

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.2604 of 2017

Raja Shaukat Aziz Bhatti

Versus

Election Commission of Pakistan and another

Date of Hearing:	27.07.2017
Petitioner by:	M/s Tanveer Iqbal and Malik Waheed Anjum, Advocates,
Respondents by:	Sardar Muhammad Latif Khan Khosa and Mr. Shahid Mehmood Mughal, Advocate for respondent No.2, Mr. Muhammad Arshad, Director General (Law), and Malik Mujtaba, A.D.G. E.C.P.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Raja Shaukat Aziz Bhatti, impugns the order dated 20.06.2017, passed by the Election Commission of Pakistan ("E.C.P."), whereby respondent No.2's petition under Section 103-AA of the Representation of People Act, 1976 ("R.O.P.A."), seeking the petitioner's de-notification as a Member of the Provincial Assembly of Punjab from constituency PP-IV (Gujar Khan, District Rawalpindi), was allowed and notification dated 22.05.2013, declaring the petitioner as the returned candidate from the said constituency, was withdrawn.

2. The record shows that on 26.11.2007, the petitioner filed his nomination papers to contest for a seat in the Provincial Assembly of Punjab from constituency PP-IV. In his nomination papers, the petitioner is said to have declared on oath that he was a graduate, and that he was qualified under Article 62 of the Constitution, and was not disqualified under Article 63 of the Constitution from being a candidate in the elections. The petitioner's nomination papers were accepted after which he contested the elections from the said constituency. The petitioner was declared as a returned candidate from the said constituency. None of the contesting candidates filed an election petition against the petitioner.

3. A copy of the Bachelors degree filed by the petitioner along with his nomination papers was sent by the E.C.P. to the Higher Education Commission ("H.E.C.") for verification. On 27.07.2010, and 02.09.2010, the H.E.C. reported that it appeared that the petitioner did not produce his own degree but that of one Shoukat Aziz Sheikh with his nomination papers. On a complaint filed by the E.C.P., F.I.R. No.856, dated 30.12.2010, under Sections 199, 200 and 471 of the Pakistan Penal Code read with Sections 78(3), 82 and 94 of R.O.P.A. was registered against the petitioner at Police Station, Gujar Khan. On 30.04.2011, the Investigation Officer reported that the allegations against the petitioner had been found to be incorrect, and that the accused had been found to be innocent. Subsequently, respondent No.2 (Major (Retd.) Iftikhar Mahmood Kayani) filed a petition under Section 104 of R.O.P.A. alleging that the petitioner, in league with other persons, had tampered with his nomination papers by replacing the educational testimonials in the file. The E.C.P. sent a copy of said petition to the Additional District and Sessions Judge, Gujar Khan so that an inquiry could be conducted. The Inquiry Officer's report dated 13.08.2012, contained findings adverse to the petitioner's interests. However, vide order dated 22.10.2012, the learned Area Magistrate, Gujar Khan accepted the cancellation report and cancelled the criminal case against the petitioner. The said order was impugned by the E.C.P. before the Hon'ble Lahore High Court in Criminal Miscellaneous Petition No.1067-M/2012 with the prayer that the said cancellation report be set aside. Vide order dated 19.02.2013, the said petition was dismissed, against which the E.C.P. filed Civil Petition for Leave to Appeal No.111/2013 before the Hon'ble Supreme Court of Pakistan. After granting leave to appeal, the Hon'ble Supreme Court consolidated the E.C.P.'s appeal with the *suo moto* case pertaining to fake degrees of Parliamentarians.

4. On 12.10.2012, the E.C.P. had lodged a complaint against the petitioner before the Judicial Magistrate, Gujjar Khan, who had forwarded the same to the Court of the learned Sessions Judge, Rawalpindi. This complaint was filed under the same very

provisions of law under which F.I.R. No.856, dated 30.12.2010, had been registered. It may be mentioned that the petitioner contested and won the elections to the Provincial Assembly of Punjab from the said constituency. He was notified as a returned candidate by the E.C.P. on 22.05.2013.

