

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : ICA NO.185-2021

Syed Yousaf Raza Gillani

Vs.

Federation of Pakistan etc.

Appellant by : M/s Farooq H. Naek, Malik Javed Iqbal Wains and Aqeel Akhtar Raja, Advocates.

Respondents by : Mr. Khalid Javed Khan, Attorney General for Pakistan, Mr. Tariq Mahmood Khokhar, Additional Attorney General, Mr. Qasim Wadood, Additional Attorney General, Mr. Arshad Mahmood Kayani, Deputy Attorney General, Mr. Saqlain Haider Awan, Assistant Attorney General, Mr. M. Nadeem Khan Khakwani, Assistant Attorney General, Mr. Farrukh Shehzad Dall, Assistant Attorney General, Syed Nazar Hussain Shah, Assistant Attorney General and Mr. Attique-ur-Rehman Siddiqui, Assistant Attorney General.

Barrister Muhammad Ali Saif, Advocate with Muhammad Javed Iqbal, Deputy Director, Senate and Mr. M. Irfan Ch. Assistant Director, Senate.

Syed Ali Zafar, Dr. Muhammad Zubair Sarfraz, Ch. Muhammad Ayyaz, Ms. Kalsoom Khaliq and Mr. Ghulam Umer, Advocates.

Dates of hearing : 22.12.2021, 28.03.2022 & 31.03.2022

AAMER FAROOQ J. Syed Yousaf Raza Gillani and Muhammad Sadiq Sanjrani are sitting Senators, who contested the election for seat of Chairman Senate. We will refer, hereinafter, former as the appellant and latter as respondent No.6. The Presiding Officer declared respondent No.6 as successful candidate, as he procured greater number of votes, as seven votes cast in favour of the appellant, were rejected, which is the foundation of controversy in hand. The appellant, after ruling by the Presiding Officer that seven votes in his favour, have been rejected, as they were not properly stamped, filed a petition (W.P. No.1131-2021) under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution), which was dismissed by the learned Judge-in-Chambers vide judgment dated 24.03.2021 (the impugned judgment); hence the appeal.

2. Learned counsel for the appellant, in support of the appeal, made following contentions:-

- i) that bar provided in Article 69 of the Constitution is not absolute and only applies where there is irregularity in procedure in the conduct of business; there is no prescribed procedure for election of Chairman Senate, hence process cannot be termed as part of business of Senate and/or there being any irregularity in the procedure;
- ii) that under the Rules of Procedure and Conduct of Business for the Senate, 2012 (the Rules, 2012), the business is divided in three categories as per Rule 24(i) viz government business, private members business and senate business. The process of election of Chairman Senate does not fall in any category;
- iii) that the Presiding Officer was a sitting Senator and member of a political party called Grand Democratic Alliance (GDA), which is the coalition partner of the ruling party Pakistan Tehreek-e-Insaaf, hence had a conflict of interest and was biased towards respondent No.6, as he was being supported by the ruling party. The ruling on the discarded votes immediately, without seeking any legal advice or hearing of objections by and on part of the appellant, clearly reflects bias floating on the surface;
- iv) that the election was in violation of Election Act, 2017 and the rules framed there-under inasmuch as the format of the ballot paper was to be prescribed by Election Commission of Pakistan nor the Chairman or Senate Secretary;
- v) that the decision by the Judge-in-Chambers to exercise restraint and not judicially review the ruling of the Presiding Officer is untenable in the facts and circumstances;
- vi) that the appellant has no alternate and adequate remedy as has been observed by the Judge-in-Chambers in the impugned judgment inasmuch as filing the Motion of No Confidence against respondent No.6, cannot be equated with the remedy of setting aside election.

In addition to the above specific contentions, learned counsel also made general contentions by submitting that where there is irregularity of procedure, ouster of jurisdiction is not attracted. It was added that despite ouster of jurisdiction, any action or inaction can be called in question in judicial review, where there is malafide, absence of jurisdiction or otherwise action or inaction, as the case may be, is *coram non judice*. Reliance was placed on cases reported as **‘Pir Sabir Shah V. Federation of Pakistan and others (PLD 1994 SC 738)**, **‘Sardar Farooq Ahmed Khan Laghari and others v. Federation of Pakistan and others (PLD 1999 SC 57)**, **‘Chief Justice of Pakistan, Iftikhar Muhammad Chaudhry v. President of Pakistan through secretary and others (PLD 2010 SC 61)**, **‘Presiding Officer v. Sadruddin Ansari, etc. (PLD 1967 SC 569)**, **‘Javed Hassan v. Principal Bolan Medical college Quetta and two others (PLD 1999 Quetta 25)**, **‘Lt. Col. Farzand Ali and others v. Province of West Pakistan through the Secretary Department of Agriculture government of West Pakistan Lahore, (PLD 1970 SC 98)**, **‘Salah uddin and two others vs. Frontier Sugar Mills and Distillery Ltd (PLD 1975 SC 244)**, **‘Muhammad Usman and PA and vs. the Province of East Pakistan and others (PLD 1957 Dacca 424)**, **R (on the application of Miller) (Appellant) v The Prime Minister (Respondent) (2019 UKSC 41)**. It was contended that the immunity provided in Article 69 of the Constitution is not absolute and the proceedings of the Parliament are justiciable in certain circumstances, where they do not fall in the internal proceedings or within the meaning of business, or if there no question of any irregularity in the procedure. Reliance was placed on cases reported as **‘Asif Ali Zardar v. Federation of Pakistan and others’ (PLD 1999 Karachi 54)**, **‘Muhammad Azhar Siddiqui and others v. Federation of Pakistan and others’ (PLD 2012 SC 774)**, **‘Munir Hussain Bhatti Advocate and others v. Federation of Pakistan and another (PLD 2011 SC 407)**, **‘Muhammad Naeem Akhtar and two others vs. the Speaker Sindh Provincial Assembly and others’ (1992 CLC 2043)**, **‘Mining Industries of Pakistan (Pvt) Ltd. through Authorized Director v. Deputy Speaker, Balochistan Provincial Assembly, Quetta and 3 others’ (PLD 2006 Quetta 36)**. Learned counsel further argued that

