

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Mian Saqib Nisar

Mr. Justice Mushir Alam

Mr. Justice Maqbool Baqar

Civil Appeals No.1169 & 1192 of 2014

Against judgment dated 05.08.2014 of Election Tribunal, Lahore, passed in Election Petition No.226 of 2013.

Ch. Muhammad Ashraf Warraich

Appellant (in CA#1169/14)

Muhammad Nasir Cheema

Appellant (in CA#1192/14)

VERSUS

Muhammad Nasir Cheema, etc

Respondents (in CA#1169/14)

Ch. Muhammad Ashraf Warraich, etc

Respondents (in CA#1192/14)

For the Appellant(s):

Ch. Aamir Rehman, ASC
(in CA#1169/14)

Ch. Khurshid Anwar Bhindar, ASC
(in CA#1192/14)

For Respondent No.1:

Ch. Khurshid Anwar Bhindar, ASC
(in C.A.No.1169/14)

Ch. Aamir Rehman, ASC
(in CA#1192/14)

Date of Hearing:

11.05.2015

JUDGMENT

Mushir Alam, J-. Through this single judgment, we intend to decide the listed Civil Appeal No.1169 of 2014, filed by Ch. Muhammad Ashraf Warraich, and Civil Appeal No.1192 of 2014, filed by Muhammad Nasir Cheema.

2. Muhammad Ashraf Cheema, also Respondent No.1 in Civil Appeal No.1192 of 2014 (*hereinafter referred to as the 'Returned Candidate'*), has been non-seated by the learned Election Tribunal, Lahore, vide the impugned decision dated 05.08.2014 and at the same time it directed the Election

Commission of Pakistan to take necessary steps for holding Bye-Elections in 33 polling stations of the Constituency of PP-97, Gujranwala. Second mentioned Appeal has been filed by Muhammad Nasir Cheema, who is Respondent No.1 in first mentioned Civil Appeal, (*hereinafter referred to as the 'Election Petitioner'*), is also aggrieved by the portion of the same impugned decision, declining to declare him elected member from the said constituency, has prayed for modification of the impugned decision of the Election Tribunal to such an extent.

3. Briefly stated the facts appear to be that the elections for Provincial Assembly for Constituency PP-97, Gujranwala-VII, comprising 120 polling stations were held along with general elections throughout the Province of Punjab on 11.05.2013. Both the contestants along with 28 other candidates contested for the Constituency, official result of the election was declared on 13.06.2013 (Ex.PW.33/H). As a result of the count in form XVI, first three candidates secured votes as follows: -

- i. Ch. Muhammad Ashraf Warraich,
Returned candidate secured.....29,756 votes;
- ii. Muhammad Nasir Cheema
Election Petitioner secured22, 335 votes;
- iii. Ghulam Sarwar
Resp.No.25/Runner up secured.....23, 871 votes.

4. None other than the Election Petitioner, Muhammad Nasir Cheema challenged the election through Election Petition No.226 of 2013 essentially on the ground summarized in the impugned decision of the Election Tribunal as follows: -

"GROUND OF ATTACK NO.1

That the petitioner defeated all his political rivals including the returned candidate and the runner up at 33 polling stations of the Constituency fully particularized in the statement, Ex.PW-33/E; that his polling agents received copies of statements of the count in form XIV regarding said 33 polling stations from the Presiding Officers and passed on to the petitioner, according to which the petitioner secured 26,769 votes whereas the returned candidate obtained 25,473 votes and that the Returning Officer tempered with the statements of the count in form XIV and reduced the votes polled to the petitioner from 26,769 to 22,335.

GROUND OF ATTACK NO.2

That the General Election-2013 from Constituency No.PP-97, Gujranwala-VII was not conducted in accordance with delimitation of the constituencies approved and notified under the Delimitation of Constituencies Act, 1974; that according to notified delimitation of constituencies vide notification dated 28th June, 2002 and notification dated 08th April, 2013, Gujranwala Cantt. was included in Constituency No.PP-96-Gujranwala, that villages Baddoke, Hardo Amin Pur, Bhaghat Garh and Dhippha were made part of Constituency No.PP-97 by the District Returning Officer through polling scheme despite the fact that the above said villages being located within the territorial limits of Cantonment, Gujranwala should have been made part of Constituency No.PP-96, Gujranwala and that the election held on 11.05.2013 at the polling stations of aforesaid villages under the said polling scheme being offensive to the notified delimitation of constituencies, was null and void."

