2014 passed by this Court in
CA 31 of 2014)*

Dr. Raja Aamer Zaman

... **Petitioner (s)**

Versus

Omar Ayub Khan, etc.

... **Respondent (s)**

For the Petitioner (s)	: Mr. Hamid Khan, Sr. ASC Mr. M. S. Khattak, AOR
For the Respondent-1.	: Mr. Muhammad Akram Sheikh, Sr. ASC Syed Rafaqat Hussain Shah, AOR
For the other Respondents:	Nemo
Date of Hearing	: 29.05.2015

J U D G M E N T

Jawwad S. Khawaja, J.- This petition seeks review of our judgment dated 7.3.2014 whereby Civil Appeal No.31 of 2014 filed by the petitioner, was dismissed. The facts relevant for the adjudication of this review petition have been set out in the said judgment and, therefore, need not be reproduced except to the extent necessary for the present judgment. Furthermore, only points of law relating to the interpretation of sections 67 and 70 of the Representation of Peoples Act, 1976 ("ROPA") are to be addressed in view of the limited scope of review jurisdiction.

2. The facts to the extent relevant are straightforward and can now be stated to facilitate the discussion which follows. The petitioner and respondent No.1 are the principal protagonists in this case. In the general elections held on 11.5.2013 for the constituency NA-19 (Haripur), the petitioner was declared as the returned candidate on the basis that he had secured 1,16,979 votes as against 1,14,807 votes in favour of the

respondent. A recount was ordered whereafter the petitioner remained the candidate with the highest number of votes polled although the difference of 2172 votes stood reduced to 1304 as a result of the recount. The respondent filed an election petition which was decided by the Election Tribunal vide order dated 31.12.2013. The Tribunal instead of declaring the election to be void as a whole, directed re-poll in seven polling stations only while holding that the petitioner was not responsible for any corrupt or illegal practice. This is the limited point of law in contention before us because according to the petitioner the Election Tribunal could not have directed a partial re-poll. The respondent, however, asserts that it was within the competence of the Election Tribunal to order partial re-poll in respect of seven polling stations.

3. Through our order of 3.2.2015 in this petition, the reason for issuing notice to the respondents has been given. The contention of learned counsel for the petitioner has been noted viz. *"the [Election] Tribunal has the power to declare election as a whole void, but it, under no circumstances has the power to declare election void in respect of a few polling stations"*. It is for this reason it was considered necessary to *"hear this case in detail"*.

4. On 7.5.2015 we had framed three questions of law and interpretation of statutes on which the hearing of the review petition was focused. These questions are reproduced as under:-

"i) Whether under the law set out in Sections 67 to 70 of the ROPA, it was permissible for an Election Tribunal to pass an order for re-poll in only 7 out of 437 polling stations ?

ii) Whether the provisions of Sections 103 and 103-AA of the ROPA, which empower the Election Commission are in pari materia with the provisions of Sections 67 to 70 of the ROPA and, therefore, if through precedent, the Election Commission is seen as being empowered to order a partial re-poll in some polling stations, whether Sections 67 to 70 of the ROPA can be similarly interpreted to authorize the Election Tribunal to order a partial re-poll ?

iii) Whether the Election Tribunal is empowered by any of the provisions in Sections 67 to 70 of the ROPA to order a partial re-poll ?"

5. Learned counsel for the petitioner has drawn our attention to our judgment under review and in particular the precedent cited therein titled Ehsanullah Reki vs. Abdul Qadir Baloch (2010 SCMR 1271). The ratio of the said precedent is the basis on which the points

of law i.e. interpretation of sections 67 and 70 of ROPA, has been made. The relevant portion of the cited case on which reliance has been placed, has been reproduced in our judgment. The learned counsel agued that this precedent in fact goes against the conclusion arrived at in the judgment and according to him, has been erroneously made the basis of the judgment. The relevant extract from the cited case can usefully be reproduced at this stage to enable us to examine if indeed the contention of learned counsel for the petitioner is well founded. Paragraphs 32 and 33 of the precedent case which are the basis of the judgment under review are reproduced as under:-

“32. We are mindful that the allegations leveled with regard to malpractices at some of the polling stations were such that it was difficult to identify the culprits and one obvious course to follow was to direct fresh polls of the entire constituency. However, we note that there were in all 220 polling stations and the dispute subject matter of this appeal is relatable to 11 polling stations only and with regard to four polling stations the appellant had alleged that in the recount carried out by P.W.1 on the direction of the Election Commission of Pakistan, the former had interpolated in the record, but this could not be proved. The objection of the appellant with regard to the report submitted by C.W.1, the Provincial Election Commissioner after the recount was duly addressed by this Court in remanding the case to the Tribunal. Parties were allowed to cross examine him. However, nothing adverse was brought in evidence which could discredit the testimony of C.W.1 and no mala fide was either alleged or could be inferred. We further note that notwithstanding the above even if all the rejected votes in all the eleven polling stations (although appellant had specific objection with regard to four only) are cast in favour of the appellant, the respondent still wins by a margin of 188 votes as is borne out from the break up given in Paras 25 and 26 above.

