

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

**CASE NO. : W.P. NO.2691-2017**

**Chaudhry Asad-ur-Rehman**

**Vs.**

**The Election Commission of Pakistan etc.**

**Petitioner by : Mr. Mustafa Ramday, Advocate**

**Mr. Zaafer Khan, Advocate**

**Respondents by : Sardar Abdul Raziq Khan, Advocate**

**Date of hearing : 26.09.2017**

**AAMER FAROOQ J.** The facts, in brief, are that the petitioner was the returned candidate in the General Elections held in 2013 with respect to Constituency NA-94 Toba Tek Singh-III. Respondent No.3 filed an Election Petition (Election Petition No.221/2013) against the petitioner challenging the results before Election Tribunal constituted by respondent No.1. The referred petition was entrusted to Election Tribunal, Faisalabad. In the proceedings, the petitioner appeared and filed reply/written statement, where-after on 09.09.2013, issues were framed. During course of proceedings, the petitioner filed an application under section 63 of Representation of the People Act, 1976 (the Act). The referred application was dismissed by the Election Tribunal, seized of the matter, vide order dated 19.11.2013. The petitioner challenged the referred order by means of a petition under Article 199 of the Constitution (W.P. No.33047/2013). In the said proceedings before the Hon'ble Lahore High Court, a status quo order was passed and the trial before the Election Tribunal was stayed. On 05.10.2015, the

Election Petition in question was transferred from Election Tribunal Faisalabad to Election Tribunal, Multan. The Election Tribunal, Multan, after transfer of the case, dismissed the same on 14.01.2016 under section 76 of the Act. On 20.12.2015, the above mentioned writ petition filed by the petitioner, was dismissed as withdrawn. Respondent No.3 filed an application for restoration as well as application for condonation of delay before respondent No.1 on 26.04.2017. The grounds for restoration were, *inter alia*, that Election Petition was dismissed while the stay was operative and that the counsel holding the brief on behalf of respondent No.3, in collusion with the petitioner, did not inform him that the Election Petition has been dismissed. Respondent No.1 issued notice on 07.06.2017 to the petitioner. On 14.06.2017, the application was disposed of vide the impugned order, whereby the application for restoration along condonation was entrusted to the Election Tribunal, Lahore with the direction to decide the application as well as the Election Petition on merits after hearing the parties.

2. Learned counsel for the petitioner, *inter alia*, contended that under section 76 of the Act, the Election Tribunal has the power to dismiss a petition for non-prosecution, however, it was contended that there is no provision in the referred Act, which is similar to Order IX Rule 9 CPC for restoration of the *lis*; that in absence of power by the learned Election Tribunal to restore a petition dismissed for non-prosecution, the order can be subjected to an appeal in terms of Section 67(3) of the Act, which entitles an aggrieved party to file an appeal against the decision of Election

Tribunal within 30-days before the Hon'ble Supreme Court of Pakistan. It was further contended that since there is no *lis* pending before the Election Tribunal after dismissal of Election Petition for non-prosecution, the only remedy available to respondent No.3, was to file an appeal before the august Apex Court. Learned counsel further contended that in the referred facts and circumstances, respondent No.1 had no jurisdiction either to transfer the Petition or to entrust the application for restoration to other Tribunal with the direction to decide the same as well as the Election Petition. In support of his contentions, learned counsel for the petitioner placed reliance on cases reported as 'Habibul Wahab Alkhairi Vs. Sheikh Rashid Ahmad and 5-others' (PLD 1989 Supreme Court 760), 'Mian Zahid Sarfraz Vs. Raja Nadir Pervaiz Khan and others' (1987 SCMR 1107), 'Dur Muhammad Khan Nasir and others Vs. Muhammad Shafiq Tareen and others' (PLD 2014 Balochistan 152), 'Muhammad Raza Hayat Hiraj Vs. Election Commission of Pakistan etc.' (2015 SCMR 233), 'Muhammad Asim Kurd Vs. Mir Lashkari Khan Riasani' (PLD 1998 Balochistan 1). It was further contended that neither the Election Tribunal nor the Election Commission of Pakistan has the power of review inasmuch as the same has not been conferred under the Act. Reliance was placed on cases reported as 'Haji Muhammad Asghar Vs. Malik Shah Muhammad Awan and another' (PLD 1986 Supreme Court 542) as well as 'Shehzad Khan Khakwani Vs. Aamir Hayat Hiraj and others' (2011 CLC 25) & 'Asif Nawaz Fatiana Vs. Walayat Shah and others' (2007 CLC 610). It was also contended that a petition under Article 199 of the Constitution is maintainable