5. On 12.07.2016, when E.C.P.'s appeal before the Hon'ble Supreme Court came up for hearing, E.C.P.'s complaint before the learned Sessions Court, Rawalpindi was still pending. Vide order dated 12.07.2016, the Hon'ble Supreme Court directed the learned Sessions Court, Rawalpindi to proceed with the case on day to day basis and to ensure its disposal within a period of two months. On 06.12.2016, the Hon'ble Supreme Court passed the following order:-

"Learned ASC for the Election Commission of Pakistan candidly states that the criminal case in which Respondent No.1 was being tried has concluded and the judgment of acquittal has been recorded in his favour, therefore, this criminal appeal becomes infructuous. This being the position, this criminal appeal is disposed of. Needless to mention that all the interim orders, if any, passed during these proceedings stand vacated."

6. Vide judgment dated 01.11.2016, the Court of the learned Sessions Judge, Rawalpindi, after a long drawn out trial, acquitted the petitioner and the complaint filed by Deputy Election Commissioner was dismissed. An appeal has been filed by E.C.P. against the said judgment. The last paragraph of the judgment dated 01.11.2016 is reproduced herein below:-

"In view of above discussion, the prosecution has failed to prove its case by producing cogent, reliable, trust worthy and independent evidence. The prosecution was under a heavy burden to prove the case but it failed. It is held that the accused Shoukat Aziz Bhatti did not contest the election on the basis of BA degree, rather he participated the election on account of diplomas. As the prosecution has failed to prove the charge, so the accused is hereby acquitted and the complaint filed by Deputy Election Commissioner is hereby dismissed. He is on bail, his surety is discharged from the bail bonds. File be consigned to the record room after its due completion."

7. In the month of April, 2016, Major (Retd.) Iftikhar Mahmood Kayani (respondent No.2) had filed a petition under section 103-AA of R.O.P.A. before the E.C.P. praying for the petitioner to be de-notified as a member of the Provincial Assembly of Punjab from constituency PP-IV. Furthermore, it was prayed that the said constituency be declared as vacant and a bye-election be ordered

to be held. The primary ground on which the said petition was filed was that the petitioner had submitted a bogus degree along with his nomination papers filed on 26.11.2007, for the Provincial Assembly elections scheduled to be held in 2008. By the time, the said petition was filed by respondent No.2, a verdict had not been given by the Court of learned Sessions Judge, Rawalpindi on E.C.P.'s complaint against the petitioner. The petitioner contested the said petition by filing a reply in which objections to the jurisdiction of the E.C.P. to adjudicate upon the matter were taken. On 29.08.2016, the E.C.P. passed the following order:-

"Neither the petitioner nor his counsel in attendance. Arguments are addressed by the learned counsel for the respondent. The question of Post Graduate Diploma, whether genuine or otherwise is pending before the learned Sessions Judge and also before the August Supreme Court which has directed the Sessions Judge to decide the case within two months. In the circumstances, it is relevant to wait for the decision of the trial court".

8. As mentioned above, vide judgment dated 01.11.2016, passed by the Court of the learned Sessions Judge, Rawalpindi, the petitioner was acquitted. On 25.01.2017, the learned E.C.P. passed the following order in the proceedings under Section 103-AA of R.O.P.A.:-

"Learned counsel for the petitioner has stated that despite acquittal in criminal proceedings, the respondent can be disqualified by the Commission after having categorically held that his B.A. degree is fake. Notice to the respondent for appearance be given by all means and also through District Election Commissioner concerned for 16.02.2017. District Election Commissioner is directed to affect service independently and report."