33. In the afore-referred circumstances, we do not deem it proper to annul the entire election and instead concur with the finding of the Election Tribunal to declare the respondent as a Returned Candidate”.

6. From the above extract it is evident that the cited case is quite distinguishable on facts and as a consequence, does not constitute precedent in the present case. The ratio, however, is supportive of the stance of the petitioner. The important point of distinction between the case of Ehsanullah Reki *supra* and the present matter is that in the cited case, regardless of the number of votes polled at the 11 disputed polling stations, the result of the election was not affected, while in the present case, the Election Tribunal as well as the judgment in appeal (now under review) have concluded

that the result of the seven disputed polling stations had materially affected the outcome of the election. It is an express stipulation of section 70 of ROPA that the election as a whole is to be declared void, if *“the result of the election has been materially affected by reason of failure of any person to comply with the provisions of the Act [ROPA] or the rules”*. In the present case both conditions of the statute viz. failure to comply with the provisions of ROPA and the second necessary condition that such failure should also have materially affected the result of the election, have been met. Since both statutory requirements exist concurrently in the present case, the election as a whole stands vitiated.

7. We will shortly be considering the words *“as a whole”* but in our humble opinion, the ratio in the case of Ehsanullah Reki *supra* supports the contention of the learned counsel for the petitioner rather than the stance of the respondent. The votes at the disputed polling stations would be decisive of the outcome of the election, which is why the case of Ehsanullah Reki *supra* is distinguishable. The only way the election in the present case could have been saved from being annulled is if the outcome of the election were to remain unaffected even if all votes at the disputed stations were treated as cast in favour of the losing candidate. It is this *“materiality test”* which has been duly noted in paragraph 29 of the judgment under review. The case of Morgan and others v. Simpson and another [(1974) 3 All ER, 722] has been referred to wherein it has been held that *“if there was breach of the rules or mistake in holding the polls, and it did affect the result, then the election is vitiated”*. The case of Muhammad Ali v. Maulana Muhammad Zakria (PLD 1966 Journal 167) has also been cited to hold that if *“it is not possible to assess as to what should have been the result of the election had the provisions of the law been correctly followed, the result of the election stood materially affected”*.

8. If the ratio of the afore cited cases is applied to the facts of the present case, it is clear that the number of votes in the seven disputed polling stations and the difference in votes polled by the two main contestants at such stations is such that it is not possible to assess the outcome of the election. Thus in the judgment of 7.3.2014, it has rightly been observed *“it is obvious that non compliance of the law in seven polling stations had materially affected the result of the entire election”*. This clearly demonstrates that even as per the judgment sought to be reviewed, the election in the constituency became contaminated as

a whole. The question, therefore, which needs to be answered is as to whether despite such finding it was open to the Election Tribunal to conclude that the election was only partially void to the extent of seven polling stations. Section 70 of ROPA, for ease of reference is reproduced as under:-

*“70. **Ground for declaring election as a whole void.**—The Tribunal shall declare the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reason of ---*

- (a) the failure of any person to comply with the provisions of the Act or the rules; or*
- (b) the prevalence of extensive corrupt or illegal practice at the election”.*

9. With great respect we are of the humble view that the ratio in the cases of Ehsanullah Reki, Morgan and others & Muhammad Ali *supra* appears to have escaped the notice of the Bench, and as a consequence the same has not been correctly appreciated and applied to the law and to facts of the present case. Therefore, even on the authorities referred to and relied upon in the judgment under review, the conclusion which must follow is that the election stood vitiated as a whole, because of being materially affected on account of failure to comply with the provisions of ROPA. Furthermore, after concluding (rightly) that non compliance of the law in seven polling stations had materially affected the “entire election”, it was not possible to allow for a partial annulment of the election.

10. The learned counsel for the respondent placed a great deal of emphasis on the provisions relating to the Election Commission under sections 103 and 103AA of ROPA as interpreted by this Court, with the object of contending that the Election Tribunal also has power to order a partial re-poll at some polling stations. For reasons now considered by us, the powers of the Election Commission under sections 103 and 103AA *ibid* are materially different from the provisions of sections 67 and 70 of the ROPA and, therefore, any interpretation of sections 103 and 103AA cannot be applied to sections 67 and 70 of ROPA. The provisions are in fact quite different, both in letter and in spirit.