against an order passed by respondent No.1 i.e. Election Commission of Pakistan. Reliance was placed on cases reported as ‘Salahuddin Tirimizi Vs. Election Commission of Pakistan’ (PLD 2008 SC 735), ‘Election Commission of Pakistan Vs. Javed Hashmi’ (PLD 1989 SC 396) & ‘Aftab Shaban Mirani Vs. Muhammad Ibrahim Jatoi’ (PLD 2008 SC 779). Lastly, it was contended that since the proceedings have taken place under the Act, which is a special law and the same is to be interpreted strictly. Reliance was placed on cases reported as ‘Nur Muhammad Vs. Mst. Sardar Khatoon’ (PLD 1951 Sindh 1) & ‘Mian Sharif Shah Vs. Nawab Khan; (PLD 2011 Peshawar 86).

3. Learned counsel for respondent No.3, *inter alia*, contended that instant petition is not maintainable in light of the amendment made in Section 103-AA of the Act, whereby a right of appeal has been provided. In this behalf, it was contended that through the referred amendment, which came into existence on 05.06.2017, the petitioner had a right of appeal, which he did not avail hence the petition is not maintainable. It was further contended that under section 56(2) of the Act, the Election Commission refers Election Petition for trial to a Tribunal. It was further contended that under section 58 of the Act, the Chief Election Commissioner has the power to transfer an Election Petition from one Tribunal to another. Moreover, it was contended that under the law i.e. Section 57 *ibid*, the Election Commission has the power to constitute Election Tribunals. In light of the referred provisions of the Act, it was contended that since the Election Tribunal, Multan has ceased to

exist therefore, application for restoration along with condonation of delay, filed by respondent No.3, was entrusted for decision by respondent No.1 to Election Tribunal, Lahore hence the impugned order does not suffer from any illegality or jurisdictional defect.

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

5. Respondent No.3 has taken a preliminary objection regarding maintainability of the instant petition in light of amendment made in Section 103-AA of the Act, whereby a right of appeal has been provided. In this behalf, by virtue of Section 103-AA of the Representation of People (Amendment) Act, 2017, right of appeal has been provided where Commission, while exercising powers under section 103-AA (1), (2) & (3) passes any order. The relevant provision of law reads as follows: -

**“3. Amendment of section 103-AA, Act LXXXV of 1976.-** *In the Representation of the People Act, 1976 (LXXXV of 1976), in section 103AA, after subsection (3), the following new subsection shall be added, namely:-*

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

The bare reading of the above provision shows that the right of appeal has been provided only where the Commission exercises powers under subsections (1), (2) & (3) of Section 103-AA of the Act and not otherwise.

6. In the instant case, respondent No.1 did not exercise powers under the aforementioned Sections hence the petitioner did not have the right of appeal.

7. The case of the petitioner is that Election Tribunal, hearing an Election Petition, dismissed the same for non-prosecution under section 76 of the Act, which amounts to a decision and can be assailed solely by way of an appeal before the Hon'ble Supreme Court of Pakistan under section 67(3) *ibid*.