9. Vide order dated 20.06.2017, the E.C.P. allowed respondent No.2's petition under Article 103-AA of R.O.P.A. and withdrew the notification declaring the petitioner as a returned candidate. Paragraph-12 of the said order is reproduced herein below:-

"12. It has been proved from the record that respondent contested the general election 2008 on the basis of B.A. degree which was later on found bogus by H.E.C. and reliance of respondent on diplomas is after thought story. The claimed bachelor degree had already been adjudicated to be that of Shaukat Aziz Sheikh and not that of respondent. It is striking feature of the case that respondent neither verified his documents from the concerned functionaries nor he submitted any application for hearing of case before august Supreme Court. For what has been discussed above, we are of the view

that respondent had betrayed the voters of his constituency by filing bogus degree with his nomination papers in general election held in 2008 and as such he was not eligible to contest general election 2013. Resultantly, this petition is accepted and notification in favour of respondent as returned candidate is withdrawn. Follow up action be taken. These are the detailed reasons of our short order of even date”.

10. The said order dated 20.06.2017 has been assailed by the petitioner in the instant writ petition. Vide order dated 13.07.2017, this Court issued notice to respondent No.2 and suspended the operation of the said order dated 20.06.2017. On 26.07.2017, the learned counsel for the contesting parties consented that, in the first instance, respondent No.2's preliminary objections to the jurisdiction of this Court to adjudicate upon the writ petition would be decided. The matter was adjourned to 27.07.2017, for the arguments of the learned counsel for the contesting parties on the preliminary objections to the maintainability of this petition.

11. Sardar Muhammad Latif Khan Khosa, ASC, learned counsel for respondent No.2, raised preliminary objections to the maintainability of the instant petition. His first objection was that an alternative remedy of filing an appeal before the Hon'ble Supreme Court under sub-section (4) of Section 103-AA of R.O.P.A. was available to the petitioner. He submitted that through the Representation of People (Amendment) Act, 2017 (Act No.XXIV of 2017), sub-section (4) to section 103-AA of R.O.P.A., was added; that by virtue of the said amendment, an appeal against the decision of E.C.P. made while exercising powers under sub-sections (1), (2) and (3) of section 103-AA of R.O.P.A., lay before the Hon'ble Supreme Court; that since the petitioner's right of appeal to the Hon'ble Supreme Court against the order dated 20.06.2017, passed by the E.C.P., was not subject to any fetters, and was not cumbersome in any manner, the instant petition was liable to be dismissed; and that since an appeal is a continuation of the proceedings before the lower forum, the petitioner was at liberty to raise all pleas, factual and jurisdictional, in an appeal before the Hon'ble Supreme Court.

12. Learned counsel for respondent No.2's second objection was to the effect that since E.C.P.'s assumption of jurisdiction on

respondent No.2's petition under section 103-AA of R.O.P.A. had been challenged by the petitioner in two writ petitions (i.e. writ petition No.1298/2017 and writ petition No. 1669/2017), before the Hon'ble Lahore Court, Rawalpindi Bench, the petitioner could not have filed the instant writ petition before this Court. Learned counsel for respondent No.2 prayed for the writ petition to be dismissed as not maintainable.

13. On the other hand, M/s Tanveer Iqbal and Malik Waheed Anjum, ASCs, learned counsel for the petitioner, submitted that the instant petition was maintainable, because the E.C.P. could not have passed the impugned order dated 20.06.2017, under section 103-AA of R.O.P.A.; that since the assumption of jurisdiction by the E.C.P. on respondent No.2's petition under section 103-AA, was wholly without jurisdiction, the said order dated 20.06.2017, is void and *non est*; and that it is well settled that where an order challenged in a writ petition is without jurisdiction or *coram non judice*, the same can be challenged before the High Court in writ jurisdiction regardless of the law providing a remedy of an appeal to the petitioner.