11. The most significant aspect of distinction between the powers of an Election Tribunal under sections 67 and 70 as opposed to the powers to the Election Commission in sections 103 and 103AA of ROPA is constitutional. While the Election Commission has powers vested in it under Article 218 of the Constitution requiring it to ensure that the

election is conducted honestly, justly, fairly, and in accordance with law, the powers of the Election Tribunal are derived from Article 225 of the Constitution which stipulates that “[n]o 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). The Act of Parliament referred to is the ROPA.

12. There is thus a qualitative difference between the powers enjoyed by and invested in the two forums. The Election Commission is mandated to conduct elections honestly, justly, fairly and in accordance with law. It follows, therefore, that where it comes to the notice of the Election Commission that the election being conducted is not in accordance with the mandate of the Constitution and the law i.e. ROPA, the Election Commission may act by removing impediments in the conduct of just and fair elections. It may well be as per ratio in the case of Lt. Gen. (R) Sallahuddin Tirimzi Vs. Election Commission of Pakistan (PLD 2008 SC 735), that for a particular reason such as natural calamity, violence, terrorism etc., effecting a few polling stations, the Election Commission has the power to order a re-poll in such polling stations which have been affected by such events. Section 103 simply states that the Commission may “*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 ...*”. Moreover, clause (c) of section 103 provides ample power to the Election Commission to “*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 this Act [ROPA] and the rules*”. This power under section 103 *ibid* is of sufficient amplitude to enable the Election Commission to order a re-poll only in some and not all polling stations in a constituency. The Election Tribunal is not invested with any such discretion. The wording of section 70 quite clearly requires that the Tribunal “shall declare the election as a whole to be void” if the dual conditions of section 70 are met, as in the present case.

13. Secondly section 103AA stipulates that “... if, from facts apparent on the face of the record and after such summary inquiry as it may deem necessary, the Commission is satisfied that, by reason of grave illegalities or violations of the provisions of this Act [ROPA] or the rules, the poll in any constituency ought to be declared void, the Commission may make a declaration

accordingly and ... call upon the constituency to elect a member in the manner provided for in section 108". This is an enabling provision which empowers the Election Commission to call upon a constituency to elect a member. This power does not detract, in any manner, from the powers under section 103 and in particular clause (c) thereof to pass orders in respect of some, but not all polling stations. Moreover, when the provisions of sections 103 and 103AA are examined, it becomes abundantly clear that the Commission has been granted administrative and policing functions for the purpose of conducting elections honestly, fairly, justly and in accordance with law. These administrative powers are not judicial in nature and are exercisable without any deep probe of facts as may be ascertainable on "*the face of the record*" or after a "*summary inquiry*" if deemed necessary by the Commission. These powers once exercised by the Commission are also subject to judicial review as administrative acts because the same are by definition, based on a summary inquiry or in certain cases, even without such inquiry. The powers of the Election Tribunal on the other hand are based on Article 225 of the Constitution and are of a judicial and adjudicatory nature subject only to an appeal, in accordance with the provisions of ROPA and the rules.

14. As for the interpretation of the above noted statutory provisions, learned counsel for the respondent cited a number of judgments from our own and from Indian jurisdictions and also referred to principles of interpretation of statutes in support of his plea that the interpretation of sections 103 and 103AA in the case of Aftab Shahban Mirani v. Muhammad Ibrahim (PLD 2008 SC 779) can be treated as precedent for applying the same interpretative principle to sections 67 and 70 of ROPA. This submission, in our opinion, is misconceived. Firstly, because of the nature of the powers of the Election Commission which are derived from section 218 of the Constitution as discussed above. This is in contradistinction to the powers of the Election Tribunal which are derived under Article 225 of the Constitution. Secondly, even the wording of sections 103 and 103AA is significantly different from the wording of sections 67 and 70 of ROPA. Since in the present case the result of the election has been materially affected as a result of the failure by polling staff to comply with the provisions of ROPA, there is no option left with the Tribunal but to declare the election as a whole to be void. The words "as a whole" do not

appear in sections 103 and 103AA and as such there is no justification for treating these provisions as being *in pari materia* with sections 67 and 70 of ROPA. The Election Commission has a wide range of powers and discretion which, we say with great respect, is not available to an Election Tribunal because of the language employed in section 70 of ROPA. The Election Tribunal cannot go beyond the powers granted by ROPA because it is constrained by Article 225 *ibid* to act only “*in such manner as may be determined by Act of Majlis-e-Shoora (Parliament)*”.

