

**IN THE SUPREME COURT OF PAKISTAN**  
**(APPELLATE JURISDICTION)**

**PRESENT:** MR. JUSTICE MIAN SAQIB NISAR, HCJ  
MR. JUSTICE UMAR ATA BANDIAL  
MR. JUSTICE FAISAL ARAB

**CIVIL APPEALS NO.508 AND 681 OF 2017**  
**AND CIVIL PETITION NO.1640 OF 2017**

(Against the judgments all dated 6.4.2017, of the Peshawar High Court, Peshawar passed in Election Appeals No.1-A/2016, 1-A/2015 and 2-P/2015 respectively)

1. Sardar Sher Bahadar Khan etc. **Vs.** Election Commission of Pakistan through Secretary, Election Commission, Islamabad etc. In C.A.508/2017
2. Asghar Ali etc. **Vs.** Election Commission of Pakistan through Chief Election Commission, Islamabad etc. In C.A.681/2017
3. Mst. Noor Jehan **Vs.** Election Commission of Pakistan through Secretary, Election Commission of Pakistan, Islamabad etc. In C.P.1640/2017

For the appellant(s)/ petitioner(s):	Sardar Muhammad Aslam, ASC Ch. Akhtar Ali, AOR (In C.A.508/2017)  Qazi Muhammad Anwar, Sr. ASC Syed Rifaqat Hussain Shah, AOR (In C.A.681/2017)  Mr. M. S. Khattak, AOR (In C.P.1640/2017)
For the respondent(s):	Ch. Aitzaz Ahsan, Sr. ASC Mr. Gohar Ali Khan, ASC (In C.A.508/2017)  Mr. Kamran Murtaza, Sr. ASC (In C.A.681/2017)  Not represented (In C.P.1640/2017)

Date of hearing: 22.9.2017

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## **JUDGMENT**

**MIAN SAQIB NISAR, CJ.-** These Civil Appeals with leave of the Court and the Civil Petition entail a common question of law, therefore, are being disposed of together. However, wherever there is some difference with regard to the facts or any subtle question relating to a legal proposition the same shall be accordingly highlighted.

2. Leave in these appeals has been primarily granted (*vide orders dated 18.4.2017 and 4.5.2017*) to consider the following: -

- (1) what is the effect and application of Section 78A of the Khyber Pakhtunkhwa Local Government Act, 2013 (*the Act of 2013*) inserted *vide* Khyber Pakhtunkhwa Local Government (Third Amendment) Act, 2015, (*the Amendment Act 2015*) and whether it (*Section 78A*) shall apply retrospectively or prospectively;
- (2) whether M/s Ali Khan Jadoon and Sadar Waqar Nabi (*in C.A. No. 508 of 2017*) and Salahuddin and Samiullah (*in C.A. No. 681 of 2017*) and Fahim Khan (*in CPLA. No. 1640 of 2017*) were nominated by their respected party/party heads to contest the election for the *Nazim* and *Naib Nazim* of the concerned District Councils;
- (3) whether in the situation the appellants were bound to vote for the party-nominated candidates;
- (4) whether the appellants, who instead of voting on the direction of the party head, have contested the election themselves or have voted against party-nominated candidates, have in effect defected in terms of the above noted provision of law;
- (5) whether the respective show cause notices, issued to the appellants/petitioners, were issued by the party/party head in accordance with the relevant provisions of law; and

- (6) whether the Election Commission of Pakistan (ECP) was not properly constituted when it passed the impugned orders, as the ECP comprises of the Chief Election Commissioner of Pakistan (Chairman) and four Members while the impugned orders dated 25.01.2016 (*in C.A. No. 508/2017*) and 29.10.2015 (*in C.P. No.1640/2017*) were passed by three Member Bench of ECP in which the Chairman and one of the Members did not participate.