5. However, serious challenge before this Court was confined to first mentioned ground. From the record, it is evident that Election Petitioner and the Returned Candidate participated in the in the proceedings and other contesting candidate were proceeded against *ex-parte*.

6. After exchange of the pleadings, the learned Election Tribunal framed the issues as follows: -

- "1. Whether the election petition is actuated by bad faith, if so its effect. OPR1*
- 2. Whether the election petition is hit by the provisions contained in section 55(1)(B) of the Representation of People Act 1976? OPR1*
- 3. Whether the petitioner is estopped by his conduct to file this petition OPR1*
- 4. What is effect of preliminary objections number A to D and F of the written statement OPR1*
- 5. Whether the election of respondent No.1 is liable to be declared as void and the petitioner is entitled to be declared as Returned Candidate for the reasons mentioned in the election petition? OPR1*
- 6. Relief"*

7. Issues No.1 to 4 were not contested by the Returned Candidate, therefore, were decided in favour of the Election Petitioner. Issue No.5, being pivotal, was seriously contested by the disputants. Since burden to prove subject issue was on the Election Petitioner, he examined himself as *RW.33* and produced his 30 polling agents, (***PW-1 to PW-32***) who supported his case that they had collected the copies of

statements of count in form XIV issued by the Presiding Officers of their respective polling stations. He produced consolidated result of 33 polling stations **Ex.P-33/E** (available at pages 316 to 319 of CA#1169/2014) which shows total vote casted in his favour whereby he secured 26,769 votes as against 25,473 votes polled by the Returned Candidate. The Election Petitioner produced the count of form XIV of all the 33 polling stations himself and through his witnesses at trial. The Returned Candidate (**RW-33**) examined 32 out of 33 Presiding Officers (**RW1-RW32**) from the disputed polling stations. He and his witnesses produced copies of the statements of the vote counts in form XIV. Result of the counts as claimed by the disputant candidates emerged as follows:-

Sr.No.	Polling station No.	Number of polled votes to the petitioner as per statement of the count relied upon by the petitioner	Number of polled votes to the petitioner as per statement of the count relied upon by the returned candidate	Number of polled votes to the returned candidate as per statement of the count relied upon by the petitioner	Number of polled votes to the returned candidate as per statement of the count relied upon by the returned candidate
1.	2	170	70	171	271
2.	4	238	138	174	274
3.	4	359	249	367	477
4.	6	285	135	145	295
5.	8	368	218	279	429
6.	9	397	297	374	474
7.	17	577	377	461	661
8.	59	306	156	480	630
9.	62	317	214	175	278
10.	78	135	35	152	252
11.	79	130	30	106	206
12.	80	259	59	260	460
13.	81	202	52	202	352
14.	82	132	32	120	220
15.	85	278	178	264	364
16.	87	226	26	159	359
17.	88	134	34	137	237
18.	91	287	87	175	375
19.	92	161	61	195	295
20.	93	189	39	223	373
21.	94	169	19	183	333
22.	97	133	33	165	265
23.	98	275	75	263	463
24.	99	190	40	173	323
25.	100	169	49	162	282
26.	101	140	40	146	246
27.	105	434	334	141	241
28.	106	364	264	157	257
29.	110	313	213	70	170
30.	113	471	271	210	410
31.	114	151	00	180	180
32.	115	430	230	306	506
33.	117	599	499	260	360
Grand Total		8988	4554	7035	11318

8. It was noted by the learned Election Tribunal that the statements of the count in form XIV as relied upon by the Returned Candidate falls to the ground, if the statement of the count adduced by the Election Petitioner is taken into consideration. Conversely, if the result of the vote counts relied upon by the Runner Up is taken as true, the Election of Returned Candidate will not be open to any exceptions.

9. Since the vote count in Form XIV produced by the contesting parties was conflicting. To resolve the controversy learned Election Tribunal, at the behest of the Election Petitioner, in exercise of powers under Section 46 of the Representation of People Act, 1976 (RoPA, 1976) deemed it expedient to appoint a *Commission* (Mr. Sultan Ahmad, Additional District and Sessions Judge, (Retd.)), to examine the election record of 33 challenged Polling Stations and submit report. The *Commission* completed the exercise in presence of contestants and also appeared as Tribunal Witness (**TW-1**). He produced the Report as **Ex. TW1/A** and **Ex. TW1/B**. He deposed that all the bags containing the election material including statutory forms were not sealed when received by the *Commission*.

