

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE AMIN-UD-DIN KHAN
MR. JUSTICE MUHAMMAD ALI MAZHAR
MR. JUSTICE SYED HASAN AZHAR RIZVI

Civil Appeal No.292/2024
Along with C.M.A No.3467/2024

Against the order dated 01.04.2024 passed
by the Election Commission of Pakistan in
Case No. 7(502)/2024 LAW-III (GE).

Nawab Jangaiz Khan Marri ...Appellant

Versus

Mir Naseebullah Khan and others ...Respondents

For the Appellant:	Mr. Zulfikar Khalid Maluka, ASC. Mr. Anis Muhammad Shahzad, AOR.
For Respondent No.1:	Mr. Kamran Murtaza, Sr.ASC Syed Rifaqat Hussain Shah, AOR.
On behalf of ECP:	Ch. Aamir Rehman, Additional Attorney General for Pakistan
Date of Hearing:	22.04.2024

JUDGMENT

Muhammad Ali Mazhar, J.- This Civil Appeal has been brought under Sub-section (5) of Section 9 of the Elections Act, 2017 ("**Act**") to challenge the Order dated 01.04.2024 passed by the Election Commission of Pakistan ("**ECP**") in Case No.7(502)/2024 LAW-III (GE).

2. The transient features of the case are that the appellant and the respondents No.1, 4, and 32 contested the general elections to the Provincial Assembly seat for PB-9, Kohlu, held on 08.02.2024. The present controversy merely revolves around the impugned order whereby re-polling was ordered by the ECP on 4 polling stations.

3. The learned counsel for the appellant argued that the impugned order is violative of Section 9(1) of the Act whereby enquiry is must before passing of any Order, however, without conducting any enquiry, the impugned order was passed. It was further argued that after the formation of Election Tribunals, the ECP was not justified in going ahead and deciding the complaint of the respondent No.1. It was further contended that the ECP has exceeded its jurisdiction by passing a similar direction twice as has been done in the impugned Order. It was further averred that it is not a universal principle that when the voters' turn-out happens to be 85%, it is termed as unnatural as has been held in the impugned Order; rather, it depends on the situation and prevailing circumstances. He further argued that no solid and convincing material was available with the ECP for passing the impugned Order.

4. The learned counsel for the respondent No.1, argued that the respondent No.1 was a returned candidate for the Balochistan Assembly Seat of PB-09, Kohlu, for which the polling took place on 08.02.2024. He secured 5,888 votes while the runner-up candidate had secured 3,351 votes. He further argued that the District Kohlu has some volatile security issues due to terrorism and insurgency, therefore, the voters could not come out in large numbers, and out of the total registered voters of 78,950, only 17,796 votes were cast. He further argued that 25.36% voters came out, as opposed to the 42.87% overall turnover in Balochistan and 47.8% turnout at the national level. It was further averred that the first re-poll Order was passed by ECP on 12.02.2024 for 07 polling stations without hearing any candidate, particularly the respondent No.1, who was the returned candidate, and when the re-poll was conducted in 07 polling stations on 16.02.2024, there was an unnatural turnout in 04 polling stations of Nisao where, previously, not a single vote was cast due to the security threats. He concluded that the ECP, after considering all facts and circumstances, passed the impugned order and the unnatural turnout was also not disputed by the appellant.

5. Heard the arguments. The niceties of Article 218 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") comprehensibly lay down that for the purpose of election to both Houses of Majlis-e-Shoora (Parliament), Provincial Assemblies and for election to such other public offices as may be specified by law, ECP is

obligated to organize and conduct the election and to make such arrangements as are necessary to ensure that the elections are conducted honestly, justly, fairly and in accordance with law and that the corrupt practices are guarded against. While under Article 219 of the Constitution, ECP is duty bound for (a) preparing electoral rolls for election to the National Assembly, Provincial Assemblies and local governments, and revising such rolls periodically to keep them up-to-date; (b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly; (c) appointing Election Tribunals (d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and (e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament).

6. If we see certain provisions of the Act in juxtaposition, it divulges that Section 4 of the Act, deals with the powers of ECP to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it and an order for the purpose of securing the attendance of any person or the discovery or production of any document, with the qualification that its direction or order shall be enforceable throughout Pakistan and shall be executed as if it had been issued by the High Court and anything required to be done for carrying out the purposes of the Act, for which no provision or no sufficient provision exists, shall be done by such authority and in such manner as the ECP may direct. While powers to ensure fair elections are provided under Section 8 of the Act which may be invoked by ECP to (a) stop the polls at one or more polling stations 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 Election Rules, 2017 ("**Rules**") including rejection of a ballot paper; and (c) issue such instructions, exercise such powers and make such consequential orders as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly, fairly and in accordance with the provisions of the Act and the Rules.

7. According to Section 98 of the Act, on receipt of the Final Consolidated Result from the Returning Officer, the ECP, within fourteen days from the date of the poll, is obligated to publish in the official Gazette the name of the contesting candidate who has received the highest number of votes and stands elected and also publish in the official Gazette the name of each contesting candidate and the total number of votes received by him as in the Final Consolidated Result.