3. The brief facts of the case in relation to Civil Appeal No.508/2017 are that Sardar Sher Bahadur Khan (*appellant No.1*) was elected as a Member of Union Council Kehal (*Urban*), District Abbottabad as an independent candidate, while Shaukat Ali Tanoli (*appellant No.2*) was elected as Member of District Council on the ticket of Pakistan Tehreek-e-Insaaf (*PTI*). The next phase of the Local Bodies elections was the election of District *Nazim* and District *Naib Nazim*. After the elections, appellant No.1 joined PTI on 25.06.2015 and thus, at the relevant point of time, when the schedule for the election of the *Nazim* and *Naib Nazim* was notified on 19.08.2015, both the appellants were the members of PTI. On 24.08.2015, an amendment was introduced in the Act of 2013 through the Amendment Act of 2015 whereby Section 78A was inserted therein, which provided the consequences of violation of party direction in the shape of defection. M/s Ali Khan Jadoon and Sadar Waqar Nabi were nominated by PTI as their candidates for *Nazim* and *Naib Nazim*; however, appellants No.1 and 2 contested the elections of District *Nazim* and *Naib Nazim* as independent candidates instead of casting their vote in favour of the party nominated candidates. Appellants No.3 to 21, who were also belonged to PTI, cast their votes in favour of appellants No.1 and

2 against the party direction. Resultantly, appellants No.1 and 2 won the election. All the appellants were issued show cause notices on 03.09.2015, to which they submitted their respective replies. However, all of them were declared to have defected by invoking the provision of Section 78A *ibid* vide letters dated 14.9.2015 and the matter was sent to the ECP for confirmation. The ECP affirmed the defection of all the appellants *vide* order dated 25.1.2016. The said order was challenged by the appellants before the learned Peshawar High Court through an Election Appeal, which was dismissed on 6.4.2017 by means of the impugned judgment.

4. In Civil Appeal No.681/2017, the facts are that appellants No.1 to 4 were elected on general seat as Member of District Council Laki Marwat, whereas appellant No.5 was elected on reserved seat on the party ticket of Jamiat-e-Ullema Islam Fazal ur Rehman Group (*JUI (F)*). In the next round of election for District *Nazim/Naib Nazim* from the said District, there was adjustment between *JUI(F)* and ANP, however, the appellants cast their vote in favour of candidates of opposite coalition (*PPP and PTI*) which resulted in the defeat of candidates nominated by *JUI(F)*. Resultantly, respective show cause notices were issued to the appellants on 07.09.2015 for having defected in terms of Section 78A *ibid*. Respective replies to the show cause notices were submitted by the appellants; however, the declaration of defection was made against them on 16.9.2015 and the matter was referred to the ECP for confirmation. The ECP confirmed said declarations *vide* order dated 03.11.2015 (*Note: in this case the full strength of ECP has rendered the decision, therefore, the question of its composition is not in issue*). Be that as it may, the appellants challenged the order of ECP before the learned High Court

through an Election Appeal, which was dismissed *vide* the impugned judgment.

5. The facts of Civil Petition No.1640 of 2017 are that the petitioner was elected as Female Councilor of Tehsil Council Lahor, District Swabi on the party ticket of PML(N). In the next phase of elections for the seat of Tehsil and District *Nazim/Naib Nazim*, statedly there was an adjustment between PML(N), JUI(F) and ANP; as such, one Faheem Khan (*belonging to PML(N)*) and one Muhammad Asad (*belonging to ANP*) were nominated by PML(N) for the seat of Tehsil *Nazim* and *Naib Nazim*. However, the petitioner in violation of party direction cast her vote in favour of rival candidate belonging to PTI, instead of her own party candidate. Thus, a show cause notice was served upon the petitioner, but she did not make any reply thereto; resultantly, the declaration of defection was issued by the nominee of the party head *vide* letter dated 11.9.2012 and the copy whereof was transmitted to ECP for confirmation. The ECP confirmed the declaration of defection of the petitioner. The said decision was challenged by the petitioner before the learned High court through an Election Appeal which was dismissed *vide* the impugned judgment.

