

**JUDGMENT SHEET**  
**IN THE ISLAMABAD HIGH COURT,**  
**ISLAMABAD**

CASE NO. : W.P. NO.4815/2016

Mrs. Sumaira Malik & Another

Vs.

Election Commission of Pakistan through Secretary, Islamabad etc.

Petitioners by : M/s Syed Pervaiz Zahoor & Mr. Mubeen-ud-Din Qazi, Advocates  
 Mr. Jameel Hussain Qureshi, Advocate  
 Respondents by : Kh. Haris Ahmad & Mr. Taimoor Aslam Khan, Advocates  
 Mr. Afnan Karim Kundi, Additional Attorney General  
 Malik Mujtaba Ahmad, ADG (Legal), ECP  
 Date of hearing : 19.05.2017

**AAMER FAROOQ J.** The facts, leading to the filing of present petition, are that petitioners being elected Members of District Council, Khushab, contested the elections for the Seats of Chairman & Vice Chairman respectively of District Council, Khushab held on 22.12.2016 as joint candidates. Respondents Nos.2 & 3 also contested the elections for the same Seats as joint candidates. At the close of polls, votes were counted in presence of candidates and their agents and petitioners were declared successful as having obtained 33-votes, while respondents Nos.2 & 3 obtained 32-votes. All the candidates and their election agents signed the certificate confirming no objection regarding the conduct of polls as well as the counting of votes; where-after statement of count was issued to the parties and the Returning Officer issued official result declaring the petitioners as returned candidates. On 23.12.2016, the Returning Officer under Rule 36 of Punjab Local Government (Conduct of Elections) Rules, 2013,

conducted the consolidation proceedings in presence of parties and issued consolidated statement dated 23.12.2016. On 26.12.2016, respondents Nos.2 & 3 filed a petition before Election Commission of Pakistan/respondent No.1 for declaring election of the petitioners as void. The referred petition was allowed by respondent No.1 vide order dated 28.12.2016.

2. Learned counsel for the petitioners, *inter alia*, contended that Election Commission of Pakistan did not have the jurisdiction in the matter inasmuch as under Punjab Local Government Act, 2013 (the Act), only Election Tribunal constituted by Election Commission of Pakistan has the exclusive jurisdiction to adjudicate upon election matters and declare the election as void. It was further contended that without prejudice to the earlier argument, the nature of allegations were of such kind that same needed recording of evidence which was neither done by respondent No.1 nor the Election Commission has the jurisdiction/power to do so; that the Election Commission of Pakistan has relied upon contrary statements of Presiding Officer and the same should have been done inasmuch as he has admitted that the same was recorded in duress. Learned counsel further contended that the breach of secrecy of the Ballot Paper does not fall within the category of corrupt and illegal practice as defined in the Act and could not result in declaration of the whole election as void inasmuch the only consequence of the same, is criminal prosecution; that without any proof or evidence that the petitioners were involved in the alleged incident of breach of secrecy of Ballot Paper, their

election could not be declared void, especially when, no finding has been given against them; that it became apparent during the course of proceedings that there was only flattering of the Ballet Paper, which does not fall within the purview of breach of secrecy as provided under section 55 & 57 of the Act. It was further contended that after consolidation order passed by the Returning Officer on 23.12.2016, the matter attained finality and could only be challenged by way of Election Petition and the Election Commission of Pakistan had no jurisdiction/authority in the matter, except to notify the results. In support of contentions, learned counsel took the Court through various provisions of the Act. Learned counsel placed reliance on cases reported as 'Moulana Atta-ur-Rehman Vs. Al-Hajj Sardar Umar Farooq and others' (PLD 2008 Supreme Court 663), 'Asghar Ali Vs. Punjab Local Councils Election Authority, Lahore and 4-others' (1999 SCMR 1123), 'Chaudhry Perwaiz Akhtar and another Vs. District Returning Officer, Layyah and 5-others' (PLD 2006 Lahore 29), 'Muhammad Arif Muhammad Hassani Vs. Amanullah and others' (2016 SCMR 1332), 'Syed Hafeez-ud-Din Vs. Abdul Razzaq and others' (PLD 2016 Supreme Court 79), 'Abdul Rasheed and another Vs. Election Appellate Authority and others' (2016 SCMR 1215), 'Muhammad Mujtaba Abdullah and another Vs. Appellate Authority/Additional Sessions Judge, Tehsil Liaquatpur District Rahim Yar Khan and others' (2016 SCMR 893), 'Muhammad Mamoon Tarar Vs. Election Commission of Pakistan and others' (2016 CLC 1708) & unreported judgment of Hon'ble Supreme Court of

Pakistan in case titled 'The Province of Sindh through Chief Secretary etc. Vs. Muttahida Qaumi Movement (MQM) etc. (Civil Appeals Nos.760 to 765 of 2016).