8. The present controversy is germane to the powers exercised by ECP to declare a poll void or directions issued for re-polling, therefore, Section 9 of the Act is relevant which is, for the ease of convenience, reproduced as under:-

"9. Power of the Commission to declare a poll void.— (1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll at one or more polling stations or in the whole constituency including implementation of an agreement restraining women from casting their votes, it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections.

Explanation.— If the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes and may declare, polling at one or more polling stations or election in the whole constituency, void.

(2) Notwithstanding the powers conferred on it by sub-section (1), the Commission may order filing of complaint under this Act before a court of competent jurisdiction against persons who entered into the agreement referred to in sub-section (1).

(3) Notwithstanding the publication of the name of a returned candidate under section 98, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any.

(4) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure.

(5) Any person aggrieved by a declaration of the Commission under this section may, within thirty days of the declaration, prefer an appeal to the Supreme Court."

9. The construal and analysis of Section 9 of the Act shows that it starts off with a non-obstante clause commonly marshaled in a provision to advocate that such provision shall preponderate regardless of anything to the contrary to such provision and in the event of any inconsistency flanked by the non-obstante clause and another provision, the non-obstante clause shall prevail and dominate over the other clause or clauses. If the ECP, from the facts apparent on the face of the record and after such enquiry as it may deem necessary, is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll at one or more polling stations or in the whole constituency, it can call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections, and notwithstanding the publication of the name of a returned candidate, under Section 98 of the Act, the ECP may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the ECP does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any. While exercising powers under Section 9 of the Act, the ECP is deemed to be an Election Tribunal to which an election petition has been presented and shall regulate its own procedure. A right to file direct appeal within thirty days in this Court is provided to an aggrieved person against the declaration of ECP.

10. The chronicle of the case reflects that the ECP earlier passed an order for re-polling at 07 polling stations in the same constituency. According to the previous Form-47 dated 09.02.2024, the respondent No.1, secured 5,888 votes, whereas the appellant secured 2479 votes. However, after re-poll at 07 polling stations, the Form-47 was issued again by the Returning Officer on 17.02.2024, according to which, the respondent No.1 secured 6277 votes, while the appellant secured 7544 votes. The bone of contention or leading plea before ECP was that the result of 04 polling stations, on the face of it, was manipulated if compared to the overall turnout which was only 25% whereas turnout of 04 polling stations of Nisao is more than 85%. According to the consolidation of the results by the Returning Officer, PB-9, Kohlu,

issued by dint of Form-48 in terms of Rule 85 of the Rules, for the polling stations which are the subject matter of the present controversy, it is revealed that out of the total 1234 registered voters in P.S. "Nisao I", 1089 votes were cast which makes total turnout of 88%. Similarly, in P.S. "Nisao II", the total registered voters were 1524, with 1214 total votes cast, which makes a total turnout of 79%, while in P.S. "Nisao III", out of 1746 registered voters, 1340 votes were cast, making a 76% turnout, whereas, in P.S. "Nisao IV", the total registered voters were 1304, out of which 1286 votes were cast showing a turnout of 99%. After considering the entire record and the report of the Returning Officer and hearing the concerned parties, the ECP reached the conclusion that turnout at 04 polling stations of Nisao I, II, III, and IV was unnatural due to some illegalities and irregularities which have ultimately affected the final results, and in exercise of powers conferred under sections 4, 8(c) and 9(1), (3) & (4) of the Act, it ordered for re-poll at (i) Improvised Polling Stations Madrassa Yar Khan at Nisao-I (combined); (ii) Improvised Polling Stations Madrassa Yar Khan at Nisao-II (combined); (iii) Improvised Polling Stations Madrassa Yar Khan at Nisao-III(combined) and (iv) Improvised Polling Stations Madrassa Yar Khan at Nisao-IV (combined).

11. No doubt, for exercising the powers conferred under Section 9 of the Act, the ECP is obligated to consider the facts apparent on the face of the record, and after such enquiry as it may deem necessary, if it is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules as have materially affected the result of the poll, then it can pass the order within the realm of this Section and it shall be deemed to be an Election Tribunal but can regulate its own procedure. Sections 139 to 166 [Chapter IX] of the Act are ordained to deal and decide the "Election Disputes", yet again with a non-obstante clause, powers are vested in ECP to regulate its own procedure while exercising powers under Section 9 of the Act which has been given an overriding effect only to certain limits and restrictions including the timeline of decision prescribed to dispose of the case i.e., if the application/complaint is not finally disposed of within sixty days from the date of publication, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition. The powers under Section 9 of the Act are summary in nature wherein ECP is permitted under the law to regulate its own procedure and against

such order, direct appeal is provided in this Court. The powers vested in the ECP by virtue of the aforesaid section are not such that the ECP should conduct a full-fledged trial; but before passing any order under Section 9 of the Act, by regulating its own procedure, the ECP should satisfy itself whether in the facts and circumstances of the case, any interference is required and whether the cognizance can be taken within the parameters and jurisdiction assigned to the ECP under Section 9 of the Act.