6. First of all we shall take up the question of applicability of section 78A *ibid*, retrospectively or prospectively, and its effect on the elections in issue. In this regard it is to be noted that under the provisions of the Act, 2013, election schedule was announced on 19.8.2015 for the elections to be held on 30.8.2015. In the meantime, on 24.08.2015, Section 78A *ibid*, was introduced in the Act of 2013 *vide* the Amendment Act, 2015, which reads as under:-

**“78A. Disqualification on grounds defection.----** (1) *If a member of a party composed of a single political party in a Council-*

- (a) *resigns from membership of his political party or joins another party in a Council; or*
- (b) *votes or abstains from voting in a Council contrary to any direction issued by the political party to which he is a member, in the Council, in relation to-*
  - (i) *election of the Nazim or Naib Nazim in a Council; or*
  - (ii) *a vote of confidence or a vote of no-confidence ; or*
  - (iii) *approval of annual budget,-*

*He may be declared in writing by the Party Head to have defected from the political party, and the Party Head may forward a copy of the declaration to the Presiding Officer of the concerned Council and the Chief Election Commissioner and shall similarly forward a copy thereof to the member concerned:*

*Provided that before making the declaration, the Party Head shall provide such member with an opportunity to show cause as to why such declaration may not be made against him.*

**Explanation:** *For the purpose of this section,-*

- (i) *“Council” means the Town Council, Tehsil Council or the District Council, as the case may be;*

(ii) *“Party Head” means any person, by whatever name called or declared as such by the Party and included the nominee of the Party Head ; and*

(iii) *“Presiding Officer” means the Naib Nazim of the concerned Council.*

(2) *A member of a Council shall be deemed to be a member of a political party if he, having been elected as a candidate or nominee of a political party which constitutes the party in the concerned Council or has become a member of such political party as per provision of clause (a) of sub-section (7) of section 74 of this Act.*

(3) *Upon receipt of the declaration under sub-section (1), the concerned Presiding Officer, shall within two days refer, and in case he fails to do so it shall be deemed that he has referred, the declaration to the Chief Election Commissioner, who shall lay the declaration before the Election Commission for its decision thereon confirming the declaration or otherwise within thirty days of its receipt by the Chief Election Commissioner.*

(4) *Where the Election Commission confirms the declaration, the member referred to in sub-section (1) shall cease to be a member of the concerned Council and his seat shall become vacant.*

(5) *Any party aggrieved by the decision of the Election Commission may, within thirty days, prefer an appeal to the High Court which shall decide the matter within sixty days from the date of the filing of the appeal.*

(6) *Nothing contained in this section shall apply to the Nazim or Naib Nazim of the Council.”*

7. It is the stance of the appellants that the said amendment would not have any retrospective effect, as nothing in this regard has been specifically mention therein; and therefore, it is not applicable to the elections in issue. It has been argued that the process of election had commenced with the notification dated 19.8.2015, when the electorates were called upon to elect their *Nazim* and *Naib Nazim* and therefore, the law applicable to the process of election, which was in force at the relevant point of time, shall be attracted. In support of the said arguments, reliance has been placed to the cases of Adnan Afzal Vs. Capt. Sher Afzal (PLD 1969 SC 187), Muhammad Ishaq Vs. The State (PLD 1956 SC 256 at 257), Commissioner of Income-Tax Karachi Vs. Eastern Federal Union Insurance Co. (PLD 1982 SC 247 at 251, para 7), Senior Member BOR and others Vs. Sardar Bakhsh Bhutta and another (2012 SCMR 864 at 866), Mst. Sarwar Jan and others Vs. Mukhtar Ahmad and others (PLD 2012 SC 217 at 221B) and the Province of Sindh through Chief Secretary, etc. Vs. Muttahida Qaumi Movement, etc. (Civil Appeals No.760 to 765/2016).

8. Conversely, it has been argued on behalf of the respondents that Section 78A *ibid* was added as a measure for preventing horse-trading and to enforce political discipline. Thus, the objective of the insertion of Section 78A *ibid* is based upon public and national interest. The said amendment, thus, would operate prospectively covering the elections on 30.08.2015. By referring to Article 63A of the Constitution, parity has been drawn to the facts and circumstances of the present case. In this regard reliance has been placed to the judgments of this Court reported as Pir Sabir Shah Vs. Shad Muhammad Khan, Member Provincial Assembly,



N.F.W.P. and another (PLD 1995 SC 66, para 109, pages 24 to 38), Wuklala Mahaz Barai Tahafaz Dastoor and another Vs. Federation of Pakistan and others (PLD 1998 SC 1263), District Bar Association, Rawalpindi and others Vs. Federation of Pakistan and others (PLD 2015 SC 401, paras 164 to 173).