10. To examine the effect of the unsealed bags and to ascertain the circumstances, how and when such bags were de-sealed, learned Election Tribunal also examined Mr. Rehan Bashir, Returning Officer as **TW-2**, Mr. Shakeel Ahmed, the then District Accounts Officer, Gujranwala as **TW.3** and Syed Safdar Raza, Head Treasurer, Gujranwala as **TW.4**. On the strength of the evidence so adduced, the learned Election Tribunal in paragraph 16 observed that *"After coming to the conclusion that the Returning Officer deposited unsealed election bags with the returning Officer attempted to conceal the factual position from this election Tribunal, which persuaded him to deposit unsealed election bags with the District Accounts Office is open to serious exception."* It was thus concluded that *"Here I would say that the reasons and motive behind deposit of the unsealed election bags in the district Treasury is shrouded in*

mystery. Hence I feel no difficulty in concluding that the record found by the Commission from unsealed Bags is worthless".

11. Learned *Election Tribunal*, took into consideration, statements of the Presiding Officer of polling station No.6, *Dr. Shaheen Naqvi (RW.3)*, Presiding Officer of polling station 78, *Mr. Abdul Hameed Khalid (RW.8)*, *Dr. Imtiaz Husain*, Presiding Officer **(RW.10)** of polling station No.80 **(PP-97)**, *Ms. Rakshanda Iqbal (RW.14)* Presiding Officer of polling station No.99, *Ms. Faiza Khan (RW.15)* Presiding Officer of polling station No.101 and *Mr. Muhammad Bilal (RW.30)*, Presiding Officer of polling station No.59. It was noted that all the six Presiding Officers, who were produced by the Returned Candidate, owned the statement of count prepared by them in form XIV, confronted to them by the Election Petitioner. They had no satisfactory explanation to offer to the contradictory statement of count contained in form XIV prepared by them and produced by the Returned Candidate. Learned Election Tribunal also carefully examined the report of the *Commission (Ex.TW.1/A and Ex.TW.1/B)* constituted under Section 46 of RoPA, 1976. It has also come on record that the Returning Officer, *Rehan Bashir (TW-2)* "*did not carry out the exercise of consolidation of results qua the rejected votes in terms of section 39(3) of the Act, 1976*" and that "*he failed to discharge his legal obligation*". Thus the Election Tribunal observed that the all the six presiding officers erroneously deposed that they had correctly prepared the statements of the counts as presented to the Election Tribunal.

12. Learned *Election Tribunal*, in paragraph 18 of the impugned Decision, also took stock of the fact that as per statements of count in Form XVI, of the six (06) challenged PS namely **PS No.2**, (271 vote) **PS No.17**, (votes 661), **PS No. 62**, (278 vote), **PS No. 81**, (votes 352) **PS No.91**(375 votes) and **PS No. 93** (373 votes) total 2260 votes were not found. It was thus concluded that the 'Returned Candidate' could not substantiate that he secured (2260) votes from said six challenged PS. In paragraph 19 of the impugned Decision it was noted that Form XIV were missing in bags of nine (09) challenged PS No.2, 17,

62, 81, 82, 91, 93 101 and 114 for the comparison with the conflicting statements contained in form XIV, relied upon by the disputant. In paragraph 20 of the Decision, it was noted that from the bags of five (05) challenged PS (No.2, 80, 85, 93 and 94), not a single counterfoil was available though the form XVI reflected that 4,302 votes were polled at the subject polling stations. Thus, the validity of the 4,302 polled votes was held to be seriously questionable.