15. The case of Aftab Shahban Mirani *supra* is thus clearly distinguishable and has no application in the present matter. Firstly because it relates to the Election Commission and its powers under ROPA and not to the powers of an Election Tribunal. Secondly, it is the plain reading of section 103 read with section 103AA of ROPA which was adopted and followed by the Court. It was clear on the facts of the cited case that in exercise of powers under sections 103 and 103AA of ROPA, the Election Commission was well within its jurisdiction to direct a re-poll only at 17 disputed polling stations. Thirdly, an important distinction is to be drawn from the fact that the case of Aftab Shahban Mirani *supra* arose out of a writ petition to challenge the administrative orders of the Election Commission by way of judicial review. The circumstances of the present case are materially different from those of the case of Aftab Shahbad Mirani for the reasons which have already been explained above and which demonstrate that none of the circumstances in the cited precedent are available in the present case. Moreover, the provisions of sections 67 and 70 of ROPA were neither subject matter of the said case nor were the same interpreted.

16. The learned counsel for the respondent also cited the case of Mohinder Singh vs. Chief Election Commissioner (AIR 1978 SC 851) decided by the Supreme Court of India wherein it was held that a partial re-poll could be ordered by the Election Court. We have examined the Indian ROPA and note that it is significantly different from the Pakistani statute and in particular it does not limit or mandatorily require the Election Court to declare the election as a whole to be void. This, however, is mandatory where the conditions of section 70 ROPA, reproduced above are met. Under section 100 of the Indian ROPA it is open to the Election Court to declare the election of the returned candidate to be void. The words “as a whole” are conspicuously missing from the Indian statute. The

case of Mohinder Singh vs. Chief Election Commissioner *supra*, therefore, does not have even persuasive value in the present case. Likewise the case of A.C. Jose vs. Sivan Pillai (AIR 1984 SC 921) is also not apt for the same reason.

17. The matter now before us, therefore, appears to be one of first impression for this Court. Finally, we may mention that learned counsel for the respondent referred to a number of cases involving interpretation of statutes. These cases and the treatise on statutory interpretation by F A R Bennion in fact, state quite clearly that where the wording of a statute does not admit of any ambiguity, Courts do not have the power to travel beyond such wording in search of some illusory meaning which may have been “intended” by Parliament. In the case before us we say with great respect, there appears to be no reason why the words “as a whole” should be ignored or made redundant. One salutary rule for interpretation of statutes is that redundancy is not to be imputed to the legislature. If the statute requires the election as a whole to be declared void, it is not possible to hold that this includes the jurisdiction to declare the election at a few polling stations to be void. This is particularly so when the finding recorded in our judgment is categorical that the entire election has been materially effected. Moreover, when the law mandates the doing of a certain thing in a certain way such thing has to be done in the way mandated by law and in no other way.

18. We may also add that the submission of learned counsel for the respondent that no prejudice has been caused to the petitioner on account of re-poll at seven stations, is not legally tenable. We have already noted above that even according to the finding of the Election Tribunal and of this Court in the judgment under review, the election as a whole stood contaminated when it became evident that the voting at the said polling stations had materially affected the outcome of the election. The prejudice, therefore, to the petitioner is evident. We may once again state that the Tribunal had concluded with clarity that “*it is a clear cut case where the result of election can be said to have been materially affected on account of illegality in process of election on the part of the polling staff*”. A similar view, as noted above, has been recorded in the judgment sought to be reviewed. Furthermore, the failure to properly apply the law would also, by definition, be prejudicial not only to the petitioner but also to the entire electorate of the constituency

because, as a consequence they would not be able to elect a Parliamentarian in a bye election, in accordance with law. This and the above discussed aspects of the case appear to have escaped the attention of the Bench while rendering the judgment under review.

19. In view of the foregoing discussion, we allow this review petition and hold that the election as a whole stood vitiated. Civil Appeal No. 31 of 2014 is thus allowed. The Election Commission shall, therefore, hold a bye election for the constituency NA-19 (Haripur) in accordance with law.

Judge

Judge

Islamabad, the
'APPROVED FOR REPORTING'
A.Rehman/*

Judge

SH. AZMAT SAEED, J.- Through the instant Civil Review Petition under Article 188 of the Constitution of the Islamic Republic of Pakistan, 1973, the Petitioner has called into question the judgment of this Court dated 07.03.2014, whereby an Appeal filed by the Petitioner, was dismissed.

2. The brief facts necessary for adjudication of the *lis* at hand are that the Petitioner and the Respondents contested the elections for the National Assembly from Constituency NA-19, Haripur, KPK, held on 11.05.2013. And after a recount, directed by the Election Commission of Pakistan (ECP), the Petitioner was declared, as the Returned Candidate. Respondent No.1 filed an Election Petition before the Election Tribunal, which was partially allowed vide judgment dated 31.12.2013, and the ECP was directed to hold re-polling at seven Polling Stations. The Petitioner challenged the said judgment in an Appeal before this Court, which was dismissed vide judgment dated 07.03.2014, now sought to be reviewed through the instant Civil Review Petition.