9. We have considered the respective submissions made and the case-law referred to by both the sides and are of the view that in the facts and circumstances of the instant case, the issuance of schedule has nothing to do with the law pertaining to casting or abstaining from casting a vote in terms of Section 78A *ibid* because the election had to take place on 30.8.2015 and on the same day nomination papers had to be filed. There was no situation that the nomination papers were filed before the said date or even before the amendment, introducing Section 78A *ibid*. It is well settled that a statute or any amendment thereto ordinarily operates prospectively unless, by express enactment or necessary intendment, retrospective operation has been given to it. Reference in this behalf may be made to the case reported as Gul Hasan & Co. and 5 others Vs. Allied Bank of Pakistan (1996 SCMR 237), Pakistan Steel Mills Corporation Vs. Muhammad Azam Katper and others (2002 SCMR 1023), Zakaria H.A. Sattar Bilwani and another Vs. Inspecting Additional Commissioner of Wealth Tax, Range-II, Karachi (2003 SCMR 271), Zila Council, Sialkot through Administrator Vs. Abdul Ghani Proprietor Iqbal Brothers, Sialkot and others (PLD 2004 SC 425) and Muhammad Tariq Badr and another Vs. National Bank of Pakistan and others (2013 SCMR 314). Considering the purpose and object of the above said amendment, namely, to curb the mischief of horse-trading and

defection, it is clear that the law was amended and the said section was introduced just few days prior to election with the clear intention to apply it to the future elections to be held after 30.8.2015, and a necessary intendment of the legislature can be validly drawn that it was meant to apply to the forthcoming elections to be held on 30.8.2015. Moreover, by virtue of the said amendment, no substantive rights of the appellants have been infringed, because not only the voting had to take place on 30.8.2015 but also the nomination papers were to be filed on the said date. It is not the case of the appellants that pursuant to the schedule they had already announced their candidature by filing the nomination papers.

10. Now we shall consider the question with regard to the validity of the orders dated 25.01.2016 (*in C.A. No. 508/2017*) and 29.10.2015 (*in C.P. No.1640/2017*) which have been passed by a three Member Bench of ECP, in which the Chairman and one of the Members did not participate. It has been argued on behalf of the appellants (*in Civil Appeal No.508/2017*) that when the order for defection of the appellants was passed, the ECP was not properly constituted in terms of Article 218 of the Constitution, in that, the ECP comprises of five members (*the Chairman and four Members*) while instead of the full strength the references in question were heard and decided by three Members. It has been further argued that a somewhat similar situation, when the ECP was not properly constituted at the time of conducting election to the Senate, this Court declared such elections to be void. Reliance in support of his contention is placed upon a judgment reported as **Imran Khan and others Vs. Election Commission of Pakistan and others** (2012 SCMR 448 at 452, para 2).

11. On the other hand it was argued on behalf of the respondents that as per Section 8(2) of the Election Commission Order, 2002 (*Order, 2002*) there is no bar or prohibition to the effect that a matter cannot be heard by a lesser number of Members of ECP, if the Chairman/Member(s) either recuses himself from participation or is otherwise on leave. In this case (*C.A. No.508/2017*) the Chairman of ECP was from the same *Zila*, therefore, he recused; whereas, the one of the Members, namely, Mr. Roshan Esani, was unwell and thus could not sit on the Bench at the time of hearing.

12. Before deciding the fate of the orders of the ECP impugned herein, it is appreciate to consider the constitutional and legal provisions which deal with the constitution and functioning of the ECP. In this regard, Article 218(2) of the Constitution is relevant which provides, *inter alia*, that the Election Commission of Pakistan shall consist of the Commissioner, who shall be the Chairman of the Commission, and four members, each of whom has been a Judge of a High Court from each province. Though Article 219 of the Constitution prescribes the duties of the ECP and Article 220 of the Constitution mandates the executive authorities to assist the ECP in the discharge of its functions; however, mode and procedure to be adopted by the ECP has not been elaborated in the Constitution, which has been prescribed in the Order, 2002. In this regard, Section 8 of the Order, 2002 is relevant, sub-Section (1) whereof provides that all decisions of the ECP shall be expressed in terms of the opinion of the majority of its members, including the Chairman, and sub-Section (2) thereof provides that no election conducted, or other action taken or thing done, by the ECP shall be invalid or called in question only on the ground of the existence of a vacancy therein or