13. Learned Election Tribunal, thoroughly and meticulously thrashed out the evidence led by the parties and took note of the fact that the number of polled ballots did not tally with the available record, as could be seen from the tabulation of 33 challenged polling stations (Typed Page 20 of the impugned judgment). It shows that total votes casted in favour of the contesting candidates as per consolidated statement in form XVI were recorded as 34,229. Whereas, total number of votes actually found in the bags were only 19,300. There is no explanation of shortage of 14,929 votes missing from the bags. Learned *Election Tribunal*, also found that total number of counterfoils did not tally with total number of polled ballot papers found from the bags. It was admitted by the Returning Officer (**TW.2**) at trial that he did not re-examine the rejected votes, excluded from the count by the Presiding Officer as was required under section 39(3) of the RoPA, 1976. Discrepancy in total number of rejected votes as per Form XIV were 728, whereas only 497 rejected votes were physically found in the bags. The state of available and missing record as noticed in various tabulated statements as discussed in the Decision and as noted and discussed above, demolished the cause of the Returned Candidate. On the strength of evidence as discussed above, the learned Tribunal came to the following conclusion: -

"26. Keeping in view the above discussed factual and legal position, the credibility, legality and transparency of the election of returned candidate from 33 polling stations of the Constituency have been eroded. According to the consolidated statement of the count under challenge the returned candidate was ahead of the runner up by 5,885 votes, whereas the returned candidate defeated the petitioner by 7,421 votes. The returned candidate claimed to have obtained 11,291

votes at 33 polling stations. After coming to the conclusion that election of the returned candidate from 33 polling stations is null and void with no legal effect, the result of election favourable to the returned candidate falls to the ground mathematically and automatically. I, therefore, declare election of the returned candidate to be void. Resultantly, the position of respondent No.1 as Member, Provincial Assembly, Punjab from the above said constituency has ceased to exist. Issue No.5 is answered to the above effect.

27. Onus to prove issues No.1 to 3 and 4 was on the respondent No.1/returned candidate. During the course of arguments, learned counsel for the returned candidate did not utter a single word regarding these issues, which are disposed of as having not been pressed.

28. The Election Commission of Pakistan shall take necessary steps for holding bye-election from the above said 33 polling stations of the constituency (mentioned in the list, Ex.PW-33/E) in accordance with law. The District Returning Officer shall prepare polling scheme of Constituency No.PP-97, Gujranwala afresh strictly in line with delimitation of the constituencies already notified by the Election Commission of Pakistan."

14. Learned ASC for the Returned Candidate, since non-seated, contended that after the evidence of the parties was concluded, in a bid to make fishing enquiry, the Election Petitioner applied to the Election Commission for inspection of record, said application was dismissed by the Election Commission on 21.4.2013, which order was challenged and is still *subjudice* before the High Court in Writ Petition No.11615/14. It was, therefore, contended that learned Election Tribunal fell into error by considering such request under section 46 of the RoPA, 1976 vide its order dated 15.5.2014.

15. It may be observed that candidature of a candidate could be challenged under the RoPA, 1976 at three different stages, right from the day of nomination till 45 days after the declaration of the official result. First stage is pre-election challenge at the time of scrutiny of nomination papers. Challenge to the candidature could be thrown by any of the contesting candidate, their agents, proposer, seconder, electors by filing objections against any of the candidate before the Returning Officer, on the grounds enumerated in clauses (a) to (d) to subsection (3) and subsection (5A) of Section 14 of the RoPA. Any decision rejecting or accepting nomination paper,

passed by the Returning Officer, is subject to right of appeal before the Tribunal comprised of not less than two and not more than three High Court Judges. Appeal is required to be decided summarily within prescribed time, if time lapses, appeal by virtue of deeming provision subsection (6) *thereof* is deemed to be rejected. Second stage is post-election challenge to the election of returned candidate before the *Election Commission* of Pakistan, under Section 103 AA of the RoPA, 1976. *Election Commission*, after such summary enquiry as to grave illegality or violation of the provisions of RoPA, 1976 or the rules framed there under, may declare the poll in any constituency as void and may call upon constituency to elect member, but such jurisdiction to declare the poll void, could be exercised before the expiry of sixty (60) days after the publication of result of the election (*per section 42 of RoPA*), where after, the *Election Commission*, becomes *functus officio*, and the returned candidate is deemed to be elected, but subject to the decision of *Election Tribunal*, constituted Section 57 of RoPA. Provided such challenge is thrown, by any of the contesting candidate. Third opportunity to challenge the election of the returned candidate becomes available post-election, to be made by any candidate of the subject constituency, before the *Election Tribunal* constituted under Section 57 *ibid*, within forty five (45) days from the date of publication in the official gazette of the name of the returned candidate, of the subject constituency in the manner provided under the RoPA, 1976 itself.