8. Admittedly, under section 76 of the Act, the Tribunal has the jurisdiction to dismiss a petition for want of prosecution. Moreover, under section 62 of the Act, the procedure which is to be followed by the Tribunal is in accordance with the procedure laid down by the Election Commission however, under section 64 *ibid*, the Tribunal has the power of a Court under the Code of Civil Procedure, 1908. The procedure laid down by the Election Commission does not give or provide the Tribunal any power/jurisdiction, which is akin to Order IX Rule 9 CPC. Similarly, no power of review has been provided to the Election Tribunal under the Act, meaning thereby that any decision rendered or order passed, cannot be recalled by the Election Tribunal either in exercise of review or powers similar under Order IX Rule 9 CPC. In this behalf, the case law relied upon by learned counsel for the petitioner, is instructive.

9. In case reported as 'Mian Zahid Sarfraz Vs. Raja Nadir Pervaiz Khan and others' (1987 SCMR 1107), the Hon'ble Supreme Court of Pakistan observed as follows: -

*“A popular and not a technical or legal word, and a very comprehensive term, having no fixed, legal*

*meaning. It has been said that a decision necessarily involves a dispute, actual or potential, and the reaching of a conclusion. In its common use, the word has been defined as meaning act of deciding, settling, or terminating, as a controversy, by giving judgment on the matter at issue; determination or result arrived at after due consideration, as of a question or doubt; settlement, or conclusion. Strictly speaking, it is intended to embrace the last act of the Court, in other words, the judgment, a deciding of the case for or against one of the parties, and as used in particular statutes, may mean a final decision, and in its broad, generic sense it means a final determination of the rights of the parties in the action.*

*After enumerating the nature or the types of orders that an Election Tribunal can pass under section 67 of the Act subsection (2) provides that such a decision as is enumerated in subsection (1) is final except for the right of an appeal provided for in subsection (3). The finality lent to such a decision is made subject to an exception of appeal. This necessarily enjoins that subsection (2) and subsection (3) of section 67 are to be read together and the two alongwith the empowering provision of section 67. It is true that while enacting, the conclusion of the trial has been mentioned in section 67 but in section 63 and section 76 provision has been expressly made for passing of such an order as is envisaged in section 67 during the trial and not at its conclusion. Nevertheless, the order is of the type as is enumerated in subsection (1) of section 67 of the Act and has the effect of either concluding the trial or is passed at the conclusion of the trial. This fact of conclusion of the trial or concluding the trial by that order and the order conforming to what is enumerated in subsection (1) section 67 limits the scope of the expression a "decision" as contained in subsection (3) of section 67 of the Act. The reference to Article 13 in the explanation is intelligible because it is under a deeming clause, clause (4) of Article 13, that an order passed under Article 13 has been given the character and status of an order passed by a Tribunal trying an election petition. The deeming effect of clause (4) of Article 13 has been totally avoided by another deeming clause contained in the explanation appended at the end of section 67 of the Act”.*

Similar view was taken by the Hon'ble Lahore Court in case reported as 'Shehzad Khan Khakwani Vs. Aamir Hayat Hiraj and others' (2011 CLC 25) and it was observed as follows:-

*“Under section 76 of the Act even the Tribunal has the power to dismiss an election petition if the petitioner does not enter appearance to prosecute the petition. I have also minutely gone through the provisions of the law on the aspect and find that although a Tribunal has power to dismiss a petition for non-prosecution but there is no provision in the Representation of the People Act, 1976 empowering the Tribunal to review or recall its own order meaning thereby that once a matter is decided one way or the other the Election Tribunal cannot review its order of its own and the power of review can only be exercised if it is so conferred by the Statute”*

Likewise, in case reported as 'Asif Nawaz Fatiana Vs. Walayat Shah and others' (2007 CLC 610), it was observed as follows: -