intention of the voter is of paramount importance technicalities can thwart the same. Reliance was placed on cases reported as **‘Jamshed Ahmad Khan and 2 others v. The S.D.M/Assistant commissioner, Garden Sub-Division Karachi and others’** (PLD 1987 SC 213), **‘Dr. Sher Afghan v. Aamar hayat Khan and 2 others’** (1987 SCMR 1987), **‘Sahibzada Abdul Latif v. Sardar Khan and others’** (1996 SCMR 1496), **‘Salah-ud-Din and another v. Abdul Khaliq and others’** (2004 SCMR 1899).

3. Learned Attorney General for Pakistan, appearing upon notice issued to him, took the Court through various provisions of the Constitution to highlight the concept of trichotomy of power which is the fundamental principle of system of governance existing in the country; he contended that with respect to said trichotomy, the conduct of judiciary cannot form basis for discussion in the Parliament; likewise, the proceedings of the Parliament cannot be called in question before the court of law; he submitted that under Article 53 of the Constitution, the Resolution for Vote of No Confidence, can be filed and if it succeeds, the officer is removed. It was also added that the political questions are not justiciable; it was highlighted that system of governance is one Parliamentary System as was highlighted by the august Apex Court in cases reported as **‘District Bar Association Rawalpindi v. Federation of Pakistan’** (PLD 2015 SC 401), **‘Mukhtiar Hussain Shah v. Wasim Sajjad’** (PLD 1986 SC 178), **‘Sohail Akhtar Abbasi v. Aamer Ali Shah’** (2007 SCMR 18). It was contended that challenge, to the Notification of respondent No.6, amounts to breach of privilege. Learned Attorney General also contended that Parliament cannot be issued direction; likewise, Parliament cannot be made party or be issued notices and the Parliament is master of its procedure and proceedings, as it has exclusive right to conduct business and no court or authority can interfere or sit in judgment or appeal over its proceedings. It is contended that acts and decisions of any officer of Senate or Members cannot be questioned nor be subjected to jurisdiction of the court. Learned Attorney General also submitted that Notification, being part and parcel of conduct of business of Senate, courts have no jurisdiction and the issue is non-justiciable, as

the writ issued in respect of the same, will lead to clash between the institutions, which will have repercussions for the system. It was argued that political problems have political solutions, which form basis for Articles 53 & 61 of the Constitution. Learned Attorney General contended that there are three fundamental privileges of Parliament; freedom of speech, Parliament is the sole and exclusive master of its procedure and any decision taken is non-justiciable and offices and members of the Parliament are not subject to jurisdiction of the courts.

4. Mr. Ali Zafar, Senior Advocate Supreme Court, appearing on behalf of respondents No.3 to 5, supplemented the contentions of learned Attorney General for Pakistan. He also highlighted concept of trichotomy of power and sharp division amongst the organs of the State which, it was argued, need to be maintained otherwise, would lead to chaos and anarchy. He further took the Court through the case law highlighting his contention that the internal proceedings of the Parliament are not questionable before any court of law and the same immunity has been respected by the courts time and again. Reliance was placed on cases reported as **‘Nazir A.M. Joint Venture through chief Executive v. the National Highway Authority through chairman and 4 others’** (PLD 2020 Lahore 801), **‘Muhammad Anwar Durrani v. Province of Balochistan through Chief Secretary and 10 others’** (PLD 1989 Quetta 25), **‘Binyameen and 3 others v. Chaudhry Hakim and another’** (1996 SCMR 336), **‘Asif Ali Zardari v. Federation of Pakistan and others’** (PLD 1999 Karachi 54), **‘Mining Industries of Pakistan (Pvt) Ltd v. Deputy Speaker, Balochistan Provincial Assembly, Quetta and 3 others’** (PLD 2006 Quetta 36), **‘Muhammad Azhar Siddiqui and others v. Federation of Pakistan and others’** (PLD 2012 SC 774), **‘Corruption in Hajj Arrangments in 2010: In the matter of’** (PLD 2011 SC 963), **‘Watan Party and another v. Federation of Pakistan and others’** (PLD 2013 SC 167).