16. In cases of allegation of misconduct, the Returning Officer on the application of a contesting candidate or on the direction of Election Commission, has power under Section 39(3) of RoPA, 1976 to open packets, examine and inspect the ballot papers in presence of contesting parties or their representatives. Such request was made by the Election Petitioner on the following day of election, but it was declined by the Presiding Officer [**Ex.P-33/F**, available at page 320 of CA#1169/14]. After the consolidation of result, such power

rests with *Election Commission*, which was moved on 18.5.2013 **[Ex.P-33/G, available at pages 322 of CA#1169/14]** to scrutinize result of 33 polling stations but, was also rejected by the *Election Commission*, through order dated 13.6.2013, on the ground *inter alia* "that the election Tribunal, which have been established and have commenced their work. If the Petitioner approaches the election Tribunal for the redress of his grievances his case would be decided expeditiously."

17. Election Commission of Pakistan, issued Notification dated 22.5.2013 declaring the Petitioner as Returned Candidate. On 03.6-2013, Election Tribunals were also set up in Province of Punjab under section 57 of RoPA, for the trial of election disputes. Consequently, Election Petitions was filed, subject matter of instant Appeal.

18. It was urged by the learned ASC, for the Petitioner, that the appointment of the *Commission*, to examine the bags of the 33 Polling Stations was not justified, as similar request was declined by the *Returning Officer* and so also by the *Election Commission*, for the recount of the votes in 33 Polling Station. It was contended that it was the duty of the polling staff to observe the law and the rules on the subject and on failure of the same, the appellant cannot be penalized. According to learned counsel, the election was held in large number of polling stations, in a peaceful manner, and no objection to majority of the polling stations was taken.

19. Adverting to the contention of the learned ASC, for the Appellant that after the dismissal of application of the Election Petitioner by the *Returning Officer* and the Election Commission of Pakistan as noted above, the *Election Tribunal*, committed grave illegality to allow such application under Section 46 of the RoPA, 1976 appointing *Commission* to inspect the record of the 33 challenged Polling Stations is concerned. It may be observed that the *Election Tribunals* are bestowed power to inspect and examine the ballot papers of all sorts i.e. polled, rejected, or spoiled etc. Such powers could not be invoked by

any party to the election Petition on mere *ipsi dixit* nor, could be exercised by the *Election Tribunal* on its own whims and fancy and or mechanically. Party seeking such recourse or inspection and examination of counted ballot paper has to demonstrate and show to the satisfaction of the *Election Tribunal* that there had been improper, reception, refusal, or rejection of votes had affected the outcome of the election materially. *Election Tribunal*, enjoys elaborate and extensive authority to carry out the exercise of examination of polled ballot either himself or, through *commission* and may order inspection and or to recount of the ballot papers, however, same are to be exercised with circumspection and care by application of mind on the strength of tangible and material evidence, *prima facie* establishing that there had been wrong inclusion or exclusion of the ballot paper in the course of ballot count that had direct and martial bearing on the final outcome of the result of the election.

20. As noted above, since the *Election Tribunals* in Punjab were already notified and after expiry of statutory period of 60 days from notification of returned candidate, the *Election Commission*, had no authority to adjudicate upon the controversy as to the examination of the ballot record of challenged Polling Stations and had rightly directed the election Petitioner to approach the *Election Tribunal*. Similar controversy came up before this Court, in the case cited as "Ehsanullah Reki v. Abdul Qadir Baloch (2010 SCMR 1271), this Court, while examining the power of *Election Tribunal*, under Section 46 of RoPA, 1976, held that "*the Election Tribunal cannot only appoint a Commission but also direct opening of packets of counterfoils and certificates or the inspection of any counted ballot papers with a rider that in carrying into effect an order for inspection of ballot papers, care shall be taken that no vote shall be disclosed until it has been held by the Election Tribunal to be invalid*". Subsection (3) of Section 46 RoPA, 1976 attaches great deal of sanctity to the production of a document by the *Commission* appointed by the *Election Tribunal*, which is

treated as conclusive evidence that the document relates to the election specified in the order and any endorsement made by the *Commission*, on any ballot paper or packet of ballot paper or documents so produced shall be prima facie evidence that the ballot papers or documents are what the endorsement states them to be. Therefore, contention of the learned ASC for the Petitioner that the *Election Tribunal* had no jurisdiction to appoint the *Commission* for the purpose of examination of polled ballot or to undertake such exercise itself, in view of discussion made above, and under given facts and circumstances, is devoid of merits.