14. It was further submitted that under the provisions of R.O.P.A. an election petition to challenge the election of a returned candidate can be filed within 45 days of the publication of the name of the returned candidate issued by the E.C.P.; that such a petition is then remitted by the E.C.P. to the appropriate Election Tribunal, as and when it is constituted; that the import of sub-section (2) of section 103-AA of R.O.P.A. is that the E.C.P. is to finally dispose of a petition under sub-section (1) of section 103-AA of R.O.P.A. within a period of 60 days of the publication of the name of the returned candidate under sub-section (4) of Section 42 of R.O.P.A.; that if the E.C.P. does not decide such a petition within the period explicitly stipulated in sub-section (2) of section 103-AA of R.O.P.A., the petition under sub-section (1) of section 103-AA of R.O.P.A. abates; that since respondent No.2 did not file a petition under sub-section (1) of section 103-AA of R.O.P.A. within a period of 60 days of the date of the publication of the name of the returned candidate (i.e. the petitioner) and since the

impugned order dated 20.06.2017, was not passed within 60 days of the publication of the name of the returned candidate, the said order dated 20.06.2017, was void and could not be termed as an order passed under sub-section (1) of section 103-AA of R.O.P.A.; that since the said order dated 20.06.2017, has not been and could not have been passed under sub section (1) of section 103-A of R.O.P.A., the petitioner cannot file an appeal against the said order before the Hon'ble Supreme Court; that an appeal under sub section (4) of section 103-AA of R.O.P.A. can only be filed against an order passed by the E.C.P. under sub-sections (1), (2) and (3) of section 103-AA of R.O.P.A.; and that since sub section (2) of section 103-AA of R.O.P.A. starts with in non obstante clause, it has an overriding effect over sub-section (1) of section 103-AA of R.O.P.A.

15. Learned counsel further submitted that in terms of Article 225 of the Constitution, an election to a Provincial Assembly can only be called in question through an election petition presented to a Tribunal constituted under the provisions of R.O.P.A.; that the E.C.P. exercising powers under sub section (1) of section 103-AA of R.O.P.A. beyond 60 days of the publication of the name of the returned candidate, could not be termed as a Tribunal, therefore, the impugned order dated 20.06.2017, is in stark violation of the mandate of Article 225 of the Constitution; that since the petitioner was notified as a returned candidate by the E.C.P. on 22.05.2013, the E.C.P. could entertain a petition under sub-section (1) of section 103-AA of R.O.P.A. against the petitioner's election only up to 21.07.2013; that in passing the impugned order dated 22.06.2017, the E.C.P. has not exercised its powers under section 103-AA of R.O.P.A.; that since the said impugned order has not been passed under sub-section (1) section 103-AA of R.O.P.A., the only remedy available to the petitioner was to file a petition under Article 199 of the Constitution before this Court; and that the E.C.P., in the impugned order did not address the objections to its jurisdiction taken by the petitioner. Learned counsel for the petitioner prayed for the jurisdictional objections to this petition taken by the learned counsel for respondent No.2

to be spurned, and for the writ petition to be heard and decided on merits.

16. I have heard the contentions of the learned counsel for the contesting parties and perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs No.2 to 10 above, and need not be recapitulated.

17. Because of the litigations between the petitioner, respondent No.2 and the E.C.P. before various *fora*, the Provincial Assembly constituency (PP-IV) has remained unrepresented for about four years.

18. The sole question that needs to be decided at present is whether in view of the enactment of the Representation of People (Amendment) Act, 2017 (Act No.XXIV of 2017), on 02.06.2017, the present petition is maintainable. Through Act No.XXIV of 2017, the following new sub-section was added in section 103-AA of R.O.P.A.:-

“(4) An appeal against decision of the Commission made while exercising powers under sub-sections (1), (2) and (3) shall lie before the Supreme Court for decision within thirty days.”

19. By virtue of the addition of sub-section (4) to section 103-AA of R.O.P.A. a right of appeal to the Hon'ble Supreme Court has been provided to an aggrieved party against an order passed by the E.C.P. under sub-sections (1), (2), and (3) of section 103-AA of R.O.P.A.