5. Mr. Ali Zafar also cited case law from across the border to highlight that the immunity, provided to the proceedings of the Parliament, is also respected by the courts there. Reliance was placed on cases reported as **‘Saradhakar Supakar, Petitioner v. Speaker Orissa Legislative**

Assembly and Secretary Orissa Legislative Assembly, Opposite Party’ (AIR 1952 Orissa 234), ‘Ram Dubey, Applicant v. The Government of the State of Madhya Bharat and another, Opposite Party’ (AIR (39) 1952 Madhya Bharat 57), ‘Raj Narain Singh, Petitioner v. Atmaram Govind and another, Opposite Party’ (AIR 1954 Allahabad 319), ‘C. Shrikishen Vs. State of Hyderabad and others’ (1956 Hyderabad 186), ‘Hem Chandra Sen Gupta and others. Vs. The Speaker of Legislative Assembly of West Bengal and others’ (1956 Calcutta 378), ‘Sri Surendra Mohanty Vs. Sri Nabakrishna Choudhury and others’ (AIR 1958 Orissa 168) and ‘Jagjit Singh Vs. State of Haryana and others’ (AIR 2007 Supreme Court 590).

6. Learned counsel placed reliance on English case law including ‘**Stoackdate Vs. Hansard (9. AD & E 207), ‘Bradlaugh Vs. Gossett, ‘Church of Scientology of California Vs. Johnson Smith, Queen’s Bench Division’, ‘British Railways Board Vs. Pickin’ (House of Lords), ‘Rost Vs. Edwards’ [1990 2 Q.B. 460], ‘R (on the application of Miller) Vs. The Prime Minister’ (2019 UKSC 41). Reliance was also placed on the text material provided in Constitutional and Administrative law (Wade and A.W. Bradley), Constitutional and Administrative law (S.A. De Smith), Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament-24th Edition’ as well as Constitutional and Administrative law SA De Smith and Rodney Brazier’. In addition to the above, reliance was also placed on ‘**Pakistan Vs. Ahmed Saeed Kirmani etc.’ (PLD 1958 Supreme Court (Pak.) 397), ‘Lt. Col. Farzand Ali and others Vs. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore’ (PLD 1970 Supreme Court 98), ‘Wasi Zafar Vs. Speaker Provincial Assembly’ (PLD 1990 Lahore 401) and ‘BNP Pvt. Ltd Vs. Capital Development Authority and others’ (2016 CLC 1169).****

7. Learned counsel for respondent No.6 primarily adopted the arguments by learned Attorney General for Pakistan, however, added that under Article 69(2) of the Constitution, the order passed by the Presiding Officer, with respect to any procedure or business of the House, cannot be

called in question; he added that in case, the appellant has any grievance regarding the ruling of the Presiding Officer, an option of moving motion for Vote of No Confidence is with him and if he claims requisite members, respondent No.6 can be ousted.

8. Arguments advanced by learned counsel for the parties have been heard and the documents, placed on record, examined with their able assistance.

9. Like many other countries, the constitutional scheme of Islamic Republic of Pakistan (Pakistan), is based on trichotomy of power viz that there are three organs of the State; the legislature, executive and the judiciary. This aspect of the Constitution and our system has been reiterated by the superior courts time and again; reliance is placed on case reported as **'Zia ur Rehman Vs. The State' (PLD 1973 SC 49)**. The underlined principle of this constitutional aspect of the governance in Pakistan means that no organ of the State should encroach on the domain and powers of the other State organ, however, judiciary though, as such, cannot encroach upon the powers and functions of the Legislature and/or Executive but has unique feature of exercising power/jurisdiction to check the actions/inactions of the executive by means of judicial review. This jurisdiction has been granted to the superior courts in Pakistan under Article 199 of the Constitution (in case of High Courts) and under Article 184 (in case of Hon'ble Supreme Court of Pakistan). The possession of jurisdiction of judicial review by the courts does not mean a 'blanket power' to examine the actions/inactions of the Executive rather it is subject to conditions and parameters laid down in the Constitution or conceived by the courts over a period of time in various pronouncements.

10. The sole issue before this Court, in the instant appeal, is whether the ruling of the Presiding Officer, falls within the 'irregularity of procedure' for the jurisdiction of this Court to be ousted within the meaning of Article 69(1) of the Constitution and also whether ruling of the Presiding Officer, is protected within the meaning of Article 69(2) *ibid*.

11. As noted above, elaborate arguments were addressed by both the sides and learned counsel for respondents No.3 to 5 placed reliance on number of judgments from the jurisdiction of United Kingdom to

substantiate his argument about ouster of jurisdiction of the courts qua internal proceedings of the Parliament. Since the parliamentary form of government, which we have as provided in the Constitution, is akin to the system in the United Kingdom, hence it would be an appropriate starting point, for rendering opinion, to consider these judgments.