12. The case in hand is predominantly focused on an abnormal or unrealistic turnout of votes at 04 polling stations which is not commensurate or in consonance with the overall turnout behavior of voters in the entire constituency. The learned counsel for the respondent No.1 argued that according to the letter of Returning Officer dated 09.02.2024, he communicated to the District Returning Officer that 74 polling stations were established for the General Elections scheduled for 08.02.2024 for NA-253 and PB-09 constituencies, however no polling happened in the said polling stations of Nisao (Nisao-I, Nisao-II, Nisao-III, and Nisao-IV) as the voters did not come out due to an attack by terrorists, but after re-polling in the said polling stations, a highly excessive and abnormal turnout of the votes was experienced. The tenor of the impugned order reflects that on the complaint of the respondent No.1, ECP considered all the facts, and after examining the entire record as well as the report of the Returning Officer submitted pursuant to the re-polling on 07 polling stations, and hearing the concerned parties, passed the impugned order for re-polling on 04 polling stations only, after due satisfaction, enquiry, and on the basis of facts apparent on the face of the record. The learned counsel for the appellant did not deny the inflated or outlandish turnout of votes but endeavored to justify that there is no universal principle that when the voters turn-out exceeds 85%, it should be termed as unnatural. The connotation and import forming the constituents of the word "satisfied" has been used in various laws and interpreted and deciphered in a number of judgments of our own as well as foreign jurisdiction. The true meaning and import of this expression deduces existence of reasonable grounds; discretionary decision is to be made according to rational reasons; existence of mental persuasion much higher than mere opinion; free from anxiety, doubt, perplexity, suspense or uncertainty

and convince beyond a reasonable doubt [Ref: M/s. Inbox Business Technologies Ltd. versus Pakistan (2018 PTD 621)]

13. In the case of Khalid Hussain Magsi Vs Mir Abdul Rahim Rind and others (2016 SCMR 900), this Court discussed the factual matrix of the overall pattern of the turnout in the different polling stations and found out that on 21 polling stations where the appellant in that case obtained not a single vote, the respondent bagged 98.4% of the total votes that were cast. Similarly, on the remaining 33 polling stations where respondent No. 1 in that case obtained not a single vote, the appellant bagged 99.8% of the total votes cast. It was also noted that why on 54 polling stations where one contesting candidate had not even bagged a single vote, the percentage of polled votes in favour of the other is phenomenal i.e. around 99% which was almost triple in comparison to the turnout on the rest of the 111 polling stations which confirmed the prevalence of illegal practice at the election. This Court held that the election was not conducted in fair manner and is liable to be declared, as a whole, void in terms of section 70(b) of the Representation of the Peoples Act, 1976. While in the case of Ali Asjad Malhi Vs Ms. Syeda Nosheen Iftikhar and others (PLD 2023 SC 1), this Court laid down certain other important factors which may be relevant to determine whether there should be a partial re-poll or a complete re-election:

- a. Were the supporters of a losing candidate or the latter him/herself responsible for creating unrest and causing a law and order situation to force a fresh election [ref: Muhammad Nawaz Chandio v. Muhammad Ismail Rahu (2016 SCMR 875) and Behram Khan v. Abdul Hameed Khan Achakzai (PLD 1990 SC 352)];
- b. Were election staff themselves involved in violating the election law [ref: Jehangir Tareen case (supra) and Abdul Hafeez Khan v. Muhammad Tahir Khan Loni (1999 SCMR 284)];
- c. Who was the direct victim of the breach of law e.g., was the polling staff intimidated and/or polling material damaged [ref: Waheeda Shah v. Election Commission of Pakistan (PLD 2013 Sindh 117)];
- d. Was political clout exerted in the candidates' strongholds resulting in abnormal results at different PS [ref: Khalid Hussain Magsi v. Abdul Rahim Rind (2016 SCMR 900)]; and
- e. Was the violation of law premeditated [ref: Waheeda Shah case (supra)]?

This Court in paragraph 14 of the aforesaid judgment held that "these are the crucial aspects of the election process that ought to be viewed holistically in order to conclusively decide the extent of re-election to be held in a constituency. Indeed, the application of one or more of the said criteria will depend on the facts of each case. Therefore, it is not necessary that all election disputes will attract the factors envisaged above. For instance, a particularly grave violation of the law e.g., attacks by a (winning) candidate on the polling staff to cause intimidation and strike fear amongst them will lean strongly in favour of a fresh election (even if the scale of the assaults is limited in scope). This is because the election machinery may be overawed causing the sabotage of the election process in the constituency as a whole. Nonetheless, it is reiterated that the extent of re-election ordered in a constituency will have to be decided by evaluating the available evidence in light of the criteria set out above".

14. As a result of the above discussion, we do not find any illegality or perversity in the impugned order which requires any interference. This Civil Appeal was dismissed along with the stay application *vide* our short order dated 22.04.2024. Above are the reasons assigned in support of our short order.

Judge

Judge

Judge

Islamabad
22.4.2024
Khalid
Approved for reporting