3. A finding was returned by the Election Tribunal and maintained by this Court that there had been a failure to comply with the mandatory requirements of the Representation of the People Act, 1976 (ROPA) at the said seven Polling Stations and such failure in view of the close contest *inter se* the Petitioner and

Respondent No.1 had materially affected the result of the election. At the very outset, learned counsel for the Petitioner submitted that such findings are not disputed. However, it is the case of the Petitioner that upon an Election Petition filed before it, the Election Tribunal can only pass one of the several possible orders set forth in Section 67 of ROPA, subject to the conditions mentioned in the succeeding Sections and in the eventuality, the Election Tribunal reaches the conclusion that there was a failure to comply with the provisions of ROPA or the Rules, which materially affected the result of the election, the election as a whole is to be declared as void by virtue of Section 70 of ROPA. Therefore, in the instant case where such a finding had been returned, both by the Election Tribunal and this Court, the only order which could have been passed was to declare the election of the entire Constituency as void resulting in a fresh election. Repoll in seven Polling Stations could not have been ordered. This is the only ground urged on behalf of the Petitioner. In support of his contentions, the learned counsel for the Petitioner relied upon the judgments, reported as Sardar Abdul Hafeez Khan v. Sardar Muhammad Tahir Khan Lone and 13 others (1999 SCMR 284) and Dr. Sheela B. Charles v. Qaisar Ifraeem Soraya and another (1996 SCMR 1455).

4. The learned counsel for the Contesting Respondent No.1 controverted the contentions raised on behalf of the Petitioner. At the very outset, the learned counsel contested the maintainability of the Civil Review Petition by urging that the ground has now been agitated on behalf of the Petitioner, was raised in Appeal and adjudicated upon by way of the judgment under review dated 07.03.2014. In the above backdrop, it is contended that the Petitioner is seeking re-hearing of the Appeal, which is not permitted in law. It is further contended that it is a settled law that the Election Tribunal for all intents and purposes, is a Court and has all the powers and jurisdiction of a Civil Court, including the inherent powers and jurisdiction under Order VII Rule 7 of the Civil Procedure Code, 1908, to mold the relief to the facts and circumstances of the case, as has been done in the instant case by directing a re-poll in the seven Polling Stations where admittedly there was a gross failure to comply with the mandatory provisions of ROPA and the Rules materially affecting the result. Therefore, no exception can be taken to the course of action adopted by the Election Tribunal and maintained by this Court vide judgment dated 07.03.2014. It is further urged that the provisions of ROPA in Pakistan are not dissimilar to the provisions of the Indian Representation of the People Act, 1951,

whereunder the Supreme Court of India has routinely ordered re-polling at a few Polling Stations in a particular Constituency. It is added that even otherwise, the powers and jurisdiction of the Election Tribunal to grant the full relief of declaring the election as a whole void, includes by necessary implication the jurisdiction to grant a partial relief of declaring the election of a few Polling Stations to be void and directing a re-poll there. Such interpretation of Section 70 of ROPA would be in accordance with the principle of interpretation, usually referred to as a common sense principle of interpretation. Even otherwise, the power to grant greater relief includes the power to grant lesser relief, as has been done in the instant case.

5. The learned counsel further contended that since the polling at only seven Polling Stations was contaminated the principle of severability would be attracted and such contamination could not poison the result of the remaining Polling Stations. It is added that by virtue of Section 103-AA of ROPA, the ECP has been conferred the jurisdiction to declare the poll in any Constituency void *inter alia* in cases of violation of the provisions of ROPA or the Rules. Such powers have been interpreted by this Court to include the power to direct a re-poll in some Polling Stations in a Constituency, by applying the

principle of severability. Such powers, it is contended, are obviously available to the Election Tribunal. Therefore, no exception can be taken in the impugned judgment.

It is next contended that the interpretation of Sections 67 and 70 of ROPA canvassed on behalf of the Petitioner is not only literal rather than purposive but would also lead to unfair, unjust and improper result and, therefore, cannot be accepted. In support of his contentions, the learned counsel for the Respondents, relied upon the judgments, reported as Sind Employees' Social Security Institution and another v. Adamjee Cotton Mills Ltd (PLD 1975 SC 32), Mrs. Monica Kamran Dost v. Mrs. Lilavati Barchandani and another (PLD 1987 SC 197), Haji Behram Khan v. Abdul Hameed Khan Achakzai and others (PLD 1990 SC 352), Aftab Shahban Mirani and others v. Muhammad Ibrahim and others (PLD 2008 SC 779), Federation of Pakistan through Ministry of Finance and others v. M/s. Noori Trading Corporation (Private) Limited and 14 others (1992 SCMR 710), Reference under S. 12, Sindh Courts' Act, 1926 [PLD 1956 (W.P.) Karachi 178], Hudabiya Engineering (Pvt) Limited v. Pakistan through Secretary, Ministry of Interior, Government of Pakistan and 6 others (PLD 1998 Lahore 90), Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and

others (AIR 1978 SC 851) and A. C. Jose v. Sivan Pillai and others (AIR 1984 SC 921).