20. Ordinarily, when an alternative and equally efficacious remedy is open to a litigant, he should, be required to pursue that remedy and not invoke the jurisdiction of the High Court for issuance of a writ. But the rule that the High Court will decline to exercise Constitutional jurisdiction when the alternative remedy had not been availed, is not an inflexible rule and Constitutional jurisdiction can be exercised when the impugned order is without jurisdiction and the alternative remedy is not efficacious or is cumbersome. The availability of an alternative remedy would not constitute an absolute bar on the jurisdiction of the High Court to entertain Constitutional petition and to exercise Constitutional jurisdiction, if the circumstances so warrant. In exceptional

circumstances where the relief to be given to the petitioner brooks no delay, or where irreparable injury would be caused to him if he is directed to resort to the statutory remedy, a writ petition may be entertained even though the alternative remedy has not been availed by the petitioner. It is entirely in the discretion of this Court to determine in the circumstances and on the facts of each particular case whether there is sufficient reason to entertain a particular writ petition on the ground that its circumstances constitute valid exception to the rule. In the case of Salahuddin Tirmizi Vs. Election Commission of Pakistan (PLD 2008 SC 735), it has *inter-alia* been held as follows:-

“The scope of judicial review of the High Court under Article 199 of the Constitution in election matter is confined to the extent of an order passed by election authority without lawful authority or it is coram non judice or mala fide an judicial review of the High Court cannot be enlarged to the cases relating to factual inquiry or in cases in which another view of the matter was also possible and if such view would have been taken it would not be illegal or unconstitutional.”

21. There are innumerable cases of absence or excess of jurisdiction or where the impugned order suffers from illegality on the face of the record, where a *certiorari* has been granted even though the right of statutory appeal had not been availed by a petitioner. Other instances where the High Courts assume writ jurisdiction in petitions where an alternative remedy is available to the petitioner under the law, are where the order impugned is based on extraneous or malafide considerations, or where the rules of natural justice have been violated, or where the alternative remedy was not adequate or was onerous, or where the provision of law under which the impugned order was passed is itself unconstitutional. In none of the cases that I have come across, the High Court has exercised Constitutional jurisdiction where the remedy of an appeal as of right to the Hon'ble Supreme Court is available under the law to a petitioner. Where the statute provides a remedy of an appeal to the High Court or the Hon'ble Supreme Court to a writ petitioner, the High Court ought to decline exercising its jurisdiction under Article 199 of the Constitution.

22. The contention of the learned counsel for the petitioner that the E.C.P. did not have the jurisdiction to entertain and decide a petition under sub-section (1) of section 103-AA of R.O.P.A. filed beyond a period of sixty days from the date of the publication of the name of the returned candidate; and that an order of the E.C.P. to de-notify a returned candidate in exercise of the powers under section 103-AA of R.O.P.A. is against the Constitutional mandate enshrined in Article 225 of the Constitution, has already been considered by the Hon'ble Supreme Court in the case of Aftab Shaban Mirani Vs. Muhammad Ibrahim Jatoi (C.P. No.369 of 2008). The question relating to scope of sections 103 and 103-AA of R.O.P.A. and the power of the E.C.P. to interfere in an election dispute in its supervisory jurisdiction and declaring the election in a constituency void, was decided by the Hon'ble Supreme Court in its judgment in the said case, in the following terms:-

"The next question for examination relates to the power of Election Commission of Pakistan under sections 103 and 103AA of Representation of the People Act, 1976 and the interpretation of these provisions in the light of Article 225 read with 218(3) and 219 of the Constitution and section 52 of the Representation of the People Act, 1976. The Plain reading of section 103 read with section 103-AA of Act 1976 would show that Election Commission of Pakistan on the complaint lodged by a candidate or his agent or polling staff or any other person if finds that in the situation mentioned therein, it would not possible to ensure fair, just and transparent election in a constituency as a whole or at a particular polling station, may declare election in the constituency void and direct for re-poll in the constituency and if such a situation is confined only to the extent of some of the polling stations, may direct re-poll at these polling stations. The power of Election Commission of Pakistan under section 103-AA is entirely independent to the power to be exercised in an election petition by the election Tribunal established in terms of Article 225 of the Constitution, therefore, the contention of the learned counsel for the respondent that power of the Commission under sections 103 and 103AA of Representation of the People Act, 1976 is subject to Chapter-VII of the Representation of the People Act, 1976, as the Commission by virtue of subsection (3) of section 103-AA of Act 1976 has to perform its functions as Tribunal has no substance. The Commission despite having been declared as Tribunal under section 103-AA (3) of the Act is empowered to adopt any procedure in the proceedings of summary inquiry before it and is not bound to follow the procedure of Tribunal or record the evidence and hold a regular inquiry. The word 'Tribunal' used in subsection (3) of section 103-AA ibid would not change the status, power and functions of the Commission."