12. In case reported as **'Bradlaugh Vs. Gosset' (1884 QB 271)**, the decision of the Queen's Bench Division of the High Courts of England and Wales, Mr. Bradlaugh was elected in the House of Commons for Northampton and expected that that Speaker shall administer his oath for participating in the affairs of the House of Commons, however, the Speaker ousted him by calling Serjeant-at-Arms instead of administering oath; in this behalf, the House of Commons also passed a resolution. The matter was agitated in the court and it was observed that House of Commons is not subject to the control of Her Majesty's Courts in her administration of that part of the statute law which has relation to its internal proceedings and that the use of actual force as may be necessary to carry into effect such a resolution as the one before us is justifiable; it was added that whatever may be the reasons of the House of Commons for their conduct, it would be impossible for us to do justice without hearing and considering those reasons, but it would be equally impossible for the House, with any regard for its own dignity and independence, to suffer its reasons to be laid before us for that purpose; it was noted that House of Commons has the exclusive power of interpreting the statute, so far as the regulation of its own proceedings within its own walls is concerned; and that, even if that interpretation should be erroneous, this Court has no power to interfere with it directly or indirectly. In case reported as **'Church of Scientology of California Vs. Johnson Smith'**, simply another decision of the Queen's Division Bench reported as **'Bradlaugh Vs. Gosset' (1884 QB 271)** was followed, as it was noticed that for modern purposes under Article 9 of the Bills of Rights, 1688, the freedom of speech and debates or proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament. In the House of Lords, the decision titled **'British Railways Board Vs. Pickin'**, the earlier decision regarding ouster of jurisdiction of the courts

to impeach the proceedings of the Parliament, was upheld and followed. In a fairly recent judgment, the matter of questioning proceedings of the Parliament, came up before Supreme Court of United Kingdom in case titled **'R (On the application of Miller) Vs. The Prime Minister' [2019]UKSC 41**; in the judgment of the Court handed down by Lady Hale and Lord Reed, the issue involved was whether the advice given by the Prime Minister to Her Majesty the Queen on 27th or 28th August 2019 that Parliament should be prorogued from a date between 9th and 12th September until 14th October was lawful; one of the questions framed by the Court was whether the Prime Minister's advice to the Queens was justiciable in a court of law? United Kingdom Supreme Court noted that although the courts cannot decide political questions, the fact that a legal dispute concerns the conduct of politicians, or arises from a matter of political controversy, has never been sufficient reasons for the courts to refuse to consider it; it was cited with approval from the judgment of the Divisional Court that almost all important decisions made by the executive have a political hue to them; it was added that nevertheless the courts have exercised a supervisory jurisdiction over the decisions of the executive for centuries; many if not most of the constitutional cases in our legal history have been concerned with politics in that sense; the Court concluded that Prime Minister's advice to the Queens was justiciable; the reasoning of the Court, on the merits of the case as noted in paras 64 to 70, is as follows:-

"64. Article 9 provides:

"That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament."

The equivalent provision in the Claim of Right of 1689, an Act of the Parliament of Scotland, is this:

"That for redress of all grievances and for the amending strenthneing and preserveing of the laws Parliaments ought to be frequently called and allowed to sit and the freedom of speech and debate secured to the members."

65. The first point to note is that these are Acts of Parliament. It is one of the principal roles of the courts to interpret Acts of Parliament. A recent example of this Court interpreting article 9 is R v Chaytor [2010] UKSC 52; [2011] 1 AC 684. The case concerned the prosecution of several Members of Parliament for allegedly making false expenses claims. They resisted this on the ground that those claims

were “proceedings in Parliament” which ought not to be “impeached or questioned” in any court outside Parliament. An enlarged panel of nine Justices held unanimously that MPs’ expenses claims were not “proceedings in Parliament” nor were they in the exclusive cognisance of Parliament. There is a very full discussion of the authorities in the judgments of Lord Phillips of Worth Matravers and Lord Rodger of Earlsferry which need not be repeated here.

66. That case clearly establishes: (1) that it is for the court and not for Parliament to determine the scope of Parliamentary privilege, whether under article 9 of the Bill of Rights or matters within the “exclusive cognisance of Parliament”; (2) that the principal matter to which article 9 is directed is “freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place” (para 47). In considering whether actions outside the Houses and committees are also covered, it is necessary to consider the nature of their connection to those and whether denying the actions privilege is likely to impact adversely on the core or essential business of Parliament; (3) that “exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament” (para 63); it was enjoyed by Parliament itself and not by individual members and could be waived or relinquished; and extensive inroads had been made into areas previously within exclusive cognisance.

67. *Ersine May, Parliamentary Practice* (25th ed 2019, para 13.12) is to similar effect:

“The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the 17th century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX. An individual member takes part in a proceeding usually by speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.”

