

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE JAMAL KHAN MANDOKHAIL

C.M.A.No.3652 OF 2023
In/and C.A.No.364 OF 2023
(For stay)
(On appeal from the order dated 01.03.2023 passed by the Election Commission of Pakistan in Case No.F6(95)/2023/Law-III).

Shujat Hussain	VS	Applicant(s)
Provincial Election Commissioner, Balochistan & others		Respondent(s)

For the Applicant(s)	:	Mr. Kamran Murtaza, ASC <i>(Via video link from Quetta)</i> Mr. Najam-ud-Din Mengal, ASC at Ibd Syed Rifaqat Hussain Shah, AOR
Respondent(s)/ECP	:	Mr. Muhammad Arshad, DG-Law Falak Sher, Legal Consultant- ECP-Ibd
Respondent-6	:	Mr. Habib-ur-Rehman, ASC <i>(Appear without filing enter appearance)</i>
Date of Hearing	:	29.05.2023

ORDER

Munib Akhtar, J.: By this judgment we dispose of both the miscellaneous application as well as the main appeal. The matter comes to this Court in the following circumstances. The appellant and the contesting private respondent were candidates for the election of the Chairman of Union Council-15, Padagai, Lashkar Khan, District Chaghi ("Union Council"), which was to be held in terms of the Balochistan Local Government Act, 2010 ("2010 Act") read with the relevant provisions of the Elections Act, 2017 ("2017 Act"). The said election was held on 09.02.2023. The Union Council comprises of 10 councilors and it appears that both the appellant and contesting private respondent secured five votes each. In terms of the Balochistan Local Government (Election) Rules 2013 the fate of the election was settled by consent by drawing a lot, which came out in favour of the appellant. He was

therefore declared as the returned candidate, i.e., the Chairman of the Union Council. Being aggrieved by this result, the contesting respondent filed an election petition before the Election Commission of Pakistan under s. 37 of the 2010 Act read with ss. 8 and 9 of the 2017 Act, seeking a re-poll of the election. This petition was allowed by the Election Commission by means of the impugned order dated 01.03.2023. The operative part of the order is as follows:

“8. For what has been discussed above, we are of the view that there are total ten voters and for doing the complete justice and to uphold the standards of transparency, justness and fairness, there is no alternate except to resort to re-poll. Resultantly, instant petition is accepted and we while exercising powers under Article 218(3) of the Constitution of Islamic Republic of Pakistan read with sections 4, 8 & 9 of Elections Act, 2017 direct the Returning Officer concerned for conduct re-poll for aforementioned category.”

2. Being aggrieved by this result, the appellant filed a petition in the Balochistan High Court, being C.P. No. 385/2023. By judgment dated 12.05.2023 the learned High Court was pleased to dismiss the writ petition in the following terms:

“5. The petitioner is aggrieved of the order dated 01st March 2023, passed by the Election Commission of Pakistan, whereby the election petition filed by the respondent No.6 was disposed of with direction to the Returning Officer to conduct re-poll for the seat of Chairman from the Union Council No.15, *Padagai, Laskhar Khan, District Chaghi*. The perusal of the record depicts that the Election Commission of Pakistan while exercising the jurisdiction as envisaged under Section 9 of the Election Act, 2017 decided the election petition filed by the respondent No.6, and thereby ordered for re-poll for the seat of Chairman of the respective union council. Whereas, Section 9(5) of the Elections Act, 2017 provides an alternate remedy to the aggrieved person for redressal of his grievances, if aggrieved of the declaration of the Election Commission of Pakistan, which stipulates as under:

“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.”

Thus, without going into merit and demerit of the case, since alternate remedy is available to the petitioner, therefore, the petition being barred by law, is not sustainable and is accordingly dismissed.”

3. In terms of the order of the learned High Court, the appellant presented this appeal under s. 9(5) of the 2017 Act. By the time the appeal came to be filed it was time barred by 47 days, counting from the date of the order of the Election Commission, i.e., 01.03.2023. The appellant has filed CMA 3652 of 2023, seeking condonation of delay. The ground taken is that the appellant was, during the relevant period, pursuing a remedy before the learned High Court as noted above.

4. We have heard learned counsel for the appellant and the contesting private respondent. We have also been ably assisted by the Director General (Law) and the Legal Consultant of the Election Commission. In view of the order that we are about to make CMA 3652/2023 is allowed and the delay, if any, is condoned.

5. The learned Director General (Law) submitted before us, in our view correctly, that the relevant statutory provisions requiring consideration were as follows:

- (i) From the 2010 Act, reference was made to sub-s. (4) of s.16 (as amended, especially by an Act of 2022) and s. 37. These provide as follows:

"16. (4) The provisions of the Election[s] Act, 2017 shall, mutatis mutandis and in so far as these are not inconsistent with this Act, apply to the elections to the local councils under this Act."