6. Heard. Available record perused.

7. At the very outset, it has been noticed that it is not the case of the Petitioner that by way of the Order of the Election Tribunal upheld by this Court by way of the judgment under review any prejudice has been caused to him. The learned counsel is merely relying on the literal text of the provisions of Sections 67 and 70 of ROPA.

In pith and substance, it is the case of the Petitioner that the Election Tribunal can only pass orders, specified in Section 67 sub-section 1 (a) to (d) and the subsequent provisions of ROPA specify the ground whereupon each or any of such order can be passed. It is the case of the Petitioner that in the event of a failure to comply with the provisions of ROPA or the Rules framed thereunder materially affecting the result, the election as a whole must be declared void. Section 67 (1) of ROPA, is reproduced hereunder for ease of reference:

"Sec. 67. Decision of the Tribunal.- (1) The Tribunal may, upon the conclusion of the trial of an election petition make an order

(a) dismissing the petition;

(b) declaring the election of the returned candidate to be void;

(c) declaring the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected; or

(d) declaring the election as a whole to be void.”

And Section 70 of ROPA, reads as under:

“Sec. 70. Ground for declaring election as a whole void.—The Tribunal shall declare the election as whole to be void if it is satisfied that the result of the election has been materially affected by reason of –

(a) the failure of any person to comply with the provisions of the Act or the rules; or

(b) the prevalence of extensive corrupt or illegal practice at the election.”

8. The interpretation advanced by the learned counsel for the Petitioner is literal. The Courts in Pakistan have always preferred a purposive rather than a literal interpretation of Statutory Instruments. Reference in this behalf may be made to the judgments, reported as Hudabiya Engineering (Pvt) Limited v. Pakistan through Secretary, Ministry of Interior, Government of Pakistan and 6 others (PLD 1998 Lahore 90) and Federation of Pakistan through Ministry of Finance and others v. M/s. Noori Trading Corporation (Private) Limited and 14 others (1992 SCMR 710).

9. An overview of the Constitution of the Islamic Republic of Pakistan, 1973, and ROPA reveals that political sovereignty is to be exercised by the chosen representatives of the people, as is apparent from the Preamble and the Article 2A of the Constitution. Such representatives must be chosen by the people through a free, fair and impartial election, as is mandated by Article 218 of the Constitution. In case of an election dispute, the same must be resolved through an Election Petition by the Election Tribunal, established in terms of Article 225 of the Constitution under ROPA. Such disputes, subject to mandatory procedural requirements, must necessarily be resolved in a manner that the will of the people is given effect to and respected.

In the instant case, the election in 430 Polling Stations is not in issue. An interpretation whereby valid votes cast in 430 out of 437 Polling Stations are invalidated without any unavoidable compulsion, especially in the absence of prejudice to any party, would not advance the obvious purpose of the relevant constitutional provisions of ROPA, therefore, cannot be easily accepted.

10. The precipice of severability is well recognized and held applicable to election matters. Furthermore, such an interpretation would encourage and enable a losing candidate to

precipitate a re-poll in the entire Constituency by disturbing the election at one or two Polling Stations and thereby frustrating and subverting the purpose of the law. In this behalf, this Court in the judgment, reported as Haji Behram Khan v. Abdul Hameed Khan Achakzai and others (PLD 1990 SC 352), held as follows:

“We agree with the High Court that in a case where a serious violation of law or any statutory rule is established by a group of miscreants or by the supporters of a losing candidate in one or two polling stations, the election of the whole constituency may not be set aside if on the strength of the votes cast in other polling stations and the available record a clear result is determinable. In this case, respondent No.1 had obtained 5,122 votes and the next highest number of votes obtained were by the petitioner Haji Behram Khan namely 2,625 votes. Admittedly, the three ballot boxes which were not recovered contained only 1,785 votes and even if all of them had been cast in favour of Haji Behram Khan (petitioner herein) he would still have lost. In these circumstances, to declare the election of the whole constituency as void on account of the misdoings or the hooliganism perpetrated by the supporters of other candidate would be to encourage candidates who felt that they are losing getting the whole election annulled and frustrating the wishes of the electorate. This Court will not easily countenance such a malversion of the electoral process. It has been repeatedly held by this Court that it shall not act in aid of injustice and where an order of the High Court has been passed to bring about a just, proper and fair result, this Court will not interfere.

11. Furthermore, as a principle of interpretation a word or a phrase implying the “whole” ordinarily includes any part

thereof. Reference in this behalf may be made to the “Statutory Interpretation” A Code (Fourth Edition) by F A R Bennion MA (Oxon) Barrister, wherein it has been observed, as follows:

“Greater includes less The requirement that commonsense shall be used in interpretation brings in such obvious principles as that the greater includes the less: *omne majus continet in se minus*. This is a principle the law recognizes in many contexts.