68. The prorogation itself takes place in the House of Lords and in the presence of Members of both Houses. But it cannot sensibly be described as a “proceeding in Parliament”. It is not a decision of either House of Parliament. Quite the contrary: it is something which is imposed upon them from outside. It is not something upon which the Members of Parliament can speak or vote. The Commissioners are not acting in their capacity as members of the House of Lords but in their capacity as Royal Commissioners carrying out the Queen’s bidding. They have no freedom of speech. This is not the core or essential business of Parliament. Quite the contrary: it brings that core or essential business of Parliament to an end.

69. This court is not, therefore, precluded by article 9 or by any wider Parliamentary privilege from considering the validity of the prorogation itself. The logical approach to that question is to start at the beginning, with the advice that led to it. That advice was unlawful. It was outside the powers of the Prime Minister to give it. This means that it was null and of no effect: see, if authority were needed, *R (UNISON) v Lord Chancellor* [2017] UKSC 51, para 119. It led to the Order in Council which, being founded on unlawful advice, was likewise unlawful, null and of no effect and should be quashed. This led to the actual prorogation, which was as if the Commissioners had walked into Parliament with a blank piece of paper. It too was unlawful, null and of no effect.

70. It follows that Parliament has not been prorogued and that this court should make declarations to that effect. We have been told by counsel for the Prime Minister that he will “take all necessary steps to comply with the terms of any

declaration made by the court” and we expect him to do so. However, it appears to us that, as Parliament is not prorogued, it is for Parliament to decide what to do next. There is no need for Parliament to be recalled under the Meeting of Parliament Act 1797. Nor has Parliament voted to adjourn or go into recess. Unless there is some Parliamentary rule to the contrary of which we are unaware, the Speaker of the House of Commons and the Lord Speaker can take immediate steps to enable each House to meet as soon as possible to decide upon a way forward. That would, of course, be a proceeding in Parliament which could not be called in question in this or any other court”.

As noted in the above judgment, the United Kingdom Supreme Court cited paragraphs from ‘Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament-24th Edition; as to the concept of ‘Proceedings in Parliament’ at pages 235 and 236, observed as follows:-

“Proceedings in Parliament

The terms ‘proceedings in Parliament’ has received judicial attention (not all of it in the United Kingdom) but comprehensive lines of decision have not emerged and indeed it has been concluded that an exhaustive definition could not be achieved. The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognized by its inclusion in the formulation of article IX. An individual Member takes part in a proceedings usually by speech, but also various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.

On a number of occasions, the House of Commons or a committee has endeavored to elucidate this very broad understanding. The Select Committee on the Official Secrets Act in 1938-39 argued that ‘proceedings’ covered both the asking of a question and the giving of written notice of the question, and as a Member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business. After considering the scope of the protection, the committee concluded:

Cases may be easily imagined of communications between one Member and another or between a Member and a minister so closely related to some matter pending or expected to be brought before the House that, although they do not take place in the Chamber or a committee room, they form part of the business of the House, as for example where a Member sends to a minister the draft of a question, he is thinking of putting down, or shows it to another Member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed.”

13. In so far as the Courts and Parliamentary Privilege’ is concerned, it discusses the evolution of the concept of ‘immunity’ from impeachment of the proceedings from the courts and at page-291, it was concluded that in general, the judges have taken the view that when a matter is proceedings of the House, beginning and terminating within its own walls, it is obviously outside the jurisdiction of the courts.

14. The above set of judgments from the jurisdiction of United Kingdom can be used only as a guideline for interpreting the provisions of the Constitution inasmuch as in all above judgments, United Kingdom courts laid down the law on the basis of their conventions, practices and privileges in the country inasmuch as United Kingdom does not have a written constitution unlike Pakistan.

15. Before deliberating upon the judgments and arguments addressed before the Court, relevant constitutional provisions are summarized for the sake of brevity. Article 50 of the Constitution defines Majlis-e-Shoora (Parliament) as consisting of the President and two Houses to be known respectively as the National Assembly and the Senate; Article 59 of the Constitution provides for 'The Senate' consisting of 104 members and as per Article 60, after the Senate has been duly constituted, it shall, at its first meeting and to the exclusion of any other business, elect from amongst its members a Chairman and a Deputy Chairman and, so often as the office of Chairman or Deputy Chairman becomes vacant, the Senate shall elect another member as Chairman or, as the case may be, Deputy Chairman; under Article 61 of the Constitution, the provisions of sub-clauses (2) to (7) of Article 53 are to apply *mutatis mutandis*; the fundamental Article, with respect to which the controversy in the case in hand involved, is Article 69, which reads as follows:-

“69. Courts not to inquire into proceedings of Majlis-e-Shoora Parliament).-

(1) *The validity of any proceedings in Majlis-e-Shoora (Parliament) shall not be called in question on the ground of any irregularity of procedure.*

(2) *No officer or member of Majlis-e-Shoora (Parliament) in whom powers are vested by or under the Constitution for regulating procedure or the conduct of business, or for maintaining order in Majlis-e-Shoora (Parliament), shall be subject to the jurisdiction of any court in respect of the exercise by him of those powers.*

(3) *In this Article, Majlis-e-Shoora (Parliament) has the same meaning as in Article 66”.*

Moreover, under Article 53 (7) (c) of the Constitution, the Office of Speaker or Deputy Speaker shall become vacant, if he is removed from office by a resolution of the Assembly, of which not less than seven day's notice has been given and which is passed by the votes of the majority of the total membership of the Assembly; under Article 61 *ibid*, provisions of sub-clauses (2) to (7) of Article 53 shall apply to the case of Chairman and Deputy Chairman Senate, meaning thereby that a Chairman or Deputy Chairman of the Senate, can be removed from the office by a resolution of

Senate of which less not than seven day's notice has been given and it is passed by the votes of the majority of the total membership of the Senate.