"37. No election under this Act shall be called in question, except by an election petition made by a candidate for the election."

- (ii) From the 2017 Act, reference was made to s.229 which in material part is in the following terms:

"229. (1) Subject to this Chapter and the Rules relating to conduct of local government elections, election disputes, election offences and allocation of symbols, the provisions of Chapter V, Chapter IX, Chapter X and Chapter XII of this Act, as nearly as possible, shall apply to the conduct of local government election...."

Reference may also be made to s. 219 of the 2017 Act which, in material part, states as follows:

"219. (1) The Commission shall conduct elections to the local governments under the applicable local government law, and the Rules framed thereunder, as may be applicable to a Province...."

Section 2(ii) defines “applicable local government law” to mean “an Act of *Majlis-e-Shoora* (Parliament) or of a Provincial Assembly for establishment of a local government and includes an Ordinance”.

6. We begin by noting that the 2010 Act is clearly an “applicable local government law” within the meaning, and for the purposes, of the 2017 Act. Furthermore, s. 9 of the latter is in Chapter II, which is not specified in s. 229. On a conjoint reading of the aforesaid provisions, it is our view that an election to an office of any local government under the 2010 Act is, as provided for by s. 16(4), to be regulated by the 2017 Act (applying *mutatis mutandis*) only insofar as the applicable provisions are not inconsistent with those of the former. It follows that if there is an express provision in the 2010 Act in relation to the election of a local council, that provision will apply and to that extent the provisions of the 2017 Act will have to give way, unless the matter is covered by s. 229(1) in which case it will have to be resolved by a harmonious reading of the two laws. In our view, s. 37 is precisely a provision of such nature. It is common ground that the election in question, i.e., to the office of the Chairman of the Union Council is an election under the 2010 Act. The contesting private respondent sought to call in question the election to this office. That could only have been done by an election petition and not otherwise. Section 38 of the 2010 Act provides, in its sub-s. (1), that for the hearing of the election petition the Election Commission shall appoint an Election Tribunal in terms as therein stated by a notification. Therefore, the proper remedy for the contesting private respondent was to file an election petition under s. 37 of the 2010 Act and not by taking recourse to ss. 8 and/or 9 of the 2017 Act. Inasmuch as the Election Commission failed to constitute an Election Tribunal and instead chose itself to decide the matter, the same is not sustainable in the eyes of law. The proper course for it was to constitute an Election Tribunal under s. 38 of the 2010 Act and for the election dispute to be then resolved in terms as provided in that statute, and to the extent not expressly provided for therein then, as provided in s. 229(1), also by reference and regard to, and application of, Chapter IX of the 2017 Act (which relates to election disputes). The election dispute and its resolution lay essentially within the four corners of the

2010 Act. Now, an appeal to this Court under s. 9(5) is not a general right; it lies only against an order made “under this section”. The determination of the election dispute by the Election Commission in the facts and circumstances of the present case was beyond jurisdiction and without lawful authority, as it acted in terms of an inapplicable provision of the wrong statute. Its purported decision could therefore be challenged by way of a writ petition to the High Court. In our view, with respect, the learned High Court erred in dismissing the writ petition filed by the appellant in terms of its judgment dated 12.05.2023.

7. We are informed that the re-poll directed in terms of the impugned order of the Election Commission is taking place today. Learned counsel for the appellant prayed for appropriate relief by way of suspension of such re-poll, which was strongly opposed by learned counsel for the contesting private respondent, as also the learned Director General (Law).

8. Having considered the matter in the totality of the circumstances that exist as of today we dispose of this appeal in the following terms:

- (i) The matter is to be treated as remanded to the High Court where CP 385/2023, the petition filed by the appellant, shall be deemed pending. Accordingly, the order dated 12.05.2023, whereby the said writ petition was dismissed, is hereby set aside.
- (ii) The re-polling shall continue but the result shall not be declared. Instead the Election Commission shall forward the entire record of the re-poll, as also of the earlier poll held on 09.02.2023, to the learned High Court for its examination and consideration.
- (iii) The learned High Court shall hear the parties to the writ petition appearing before it and the said parties shall be allowed to take all legal and other grounds as may be available to them.
- (iv) After so hearing the parties and considering the record of the original poll and the re-poll the learned High Court shall decide the matter in accordance with law and consistently with what has been said hereinabove.

We are hopeful that the learned High Court will give an expedited hearing to this matter so that the Union Council does not remain without a duly elected Chairman. The appeal is disposed of in the above terms.

Judge

Judge

Judge

ISLAMABAD, THE

29th May, 2023.

Nisar/*

Approved for reporting