21. The *Commission*, as appointed by the *Election Tribunal*, was also examined as the Tribunal Witness **TW-1**. Lengthy cross examination by the Returned Candidate could not demolish the credibility of the Report **EX-TW-1/A and Ex-TW-1/ B**, nor was he able to point out any error in the tabulated statement of votes count actually found and as relied upon by the disputants. Learned ASC for the Returned Candidate, could not bring home the objections as to authority and jurisdiction of the Election Tribunal to appoint "*the Commission*" and empowering "*the Commission*" to examine the Bags of the challenged Polling stations and submit report.

22. Before adverting to examine the power and jurisdiction of the *Election Tribunal* under Section 67 *ibid* and other enabling provision to declare "*the election of returned candidate void*", would amount to "*declaring the election as a whole void*" and as a consequence; direct the election of whole of the constituency or "partial poll" could be ordered, as has been done in the instant case. We have noted that the "*Election Commission*," in post election scenario, though for a limited period within 60 days after declaration of official result has to some extent concurrent jurisdiction and power to declare the "*poll in any constituency*" void under section 103-AA *ibid*, which power, is akin to the power of the Election Tribunal under clause

(b) of section 67 of the RoPA, “*declaring the election of the returned candidate to be void*”

23. In numbers of cases, various High Courts and so also this Court had the occasion to examine the power of the *Election Commission* to declare the poll, in any constituency to be void and whether such powers, includes declaring and to direct re-poll partially in some of the polling station and not in the entire constituency. In the case of *Ghulam Ali v. Election Commission (PLD 1991 Karachi 396)*, learned Division Bench maintained the order of re-poll in 3 polling station, made by the *Election Commission*. In the case reported as *Salahuddin Tirmizi v. Election Commission of Pakistan (2008 YLR 1624)*, learned Division Bench of the Peshawar High Court, maintained the order of the *Election Commission* of Pakistan, ordering re-poll in two polling stations including one female polling station. In the case of *Wahid Bukhash Khan Bhayo v. Ghous Bukhash Maher (CLC 2012 Karachi 39)*, learned single judge of the Sindh High court relying on the case of *Aftab Shaban Merani v. Muhammad Ibrahim (PLD 2008 SC 779)*, maintained the order of Election Commission directing re-poll in only 47 polling stations. In the case of *Behram Khan v. Abdul Hameed Khan Achakzai (PLD 1990 SC 352)*, this Court upheld the order of the High Court, maintaining order of the *Election Commission* directing re-poll in some of the challenged Polling Station. In the case of *Manzoor Hussain v. Election Commission (2004 SCMR 672)* in which case, the *Election Commission*, ordered re-polling in one of the Polling Station, which was shifted on the day of election without any intimation, such order was unsuccessfully challenged in the High Court and this Court refused leave to appeal. Five member bench of this court in the case reported as *Aftab Shaban Mirani v. Muhammad Ibrahim (PLD 2008 SC 779)*, had the occasion to examine the power of the *Election Commission* to declare the poll in *any constituency void*, under Section 103-AA and other enabling provisions of the RoPA, 1976 read with Article 225 of the Constitution of Pakistan, 1973, and at page 814; held that the “power of declaring the election partly void and re-polling at

some polling station is included in the power of declaring election of the constituency as a whole void". And at page 817 interpreted the expression "*in the constituency void*" as used in section 103-A *ibid*, 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 station".

24. Now adverting to more serious a challenge to the power and authority of the *Election Tribunal* to order partial poll in any constituency, it would be beneficial to glance through relevant provision, where under the *Election Tribunal* is conferred power to make host of orders after conclusion of trial of an election Petition, section 67 (1) of the RoPA, 1976, which reads as under: -

"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.

25. Power of the *Election Tribunal*, to order re-poll in some of the Polling station, is not some thing that has come up for the first time, controversy came up in the case of Mohinder Singh Gill and another v. The Chief Election Commissioner, New Delhi and others (AIR 1978 SC 851). Indian Supreme Court, while examined various provisions including section 98 and 100 of the *(Indian) Representation of Peoples Act, 1951*, (which provisions are analogous to Section 67 and section 68 respectively of RoPA), at page 391, came to a conclusion that the Election (High) Court (*Election Tribunal* herein) has power to make all sort of order including partial poll in furtherance to achieve free and fair election.