16. By way of recapitulation of the relevant facts, it is noted that respondent No.6, who was Chairman Senate after the elections of the Senate and upon expiry of his stint in the referred position, sought re-election and his contesting rival was the appellant; seven votes, apparently in favour of the appellant, were discarded by the Presiding Officer; in this behalf, since respondent No.6 was a contesting candidate, hence he could not have chaired the proceedings/Session of the Senate qua holding election of Chairman Senate.

17. Under the Rules of Procedure and Conduct of Business for the Senate, 2012, which were framed under Article 67(2) of the Constitution, Rule 2 provides for election of Chairman Senate, whereby at the first meeting of the Senate after members have taken oath and to the exclusion of any other business including privileges and adjournment motions, the Senate will proceed to elect from amongst its members a Chairman, and so often as the office of the Chairman becomes vacant, the Senate will elect another member as Chairman, in accordance with the rules; under sub-rule (2), first meeting of the Senate, for election of the Chairman, shall be presided over by the outgoing Chairman or, in his absence, by a person nominated by the President for the purpose, who shall be referred to as the Presiding Officer; under the proviso to the above Rule, no person shall preside over the meeting for the election in which he himself is a candidate. Pursuant to the referred Rule, the President of Pakistan appointed respondent No.3 as the Presiding Officer to conduct the Session for election of Chairman Senate, as respondent No.6, the outgoing Chairman, was also a candidate.

18. There are three judgments of Hon'ble Supreme Court of Pakistan, which are crucial to the determination of the controversy raised in the instant appeal, viz 'Pakistan Vs. Ahmed Saeed Kirmani etc.' (PLD 1958 Supreme Court (Pak.) 397), 'Lt. Col. Farzand Ali and others Vs. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore' (PLD 1970 Supreme Court 98) and 'Muhammad Azhar Siddiqui and others v.

Federation of Pakistan and others’ (PLD 2012 SC 774), as the three discuss the question of jurisdiction of the courts to scrutinize the proceedings of the Parliament.

19. In case reported as **‘Pakistan Vs. Ahmed Saeed Kirmani etc.’ [PLD 1958 Supreme Court (Pak.) 397]**, the Court had to consider various provisions of the Constitution of 1956 and the controversy revolved around the election of Speaker of the National Assembly. After taking stock of the case law from jurisdiction of United Kingdom and examining Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament-24th Edition’, the Hon’ble Supreme Court noted that the judges are therefore bound to take judicial notice of the parliamentary privileges and observed that each House has the control over its internal proceedings which is absolute and cannot be interfered with by the courts; it was added that the above conclusion is in line with the case law developed in United Kingdom based on Article 9 of Bills of Rights and which has its resemblance with Article 184 of the Constitution of 1956; it was added that the High Court only could have properly investigated as to the effect, whether proceedings impugned before it, fell within the concept of ‘internal proceedings’ of the provincial assembly, to which, the answer was in affirmative, as everything that happened, took place within the four corners of the assembly.

20. The second case, related to the controversy in hand, is **‘Lt. Col. Farzand Ali and others v. Province of West Pakistan through the Secretary Department of Agriculture government of West Pakistan Lahore’ (PLD 1970 SC 98)**; here again, the question was whether internal proceedings of assembly, relating to its business, are immuned from challenge before the courts. The judgment of the Hon’ble Supreme Court was handed down by Mr. Hamoodur Rehman, Chief Justice (as he then was) and after taking into account the case law on the subject from across the border and while interpreting Article 111 of the Constitution of 1962, earlier judgment reported as ‘Pakistan Vs. Ahmed Saeed Kirmani etc.’ [PLD 1958 Supreme Court (Pak.) 397], was cited with approval and it was observed that a proper business, with respect to internal proceedings of the House, enjoys immunity from challenge in courts, however, it was

observed that question, relating to title of a person to be member of the House or continue to sit therein, is a question not pertaining to internal proceedings of the House.