3. Learned counsel for respondents Nos. 2 & 3, *inter alia*, contended that Election Commission of Pakistan, while passing the impugned order, complied with the principles of natural justice as well as due process of fair trial as enshrined in Article 10-A of the Constitution. In this behalf, reliance was placed on cases reported as 'Mohinder Singh Gill & Another Vs. The Chief Election Commissioner, New Delhi & Others' (1978 AIR 851) & 'Mir Ghalib Domki Vs. Election Commission of Pakistan, Islamabad and 6-others' (PLD 2006 Karachi 314). It was further contended that the process of election starts with the nomination of the papers till the final results. It was further contended that under the principle of *locus poenitentiae*, an order which is illegal, can always be recalled. Reliance was placed on case reported as 'Darayus Pestonji Vs. Nam Singh and 2-others' (1998 CLC 921). It was further contended that it is the duty of Election Commission of Pakistan to hold fair and free elections and its functions and powers were duly highlighted by the Hon'ble Supreme Court of Pakistan in case reported as 'Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6-others Vs. Federation of Pakistan and 2-others' (PLD 2012 Supreme Court 681).

4. The facts, leading to the filing of instant petition, have been lucidly mentioned hereinabove therefore need not to be recapitulated.

5. The petitioners as well as respondents Nos.2 & 3 are elected Members of District Council Khushab and were candidates for the Seats of Chairman and Vice Chairman respectively of said Council. The elections for membership as well as Chairman & Vice Chairman of District Council Khushab were held under the Act. In this regard, under section 19 of the Act, the Election Commission of Pakistan is to conduct Local Government Elections and make provision for the same; under section 20 of the Act, all exclusive authorities in the Province of Punjab are to assist the Election Commission in discharge of its functions. The appointments of the electoral staff including District Returning Officer/Returning Officer etc. are also to be made by Election Commission of Pakistan as provided in section 22 of the Act. The elections are to be held and conducted in the manner prescribed under section 29 of the Act. Any challenge to the elections is to be made under section 38 *ibid*, by way of election petition, in the prescribed manner before Election Tribunal. Under section 39 *ibid*, the Election Commission, by notification, is to appoint an Election Tribunal for such local area as may be specified in the notification. Section 40 of the Act provides that Election Tribunal may exercise powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908 and shall be deemed to be a Court. The decisions/kinds of orders, which can be passed by Election

Tribunal in an election petition and the grounds on which, same can be done, are provided in sections 41 & 42 of the Act. For the sake of brevity, referred provisions are reproduced below: -

***“41. Decision of the Election Tribunal.-(1) The Election Tribunal may, on the conclusion of trial of an election petition, makes 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.*

*(2) The decision of the Election Tribunal shall take effect from the date on which it is made and shall be communicated to the Election Commission.*

***42. Ground for declaring election of returned candidate void.- (1) The Election Tribunal shall declare the election of the returned candidate to be void if it is satisfied that-***

- (a) the nomination of the returned candidate was invalid; or*
- (b) the returned candidate was not, on the nomination day, qualified for or was disqualified from, being elected as a member; or*
- (c) the election of the returned candidate has been procured or induced by any corrupt or illegal practice; or*
- (d) corrupt or illegal practice has been committed by the returned candidate or his election agent or by any other person with the connivance of the candidate or his election agent.*

*(2) The election of a returned candidate shall not be declared void if the Election Tribunal is satisfied that any corrupt or illegal practice was committed without the consent or connivance of that candidate or his election agent and that the candidate and the election agent took all reasonable precaution to prevent its commission”*

The bare reading of above provisions shows that Election Tribunal can declare an election void as a whole, inter alia, on the grounds that the election of the returned candidate was procured or

reduced by any corrupt or illegal practice or corrupt or illegal practice has been committed by the returned candidate or his election agent or any other person with the connivance of the candidate or his election agent. The election can also be declared as a whole void under section 44 of the Act, if any person fails to comply with the provisions of the Act or the Rules or the prevalence of extensive corrupt or illegal practice at the election. Under section 46 *ibid*, any person aggrieved by a final order of Election Tribunal, may appeal to the Lahore High Court. Under sections 55 & 56 of the Act, any person who interferes with the secrecy of voting, omits an offence which is punishable with six months' imprisonment or a fine. Under the Act, the Election Commission does not have the power to adjudicate election disputes. However, under Punjab Local Government (Conduct of Elections) Rules, 2013 (the Rules), the powers and functions of the Election Commission are provided (Rule 3). Moreover under Rule 78 of the Rules as well, the powers of the Election Commission are contained, which are as follows: -