23. Furthermore, it was held as follows:-

"In view of above discussion we hold that Chapter X as well as sections 103 and 103AA of Representation of People Act, 1976 are entirely independent to section 52 of the Act and the Commission before or after issue of notification of result of election, may exercise jurisdiction to entertain a complaint on the grounds mentioned therein and may continue to exercise the power within 60 days after official announcement of result of election whereas an election petition can be filed within 45 days of the publication of notification of result and election petitioner can take all these grounds which were taken in the application under section 103 AA of 1976 Act before the Election Commission and thus jurisdiction of Commission to some extent is concurrent with the Tribunal without any conflict."

(Emphasis added)

24. I would refrain from commenting on whether, in view of the above dictum, there is force in the contention of the learned counsel for the petitioner that under section 103-AA of R.O.P.A., the E.C.P. could exercise its powers as a Tribunal only until sixty days of the publication of the name of the returned candidate. The objection to E.C.P.'s jurisdiction to entertain and adjudicate upon and decide respondent No.2's petition under section 103-AA of R.O.P.A. beyond sixty days of the date of the publication of the petitioner's name as the returned candidate, can be taken as a ground in an appeal to the Hon'ble Supreme Court against the order dated 20.06.2017, passed by the E.C.P.

25. The petitioner in the instant writ petition is essentially seeking the issuance of a writ of *certiorari* against the order dated 20.06.2017 passed by the E.C.P. The petition has been filed under Article 199 of the Constitution. This Court is to exercise jurisdiction under Article 199 of the Constitution only *"if it is satisfied that no other adequate remedy is provided by law"*. Now, due to the addition of sub-section (4) to section 103-AA of R.O.P.A. there is a remedy of an appeal against an order passed by the E.C.P. under section 103-AA of R.O.P.A. For this Court to assume jurisdiction in this matter by altogether ignoring sub-section (4) to section 103-AA of R.O.P.A. as well as the mandate of Article 199 (1) of the Constitution would be tantamount to reading the law with contempt.

26. At times the statutory remedy is inadequate either because all the grounds open to a petitioner in a writ petition would not be available to him in the statutory appeal or because the statutory

appeal/remedy cannot be availed of unless some onerous condition such as the deposit of the full amount of the disputed levy or penalty is required to be paid by the petitioner. This cannot be said of the remedy of appeal under sub-section (4) of section 103-AA of R.O.P.A.

27. The petitioner is at liberty to agitate the grounds taken in this petition in his appeal before the Hon'ble Supreme Court, should he decide to file one. The appellate forum will be better equipped to consider and decide the questions of fact in this case, since it has jurisdiction over questions of fact as well as of law. The High Court while adjudicating upon a writ petition is not properly equipped to deal with questions of fact, especially if they are disputed.

28. For the above reasons, I am of the view that there are no exceptional circumstances to persuade me to depart from the normal rule that a writ petition complaining against the order of a tribunal (in this case an order of the E.C.P. passed under section 103-AA of R.O.P.A.) would not be entertained in the absence of an adequate explanation as to why the petitioner does not avail the remedy of appeal provided to him against the impugned order by sub-section (4) of section 103-AA of R.O.P.A. Since I do not find this petition to be maintainable in the presence of the remedy of an appeal to the Hon'ble Supreme Court available to the petitioner against the impugned order dated 20.06.2017, there is no need to give any finding on the second objection of respondent No.2.

29. The writ petition is, therefore, dismissed as not maintainable, but in the circumstances without any order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 28/7 /2017

(JUDGE)