*“The contention however cannot be countenanced for multiple reasons. It has been noticed above that though there is section 64 (that the Tribunal will have "all the powers of civil Court, trying a suit under the Code of Civil Procedure"), yet some specific provisions have been made by the legislature in its wisdom in the Representation of the People Act, 1976. One of them is section 76 specifically empowering the Tribunal to dismiss the petition for default. This was despite the fact that Order IX of the Code of Civil Procedure, 1908 empowers the Civil Court to dismiss a suit for default and take proceedings ex parte against the absenting party, restore the suit and set aside ex parte orders/decrees on showing sufficient cause. The enactment of section 76 of the Representation of the People Act, 1976 is thus clearly a conscious departure from the procedure prescribed by the Code of Civil Procedure, 1908 otherwise there would have been no need to specifically empower the Tribunal to dismiss a petition for default as envisaged by section 76 of the Representation of the People Act, 1976. The second part of section 64 that the Tribunal "shall be deemed to be a civil Court within the meaning of sections 476, 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898)" is also to be construed in the restricted sense for*



*the purpose of the provisions mentioned therein. The Tribunal does not ipso facto become a Civil Court by virtue of this provision. The later amendment made in subsection (1) of section 62 in the year 1985 and issuance of Notification dated 17-3-1985 (laying down the procedure for trial of election petitions) is also indicative of the same intention of the legislature viz. that certain procedure was specifically laid down to be followed by the Tribunal and some specific powers were also conferred on it to the extent mentioned therein. It shows the special status of a Tribunal under the Representation of the People Act, 1976 who being the creation of such special law is to exercise only such power and jurisdiction as may be available within the parameters of that law. It needs no mention that such a Tribunal while functioning under such a special law cannot claim to have nor can exercise any power inherent or otherwise except to the extent conferred upon it by law. By empowering the Tribunal to dismiss the petition for default of appearance and in making no provision for its restoration, the intention has been made absolutely clear that the order of the Tribunal becomes final as there is no power of review even given to the Tribunal”.*

With respect to special status of the Tribunal, the Hon’ble Supreme Court of Pakistan, in case reported as ‘Haji Muhammad Asghar Vs. Malik Shah Muhammad Awan and another’ (PLD 1986 Supreme Court 542), observed that the Election Tribunal does not have the power of review.

10. In view of above case law, it is clear that Section 76 of the Act authorizes the Election Tribunal to dismiss a petition for want of prosecution however once the order is passed, the same attains finality in terms of Section 67(2) of the Act and can only be assailed by way of an appeal. Even-otherwise, the Hon’ble Supreme Court of Pakistan, in case reported as ‘Habibul Wahab Alkhairi Vs. Sheikh Rashid Ahmad and 5-others’ (PLD 1989 Supreme Court 760), held

that the disposal of Election Petition even though prematurely, would render the trial as having been concluded and the order passed in such circumstances, can only be assailed by way of an appeal under section 67(3) of the Act.

11. Since no appeal is provided against the order passed by respondent No.1 therefore the same can be assailed, if it suffers from illegality or jurisdictional error. The order impugned, in the instant case, suffers from jurisdictional error inasmuch as the Election Commission of Pakistan had no jurisdiction to entrust the application for restoration to any other Tribunal.

12. Admittedly, respondent No.1 has the jurisdiction/power to transfer an Election Petition from one Tribunal to another, but such power can only be exercised under section 58 *ibid*, when the petition is pending. The same can be discerned from bare reading of Section 58 *ibid*. For the ease of convenience, the referred provision of law, is reproduced below: -

***“Sec. 58. Power to transfer petition.- The Commissioner, either of his own motion or on an application made in this behalf either by any of the parties, may at any stage transfer an election petition from one Tribunal to another Tribunal and the Tribunal to which the election petition is so transferred***

- (a) shall proceed with the trial of the petition from the stage from which it is transferred; and*
- (b) may, if it thinks fit, recall and examine any of the witnesses already examined”.*

13. Since, as noted above, the order for dismissal of the petition for non-prosecution amounts to a decision/final order, hence the filing of an application for restoration would not render election petition pending. Moreover, the application for restoration was also

not maintainable in light of the above mentioned case laws and the provisions of the Act.

14. For the above mentioned reasons, instant petition is allowed and the impugned order dated 14.06.2017 is set aside. Consequently, the application for restoration of petition and application of condonation of delay filed by respondent No.3 before respondent No.1, stand dismissed.

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

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

**JUDGE**

Zawar