21. In case reported as **‘Muhammad Azhar Siddiqui and others v. Federation of Pakistan and others’ (PLD 2012 SC 774)**, which incidentally, involved the appellant, the Speaker of National Assembly refused to send Reference to Election Commission of Pakistan with respect to disqualification of Syed Yousaf Raza Gillani, who at the relevant time, was the Prime Minister of the country and was disqualified pursuant to judgment of Hon’ble Supreme Court of Pakistan. The petition, in the referred case, was under Article 184(3) of the Constitution. The Hon’ble Supreme Court held Mr. Gillani as disqualified and directed the Election Commission of Pakistan to do the needful. During the course of proceedings, an objection was taken as to the maintainability of petition in light of Article 69 of the Constitution, which was not agreed with. The relevant paragraphs from the judgment are as follows:-

“35. A survey of the above case-law makes it abundantly clear that the ruling of the Speaker is open to judicial scrutiny by the superior Courts because it does not fall within the proceedings or conduct of business of the Parliament within the contemplation of Article 69 of the Constitution. Thus, we hold that the ruling of the Speaker in the matter of referring the case to the Election Commission under Article 63(2) of the Constitution wherein a question of disqualification of a Member of the Parliament has arisen, or where the Speaker decides that no such question has arisen, is amenable to the jurisdiction of the superior Courts. It may be noted that after the decision of the 7-member Bench dated 26 April, 2012, a copy of the judgment was forwarded by the office of this Court to the Speaker and in the meantime a petition was also filed by one Maulvi Iqbal Haider before the Speaker for making a reference to the Election Commission in terms of Article 63(2). However, on 24 May, 2012, a day before the expiry of the period of 30 days within which the Speaker had to decide the question in terms of Article 63(2), she gave a ruling that no question of disqualification of the respondent had arisen pursuant to his conviction by the Supreme Court. Admittedly, the judgment of this Court along with the covering letter was not made a part of the proceedings of the Parliament for the obvious reason that under Article 63(2) the Speaker's function is not part of the parliamentary process. Applying the test laid down in the judgments noted hereinabove and also considering the provision of the Constitution and the Rules of Procedure on the subject, we hold that ruling of the Speaker dated 25 May, 2012 does not fall within the "proceedings" of the Majlis-e-Shoora (Parliament) which cannot be subjected to judicial scrutiny by virtue of Article 69 of the Constitution. In light of the above discussion, the objection raised by respondent's counsel is not tenable and is overruled.

36. Suffice it to observe that the Speaker, in performing the function assigned to him under Article 63, has to decide whether there is any determination by a Court of competent jurisdiction in respect of any of the disqualifications mentioned in clause (1) thereof, e.g., whether a person is of unsound mind and has been so declared by a competent court, etc. In this case, the Speaker is required to consider the judgment of the concerned Court. Secondly, in the case of disqualification which is not

emanating from a judgment of a Court of law, the Speaker has to decide the matter on the basis of the information laid before her, e.g., where a person has become undischarged insolvent, or he has ceased to be a citizen of Pakistan, or has acquired the citizenship of a foreign State, or he holds an office of profit in the service of Pakistan, or is in the service of any statutory body, or is dismissed from service, etc.

22. An explicit question was put to learned counsels for parties regarding reconciliation of cases reported as ‘Lt. Col. Farzand Ali and others v. Province of West Pakistan through the Secretary Department of Agriculture government of West Pakistan Lahore’ (PLD 1970 SC 98) as well as PLD 1958 SC 397 supra and ‘Muhammad Azhar Siddiqi and others v. Federation of Pakistan and others’ (PLD 2012 SC 774); the response, by learned counsel for the appellant, was that case reported as PLD 1970 SC 98 supra interpreted and followed the Constitution of 1962, however, learned counsel for respondents No.3 to 5 contended that jurisdiction exercised by Hon’ble Supreme Court of Pakistan in case reported as PLD 2012 SC 774 supra, was with respect to administrative issue regarding referring question of disqualification to Election Commission of Pakistan. It was contended that even-otherwise, controversy was different and matter was not regarding irregularity in procedure qua proceedings of the Parliament. We tend to agree with Mr. Ali Zafar, learned counsel for respondents No.3 to 5 inasmuch as the controversy in case reported as PLD 2012 SC 774 supra was of different nature than in case reported as PLD 1970 SC 98 and PLD 1958 SC 397 supra or for that case the present matter. Learned counsel for appellant cited a number of judgments on the issue that even where jurisdiction of the court is ousted under any constitutional or sub-constitutional provision, the matter can still be examined under Article 199 of the Constitution, if the same is without jurisdiction, malafide or *coram non judice*; reliance was placed on case reported as ‘Shabbir Shah Vs. Federation of Pakistan etc.’ (PLD 1994 SC 738) as well as ‘Sardar Farooq Ahmed Khan Laghari Vs. Federation of Pakistan etc.’ (PLD 1999 SC 57). There is no cavil with the referred judgments of the Hon’ble Supreme Court of Pakistan, however, this Court needs to examine and reconcile various provisions of the Constitution; in this behalf, it seems that under Article 111 of the Constitution of 1962, a blanket immunity was granted to the internal

proceedings of the Parliament from scrutiny by the superior courts, however, under Article 69(1) of the Constitution, immunity is restricted only to the procedural irregularity qua the proceedings.