26. Recently in the case cited as Raja Aamer Zaman v. Omar Ayub Khan (2015 SCMR 890), this Court had the opportunity to examine the non observance or breach of duty on the part of the Returning Officer and other polling staff entrusted to conduct election in free, fair and transparent manner in accordance with RoPA and Rules framed there under. In a situation where it is found that that the result of election is dependent on count of vote at the challenged polling station, than the Election Tribunal is within its jurisdiction not to declare the election as a whole void in terms of clause (d) of section 67 read with section 70 of the RoPA, but to declare the election of the returned candidate to be void to the extent of few challenged polling Station in terms of clause (b) of Section 67 *ibid*. It is under such circumstances not necessary to declare the election as a whole to be void per section 67 (d) of the RoPA; It was further held *that the Election Tribunal, however was not denuded of the jurisdiction to grant partial relief of declaring the election at a few polling stations to be void and, directing re-poll there at. The question, as to which of the two available courses is to be followed would depend on the facts and circumstances of each case.*

27. It may be observed that the *Election Tribunal* are constituted as mandated under Article 225 of the Constitution, of Pakistan, 1973 under section 57 of the RoPA to adjudicate all and each nature of election dispute. *Election Tribunals* in terms of section 64 *ibid* is deemed to be a Civil Court, has absolute jurisdictions to decide all question or dispute pertaining to election to either of the House or Provincial Assembly and is bestowed comprehensive power as is enjoyed by the Civil Court trying a suit under Code of Civil Procedure 1908. it is absolutely permissible for the '*Election Tribunal*' to grant all or any of the reliefs wholly or partly as set out in section 67 of the RoPA and to direct the *Election Commission* to take such ancillary and incidental steps as may be necessary to ensure honest, just, and fair election in accordance with law and further to ensure corrupt practice are guarded against. Where a Court or Tribunal

is conferred jurisdiction and power to grant large relief also has jurisdiction to grant smaller relief under the law. The Election Tribunal like a Court in consideration of ground realities, circumstances of each case may suitably mould the relief as may be appropriate, just, proper and fair.

28. Examining the case in hand as act of omission and commission of election staff was successfully established in respect of 33 polling stations of the subject constituency, and the vote count of the subject station had material bearing on the eventual out come of the result of the election. In the instant case as could be noted the difference between the appellant and runner up is only 5,885 votes and between the appellant and respondent No.1 *Muhammad Nasir Cheema, the Election Petitioner* comes to 7,421 votes only. It may be observed as noted by the Election Tribunal in paragraph 22 of the impugned Decision that total number of votes casted in favour of all the contesting candidates as per consolidated statement in form XVI in 33 challenged Polling Station come to 34, 229- whereas only 19,500- polled votes were recovered from the bags of said 33 polling stations, there is staggering difference of 14,929= votes which is more than double the difference between the contestant parties. Thus it could be seen that the total votes cast in the 33 polling stations will in fact determine the fate of Contesting candidate in accordance with the will of the people. It was established on record that only the result of 33 polling stations was stained and soiled by non performance of statutory duties by the Returning and Presiding Officers as noted in detail above. There is no challenge as to majority of the polling stations. It may be observed that where the result of few challenged polling station does not materially affect the over all result of the election than no order of invalidating the election either as a whole or in part would be justified or warranted. However, where the ultimate result of the election is dependent on the out come of the ballot count of even one or few polling station, than order "*declaring the election of the returned candidate to be void*" in terms of clause (b) of section 67 read

with Section 70(a) *ibid*; may be justified and ordering partial poll to the extent of such challenged polling station only would be necessitated, instead of *"declaring the election as a whole to be void"* per clause (d) of section 67 *ibid*. In instant case learned election Tribunal, was justified to declare the election of the Returned Candidate void, for the simple reasons, if the vote count of challenged polling station are excluded, over all result would not be reflective of the true will of electors of the constituency.

29. After examination of the evidence that has come on record, learned Election Tribunal rightly concluded that *"the credibility, legality and transparency of the election of returned candidate from 33 polling stations of the Constituency"* was successfully demolished by the Election Petitioner. Consequently, the conclusion drawn by the Election Tribunal that *"the result of election favorable to the returned candidate falls to the ground mathematically and automatically"*. Therefore impugned decision of the learned Election Tribunal declaring *"election of the returned candidate to be void"* calls for no interference, resultantly C.A No. 1192/14 being devoid of merits is dismissed.