of the absence of any member from any meeting thereof. From the perusal of the above provisions, it is clear that the ECP is comprised of five members but at nowhere it has been provided that any decision of the ECP shall be taken by all of its five members. Contrary to it, in section 8(2) of the Order, 2002 any order passed by the ECP by lesser members of its total strength has been protected by specifically providing that no action taken or thing done by the ECP shall be invalid or called in question only on the ground of the existence of a vacancy therein or of the absence of any member from any meeting thereof. The ratio of the case reported as **Imran Khan's case** (*supra*) is not applicable upon the instant case, because at the time of holding of election to Senate challenged therein, the ECP was not properly constituted and this Court though pointed out such defect but restrained itself from declaring such election to be null and void, rather provided an opportunity to the Parliament to cure that defect, which was thereafter cured by virtue of the 21<sup>st</sup> Amendment in the Constitution. Thus, we hold that the orders of the ECP dated 25.01.2016 (*in C.A. No. 508/2017*) and 29.10.2015 (*in C.P. No.1640/2017*), passed by three of its members, whereby the declaration of defection of appellants/petitioner was confirmed, were validly passed.

13. Other question which requires consideration is that who has the authority, within a political party, to nominate a candidate for the seats of *Nazim*/*Naib Nazim* and issue direction to its members to cast votes in favour of that candidate, and in case of violation of such direction, can issue a show cause notice and then pass the declaration of defection against such member. The answer to those question has to be found in Section 78A *ibid*, wherein it has been provided *inter alia* that if a member of a party votes or abstains from

voting in a Council contrary to any direction issued by the **political party** to which he is a member, in relation to election of the *Nazim* or *Naib Nazim* in a Council; he may be declared in writing by the **Party Head** to have defected from the political party, and the **Party Head** may forward a copy of the declaration to the Presiding Officer of the concerned Council and the Chief Election Commissioner. It is also provided that before making the declaration, the **Party Head** shall provide such member with an opportunity to show cause as to why such declaration may not be made against him. However, as per definition clause, the "Party Head" means any person, by whatever name called or declared as such by the Party and included the nominee of the Party Head. Thus, the authority to issue show cause notice, to consider the reply thereto and to declare a member to have defected, lies with the Party Head; however, the said authority may also be vested with the nominee of the Party Head. It is also evident from the above provision that every member of a political party is bound to follow the directions issued by the political party/Party Head, not only with regard to casting the vote or to abstain from voting in the election of the *Nazim* or *Naib Nazim*, but also regarding vote of confidence or no-confidence and the approval of annual budget.

14. Having decided the questions of law involved in the matter, now we shall take up each case independently and decide it according to its own facts.

15. In Civil Appeal No.508/2017 at the time of issuance of schedule for the election of *Nazim* and *Naib Nazim* which was notified on 19.08.2015, both the appellants were the members of PTI. As per schedule, the election was to be held on 30.8.2015, however, in the

meantime, on 24.08.2015, Section 78A *ibid* was added. As per relevant rules, the election was to be conducted “by open division”. Appellants No.1 and 2 contested the elections of District *Nazim* and *Naib Nazim* as independent candidates against M/s Ali Khan Jadoon (*Nazim*) and Sadar Waqar Nabi (*Naib Nazim*), who had been awarded party ticket by PTI. In the elections, appellants No.1 and 2 succeeded having secured 41 votes, whereas, the nominated candidates of PTI lost having secured 33 votes. It may be relevant to state that the complete house comprised of 77 members, out of which three members for certain reasons could not cast their vote, as such, only 74 members of the electorate voted in the election. On 02.09.2015, respondent No.2 was nominated by Imran Khan, Chairman of PTI to take action against all the twenty-one appellants under the provisions of Section 78A *ibid*. On 03.09.2015, respondent No.2 being the nominee of the Party Head issued show cause notices not only to appellants No.1 and 2, who contested the election of District *Nazim/Naib Nazim* but also to appellants No.3 to 21, who voted for appellants No.1 and 2 against the party direction, despite admittedly being elected as members of the Union Council on PTI ticket or becoming members of PTI prior to the issuance of the election schedule. Appellant No.1 in his reply has stated that he was an elected President of PTI from District Abbottabad but was not awarded party ticket to contest the elections of Member Union Council and thus, contested election as an independent candidate; in the election of Zila *Nazim* Abbottabad, when PTI announced the names of M/s Ali Khan Jadoon and Sardar Waqar Nabi, but most of the PTI members did not want to cast their votes in favour of party nominated candidates, therefore, he and respondent No.2 decided to