.....

Example 197.5 Section 3(1) of the Criminal Law Act 1967 states that a person may use such force as is reasonable in the prevention of crime. Milmo J said ‘It is, of course, true that the charge against the defendant was not that he used force but that he *threatened* to use force. However if force is permissible, something less, for example a threat, must also be permissible ...’”

The aforesaid quoted maxim of interpretation is not unknown to the Courts in Pakistan. Reference in this behalf may be made to the judgment, reported as Reference under S. 12, Sindh Courts’ Act, 1926 [PLD 1956 (W.P.) Karachi 178], wherein Justice S.A. Rehman, as he then was, observed as follows:

“Omne majus continet in se minus - the greater contains the less – is a well known maxim of the law.”

12. Section 67 of ROPA enumerates the possible reliefs, which may be granted by the Election Tribunal. It is in the above context that the phrase “declaring the election as a whole to be void” as used in clause (d) must necessarily be examined. The

jurisdiction to grant a specified relief includes the jurisdiction to grant a partial relief, as has been held by this Court in the case, reported as Sind Employees' Social Security Institution and another v. Adamjee Cotton Mills Ltd (PLD 1975 SC 32), in the following terms:

“It is not disputed that the Social Security Court, on an appeal brought before it under the above section can set aside the order appealed against in its entirety or may grant even partial relief depending upon the facts of a particular case. ...”

13. Thus, as a general principle of law, the Election Tribunal while exercising its jurisdiction in terms of Section 67 (1) (d) of ROPA not only can declare the election as a whole void but also any part thereof i.e. the elections in a few Polling Stations, if the circumstances so require. This is also obvious from a bare reading of the aforesaid provisions which reveals that the phrase “declaring the election as a whole to be void” employed in clause (d) has been used in contradistinction to clause (b) envisaging an order “declaring the election of the returned candidate to be void”.

14. In the case of Mrs. Monica Kamran Dost v. Mrs. Lilavati Barchandani and another (PLD 1987 SC 197), equal numbers of valid votes were polled in favour of the two contesting candidates. The Returning Officer misapplied the

provisions of sub-rule 5 of rule 66 of the Representation of the Peoples (Conduct of Election) Rules, 1977. On an Election Petition, the Election Tribunal apparently following a literal interpretation of Section 70 of ROPA, declared the election as a whole void. On appeal, this Court modified the result by holding that "On this view of the matter, the Election Tribunal should have declared the election of the appellant, in Appeal No.3-K of 1986, to be void."

15. The ROPA in addition to the powers conferred on the Election Tribunal has also conferred powers on the ECP to pass appropriate orders regarding the conduct of the election, including Section 103-AA, which is reproduced hereunder:

"Sec. 103-AA. Power of Commission to declare a poll void.—(1) Notwithstanding anything contained in this Act, it, from facts apparent on the face of the record and after such summary inquiry as it may deem necessary, the Commission is satisfied that, by reason of grave illegalities or violation of the provisions of this Act or the rules, the poll in any constituency ought to be declared void, the Commission may make a declaration accordingly and, by notification in the official Gazette, call upon that constituency to elect a member in the manner provided for in section 108.

(2) Notwithstanding the publication of the name of a returned candidate under sub-section (4) of section 42, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the

Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to a decision of a Tribunal.

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

A perusal of the aforesaid provisions makes it is clear and obvious that *inter alia* on account of violation of any of the provisions of ROPA or the Rules framed thereunder, the ECP may declare the poll in any Constituency as void. It may be noticed that no specific power has been conferred to declare an election in a part of the Constituency as void or to direct a re-poll at a few Polling Stations, yet in exercise of the powers conferred by Section 103-AA of ROPA, the ECP on many occasions has ordered re-poll in a few specific Polling Stations. An order in one of such cases was challenged, *inter alia*, on the ground that in terms of Section 103-AA of ROPA, election as a whole could be declared void and no partial re-poll in a few Polling Stations could be ordered. In the said case, reported as Aftab Shahban Mirani and others v. Muhammad Ibrahim and others (PLD 2008 SC 779) it was held as follows:

“The emphasis of the learned counsel for the respondent that the Election Commission, without holding proper inquiry could not exercise powers under section 103-AA of the Act to declare the election of a constituency as a whole void and there is also no concept of partial declaration of election void, has no legal foundation. The Election Commission of Pakistan may exercise power under section 103-AA of the Act in the manner provided therein and not beyond that, but the plain reading of section 103-AA of the Act would show that meaning of expression “in the constituency void” is not only referable to the whole constituency rather its true import is election in the constituency as a whole or at one or more polling stations. It was held in Abdul Hamid Khan Achakzai v. Election Commission of Pakistan 1989 CLC 1833 as under:--

“Election commission’s jurisdiction for declaring election of the whole constituency as void would depend on being satisfied about the existence of grave illegalities or serious violations of the provisions of the Act LXXXV of 1976 or Election Rules in the conduct of polls in any constituency.”