30. Now adverting to merits of C.A 1169/2014 filed by the Election Petitioner, seeking his declaration as duly elected in place of returned candidate, since de-seated. It is not necessary that whenever the election of a returned candidate is declare *"wholly void"*, the Election Petitioner, as a matter of right could be declared elected. No doubt Section 67 (1)(c) read with section 69 of RoPA, do empower the learned Election Tribunal to declare the election Petitioner or any of the contesting candidate to be declared as elected in event, the election of the returned candidate is annulled, that the Election Petitioner and or any of the Respondent has so prayed and secondly in cases where the Election *"Tribunal is satisfied"* that the election Petitioner or such other contesting candidate was *"entitled"* to be declared elected. Thus it is clear that swapping

of Election Petitioner and or any other contesting candidate is neither automatic nor a natural corollary to the invalidation of election of returned candidate, but is subject to two qualifying conditionalities as noted herein. What constitute "*Tribunal is satisfied*" and when the election Petitioner or other contesting candidate becomes "*entitled*" to be declared elected are neither elucidated nor any parameters are provided either under the RoPA or rules framed thereunder as against the contemporary provisions of section 101 of the (Indian) Representation of Peoples Act, 1951. However, satisfaction of the Election Tribunal to exercise power under Section 67 (1)(c) read with section 69 of the RoPA, 1976, is to be based on rational criteria, guided by good conscience. One of the rational consideration may be where on the basis of recount of total votes and or on re-examination of valid and invalid vote count in ultimate analysis the Election Petitioner and or any other contesting candidate who so ever had secured highest number of total valid vote counts as against the returned candidate or there may be a situation, where votes of certain polling station for any reason have not been correctly added up in the total vote count, in such like situation the outcome, is clear leaving no doubt and ambiguity in determining who has emerged successful. The Election Tribunal could declare the candidate; whosoever may it be the Election Petitioner or any other contesting candidate, having secured highest number of vote as duly elected. It is not so in the instant case. As noted in detail in preceding paragraphs more particularly in paragraph 13 and 28 above that the returned candidate was shown to have secured 7,421 vote more than the Election Petitioner, and he his lead was even narrow i.e merely 5, 885 votes as against the runner-up/respondent No.25. It may be observed that the election of the returned candidate was not declared "*whole to be void*" in terms of section 67(1)(d), *ibid* rather on account of discrepancy or missing valid votes count of actual vote casted in 33 challenged polling station, that persuaded the learned Election Tribunal to declare the election of the returned candidate as void within the contemplation of section 67(1)(b) of the RoPA,

1976. Since contesting parties before the learned Election Tribunal were the Election Petitioner and the returned candidate, even the runner-up chose to remain away from the dispute. Total number of vote casted in all 33-challenged polling station, as per consolidated statement of votes count in form XVI comes to 34,229, whereas, only 19,500- polled votes were recovered from the bags of all such polling stations. There is no explanation as to where 14,929- votes disappeared. Since difference of votes count between the returned candidate since unseated, the runner up/respondent No.25 and the Election Petitioner is much less than the missing number of votes. Under the given facts and circumstances none of the parties to dispute could claim nor it could be determined as to which of the contesting candidate command the confidence of the majority of the electorate in the subject constituency. Election Petitioner, was not able to make out any case whereby he could become *"entitled to be declared elected"* within the contemplation of section 69 of the RoPA, 1976.

31. As observed above, the creditability, legality, and transparency of the election in 33 challenged polling stations were successfully demolished. It is the votes that may be polled in said 33 polling stations would be decisive as to which of the contesting candidates commands the confidence of majority of the electorate, and unless they are given free and fair opportunity to the electorate of subject polling stations to express their free will, it cannot be concluded that the Election Petitioner had secured the winning number of votes, even if total vote casted in said constituency are counted towards the Returned Candidate. Such being the position, the Election Petition filed by the Election Petitioner was rightly dismissed. In this view of the matter, we do not find any merit in C.A No.1169/2014 filed by the Election Petitioner, is accordingly dismissed.

32. In view of the discussion made above, we do not find any factual and or legal infirmity in the impugned decision.

Both the listed Appeals, being without merits are accordingly dismissed.

Judge

Judge

Judge

ISLAMABAD, THE

11th May, 2015

Arshad/*

NOT APPROVED FOR REPORTING