23. It was vehemently argued by learned counsel for the appellant that ruling by the Presiding Officer that seven votes are discarded does not amount to internal proceedings of the Parliament; with deference to the referred argument by learned counsel, we fail to bring ourselves in agreement with the same inasmuch as reading of Article 60 of the Constitution shows that all other businesses are excluded when the Senate is constituted and the Chairman and Deputy Chairman are to be elected. The process of election of Chairman Senate is part and parcel of valid structuring of the Senate. Though under the Rules of Procedure and Conduct of Business for the Senate, 2012, the election process is not headed as a business of the Senate yet the fact remains that in order for a valid Senate to be in place, the Chairman Senate and Deputy Chairman are to be elected and the process of election, to the referred posts, tantamount to “proceedings” inasmuch as careful examination and reading of the above judgments from United Kingdom courts as well as judgments of Hon’ble Supreme Court of Pakistan would provide that since the procedure and process is being carried out for election within the four walls of the Senate, hence are internal proceedings.

24. Another judgment, which was relied upon by learned counsel for the appellant, was from Sindh jurisdiction i.e. case reported as **‘Asif Ali Zardar v. Federation of Pakistan and others’ (PLD 1999 Karachi 54)** challenging the ruling of the Speaker Sindh Assembly for refusing to summon the petitioner, however, again in the instant case, the matter was different from the case in hand, as a process of election was going, on which certain ruling/order was made, which of course, was not part of internal proceedings of the Parliament rather was administrative action or inaction.

25. Learned counsel for the appellant also laid emphasis that since there is no prescribed procedure in the Constitution or 2012 Rules, hence the question of irregularity, cannot arise. Be that as it may, there may not be written rules laying down the procedure for the election of Chairman Senate or Deputy Chairman, but a certain practice is being followed over a period of time, which perhaps, is consistent and forms part of process of

elections and would be regarded as 'procedure', therefore, the ruling by the Presiding Officer that votes were not proper, might not be in consonance with any law, might be irregular but since is part of proceedings of the Parliament, cannot be impeached under the provisions of Article 199 of the Constitution. Likewise, under Article 69(2) of the Constitution, immunity is afforded to the Presiding Officer from scrutiny of his decisions and orders.

26. Though learned counsel for the appellant did question that Presiding Officer was biased, as he was from alliance of the ruling party yet since no prayer has been made challenging his appointment as Presiding Officer, no finding is required to be rendered on the said issue, however, as noted earlier, Article 69(2) of the Constitution, provides immunity to the Presiding Officer with respect to business qua the procedure.

27. The above discussion does not, by any means, amounts to the effect that no decision of the Speaker of National Assembly or Chairman Senate or the Deputy Chairman Senate, as the case may be, cannot be assailed, come what may; the actions or inactions of the said office bearers if are of administrative nature or do not fall within procedural irregularity in proceedings, can be judicially reviewed on the touchstone of settled principles as well as grounds as noted in cases reported as PLD 1994 SC 738 as well as PLD 1999 SC 57 supra that where action is without jurisdiction, *coram non judice* or is based on malafide, it can be assailed. The referred judgments do not come to the aid of the appellant in the instant matter.

28. Again, much emphasis was laid by learned counsel for the appellant that it is the 'intention' of the voter that is to be gathered and in support of the same, reliance was placed on a number of cases; there is no cavil with the principles laid down in the said cases and as noted above that the ruling of the Presiding Officer might not be correct but since the matter falls within the domain of 'internal proceedings' and/or 'irregularity of the procedure' (which might not be written in the Constitution or the Rules) but is being adhered to or followed over a period of time, hence this Court does not have the jurisdiction to examine the matter.

29. The above findings, by no means, render the appellant without a remedy; he has the remedy by way of a resolution for removal of Chairman

Senate i.e. respondent No.6 within the framework of the Constitution. In this behalf, Motion for removal can be tabled by requisite number of members and the House can vote on the same and if the motion, by majority, succeeds, respondent No.6 would cease to be the Chairman Senate.

30. The Hon'ble Supreme Court of Pakistan, in a fairly recent judgment in case reported as **'Malik Ameer Haider Sangha and another Vs. Mrs. Humaira Malik and others' (2018 SCMR 1166)**, observed that foundation of a representative democracy rests on a credible electoral process. A democratic façade 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 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. It was added that 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. It was added in paragraph-15 as follows: -

"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, voice chairman, are not held honestly, justly, 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."

The referred judgment of the Hon'ble Supreme Court emphasizes the existence of honest, just and fair process of election so that elections must not only to be held but be seen to be held honestly, justly, fairly and corruption free.

31. In the referred backdrop, it is only essential and proper that a resolution may be moved by the appellant, if he feels that he has been declared an unsuccessful candidate through an erroneous ruling of the

Presiding Officer; making election or the process of election not fair, just and honest, which may be put to vote and whoever has the majority, shall carry the day.

32. In so far as findings of learned Judge-in-Chambers regarding maintainability of writ petition as well as alternate and adequate remedy are concerned, they do not suffer from any error calling for interference.

33. For the above reasons, instant appeal fails and is accordingly dismissed.

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

(AAMER FAROOQ)
JUDGE

Approved for reporting

Zawar