It was further held that:-

“No doubt Election Commission is vested with jurisdiction to declare void, results of the entire constituency within the purview of section 103-AA but such authority is exercisable only when other express provisions of law are not suitable to cater for the given situation.”

16. The provisions of the Indian Representation of the People Act, 1951, with regard to the Election Petitions are not dissimilar to that of ROPA. Though no doubt, the phrase “declaring the election as a whole void” has not been employed

yet in the relevant provisions, no specific power to declare the election in a few Polling Stations as void is granted. The Supreme Court of India upon an Election Petition has repeatedly declared the result of a few Polling Stations to be void and a re-poll in such Polling Stations ordered. Reference in this behalf may be made to the judgments, reported as Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others (AIR 1978 SC 851) and A. C. Jose v. Sivan Pillai and others (AIR 1984 SC 921).

17. In view of the above, it appears that the interpretation of Sections 67 and 70 of ROPA, being pressed into service on behalf of the Petitioner is too literal, rigid and ritualistic to accept. It offends against the well recognized common sense principle of interpretation and tends to erstwhile maxim that “the greater contains the less” which has been applied by the Courts. We cannot also loose sight of the fact that the Election Tribunal is for all intents and purposes a Court and it is settled law that Courts and Tribunals cannot only grant the entire relief permitted by law but also any part thereof. The principle of severability is also well recognized and the same is duly attracted to elections thereby isolating the result in a few Polling Stations where poll has contaminated and a fresh poll thereat. It is also obvious that such

principles have been applied by this Court, both with reference to the powers of the ECP under Section 103-AA and by the Election Tribunal, as is evident from the judgments referred to and reproduced hereinabove. Directing a re-poll in some Constituencies as was done in the instant case is also a course of action adopted and followed by the Supreme Court of India in the election matters.

18. The interpretation followed by the Election Tribunal and upheld by this Court by way of the judgment under review, besides conforming to the established principle of interpretation advances the object and intent of Articles 218, 219 and 225 of the Constitution and the provisions of ROPA. Furthermore, thereby the mischief of encouraging disruption of the poll is suppressed. In the instant case, the election in 430 out of 437 Polling Stations, was carried out fairly, justly and in accordance with the law merely because in seven Polling Stations, ROPA and the Rules framed thereunder are violated, does not justify annulling the election in 430 Polling Stations. Importantly, it is not the case of the Petitioner that the interpretation of Sections 67 and 70 of ROPA, as employed by in the instant case has caused any prejudice to him. It may be noted the possibility that the known result of 430 Polling Stations would influence the subsequent re-

poll in the seven disputed Polling Stations, does not arise as it was a very closely contested election dependent entirely on the result of the seven disputed Polling Stations. Even otherwise, the ECP under Section 103-AA of the ROPA order re-polling in a few Polling Stations, which course of action has been upheld by this Court.

19. We cannot also loose sight of the fact that during the pendency of the appeal, re-poll in seven Polling Stations, was conducted as a consequence whereof Respondent No.1 was declared the Returned Candidate. The people of the Constituency have spoken and there is no occasion to discard the will of the people and force them go to the polls again.

20. In this view of the matter, it appears that in the eventuality of a failure to comply with the mandatory provisions of ROPA and the Rules, an Election Tribunal in exercise of powers under Section 70 of ROPA, may declare the election as a whole to be void. However, the Election Tribunal is not denuded of the jurisdiction to grant partial relief of declaring the election at a few Polling Stations to be void and directing a re-poll thereat. Which of the two available courses of action to be followed would depend on the facts and circumstances of each case. The real and decisive factor would be the fulfillment of the mandate of the

Constitution and ROPA of ensuring the will of the people is respected and a free, fair and impartial election held. It should be ensured that no prejudice is caused to any of the candidates. In the instant case, it is not even the case of the Petitioner that any prejudice has been caused to him or the true intent and object of law has not been achieved. Consequently, the judgment dated 03.07.2014 does not suffer from any error requiring rectification, therefore, this Civil Review Petition, being without merit is liable to be dismissed.

Judge

ORDER OF THE BENCH:

By majority of 2 to 1 (Sh. Azmat Saeed, J. dissenting), we allow this review petition and hold that the election as a whole stood vitiated. Civil Appeal No.31 of 2014 is thus allowed. The Election Commission shall, therefore, hold a bye election for the constituency NA-19 (Haripur) in accordance with law.

Judge

Judge

Judge

Announced in open Court at Islamabad on **19.06.2015.**

APPROVED FOR REPORTING.