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

- (a) Stop the polls at any stage of the election if it is convinced that it shall not be able to ensure the conduct of the election justly, fairly and in accordance with law due to large scale malpractices, including coercion, intimidation and pressures, prevailing at the election;*
- (b) review an order passed by an officer under the Act or the rules, including rejection of a ballot paper; and*
- (c) issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly,*

*and in accordance with the provisions of the Act and the rules”*

The above position of law, in light of the above referred provisions under the Act and the Rules, is that it is the duty of the Election Commission of Pakistan to ensure fair and free Local Government Elections including the elections for the Seats of Chairman & Vice Chairman of District Council. Respondent No.1 has the vast powers for conducting elections however the election disputes are to be adjudicated by Election Tribunal exclusively to be notified by Election Commission of Pakistan. The secrecy of Ballot Paper and the interference with the secrecy of vote as such does not fall within the definition of illegal corrupt practice, but is an offence punishable up to six months' imprisonment and fine however the elections can be declared void as a whole, in case, any person does not adhere to the provisions of the Act and/or the Rules.

6. The thrust of the arguments by learned counsel for the petitioners was that the Election Commission of Pakistan had no jurisdiction in the matter inasmuch as respondents Nos.2 & 3, if had any grievance regarding the conduct of elections or violation of any provision of the Act or the Rules, same could have been assailed before the Election Tribunal. Conversely, learned counsel for respondents Nos.2 & 3 has placed reliance on Rule 78 of the Rules to substantiate his argument that the Election Commission of Pakistan had the jurisdiction in the matter inasmuch in order to conduct fair and free elections, it can pass any order.



7. The Hon'ble Lahore High Court, Lahore in a case reported as 'Muhammad Mamoon Tarar Vs. Election Commission of Pakistan and others' (2016 CLC 1708) has held as follows:-

*"In the present case, the election process came to an end with the consolidation of result by filing Form XIII. Any challenge thereafter to the process could only be made before the Election Tribunal in terms of Section 44 of the Act. Hence this case does not support the contentions of respondents Nos.5 and 6"*

The Hon'ble Lahore High Court also observed that Rule 78 of the Rules, when read with Articles 140-A & 218(3) of the Constitution, suggests that power to review an order under Rule 78 (b) of the Rules was executive function of Election Commission to reorganize and conduct local government election so as to ensure that they were being carried out honestly, justly, fairly and in accordance with law.

8. In the instant case as well, results were duly consolidated by the Returning Officer and the statement in this behalf was duly signed hence the election process came to an end and was only to be notified by the Election Commission of Pakistan. In the referred facts and circumstances, the only course open to the petitioners was to challenge the elections before the Election Tribunal under section 44 of the Act and the Rules. In this behalf, the case law cited by learned counsel for the petitioners is instructive. The reliance is placed on cases reported as 'Moulana Atta-ur-Rehman Vs. Al-Hajj Sardar Umar Farooq and others' (PLD 2008 Supreme Court 663) and 'Abdul Rasheed and another Vs. Election Appellate Authority and others' (2016 SCMR 1215).

9. Even-otherwise, the controversy raised in the petition filed by respondents Nos.2 & 3 before Election Commission of Pakistan, was such, which could not have been resolved without recording of evidence and the Election Commission of Pakistan does not have any jurisdiction/power to enter in any detailed inquiry, where there are disputed questions of facts. The bare examination of Rule 78 of the Rules shows that the nature of power, which Election Commission of Pakistan has, is executive in nature and has been granted by the legislature to ensure that the elections are conducted in just, fair and free manner in accordance with the provisions of the Act and the Rules. The legislature has given the power to adjudicate election disputes to the Election Tribunal only. In this behalf, the plain reading of Section 38 *ibid* shows the intention of the legislature which provides that the election to the Office of a Local Government shall be called in question except by an election petition.

10. The statement of the Presiding Officer, which has been relied upon by the majority Members of the Election Commission of Pakistan is vivid and raises a controversy which could only be resolved by way of recording of evidence.

11. The principles laid down in the case law relied upon by learned counsel for respondents Nos.2 & 3 are not applicable in the facts and circumstances of the instant case inasmuch as the case of Watan Party *supra* pertains to the election under Representation of Peoples' Act and does not confer any inherent power/jurisdiction on the Election Commission to adjudicate the

election disputes. Moreover, the Election Commission of Pakistan, in elections held under the Act and the Rules, does not have the jurisdiction/power or albeit summary inasmuch as no provision similar to Section 103 AA of Representation of Peoples' Act, 1976 exists either in the Act or the Rules.

12. In view of above, instant writ petition is allowed and the impugned order dated 28.12.2016 passed by respondent No.1 is set aside.

**(AAMER FAROOQ)**  
**JUDGE**

Announced in Open Court on \_\_\_\_\_

**JUDGE**

Zawar

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