contest election against the candidates of PTI. Somewhat similar reply was submitted by other appellants. However, their replies were not accepted and vide letter dated 14.9.2015, all the 21 appellants were declared by the nominee of the party head to have defected under section 78A *ibid* and a reference was filed with the ECP. The ECP *vide* order dated 25.1.2016 affirmed the declaration of defection of all the appellants.

16. It is argued on behalf of the appellants that no specific direction, as is required under the noted section, was ever issued to the appellants to vote for the nominated candidates of PTI or to abstain the appellants No.1 and 2 from contesting the election against the candidates nominated by the party i.e. PTI. It is further argued that merely on account of the nomination of candidates by the party, it cannot be assumed that a party direction has been issued to the appellants No.1 and 2 not to contest the elections and to appellants No.3 to 21 not to vote in favour of appellants No. 1 and 2, who were also members of PTI. It is submitted that the mere issuance of a ticket to other candidates would not be tantamount to a direction within the purview of Section 78A (*ibid*).

17. Responding to the above, Mr. Aitzaz Ahsan, learned counsel for the respondents has submitted that the nomination papers were to be filed on the election day i.e. 30.8.2015 and on the said date M/s Ali Khan Jadoon and Sadar Waqar Nabi had not been nominated by PTI as the party candidates, as is clear from the ticket issued to them, which is available on record. In this regard reference has also been made to the reply to the show cause notice submitted by the appellants, wherein they categorically admitted that the party ticket was granted to M/s Ali Khan Jadoon and Sadar Waqar Nabi

but their case is that it had been done by political maneuvering and without consultation with the local leadership of PTI. It is also argued that the defection of the appellants is justified on the basis of the allegations leveled against them because appellants no.1 and 2 contested had contested the election as independent candidates against the candidates nominated by the party and other appellants cast their vote in their favour, which was not only against the interest of the party but also the party directions. According to him the show cause notice was validly issued by Mr. Fazal Muhammad Khan, Provincial Organizer KPK as he was a nominee of the Party Head (*Imran Khan*) vide notification dated 02.9.2015.

18. We have considered the documentary evidence available on record as also the respective contentions of the parties. The elections of *Nazim/Naib Nazim* were scheduled to be held on 30.8.2015 and on the same date the nomination papers were to be filed. However, prior to that date, the party ticket was issued to M/s Ali Khan Jadoon and Sadar Waqar Nabi and this fact was in the knowledge of all the members of PTI and there is no dispute between the parties to that effect. Even in the reply to the show cause notice, appellant No.1 has admitted that the party ticket was issued to one Ali Khan Jadoon for the seat of *Nazim*, however, his defence was that the past conduct of the said person was not appreciable therefore appellant No.1 informed the party leadership that the said person should not be given party ticket, but despite that the ticket was maneuvered by the local leadership in his favour; as such, many of the PTI members were not willing to vote for him, thus, appellant No.1 opted to contest election against him (*party nominated candidate*). The nominee of the party head issued the declaration of defection of



appellant No.1 *vide* letter dated 14.9.2015 on the ground that in sheer disobedience and violation of PTI's decision and direction to support, assist and vote for PTI's ticket holder and candidate for the office of District *Nazim* and *Naib Nazim* appellant No.1 himself submitted the nomination papers as an independent candidate against the candidate nominated by the party and also cast his vote in favour of rival candidate for the seat of *Naib Nazim*. The other appellants also did not deny the fact that M/s Ali Khan Jadoon and Sadar Waqar Nabi were nominated by the party and despite that they cast their vote in favour of rival candidates i.e. respondents No.1 and 2. Considering the contentions of both the sides as well as the available record we are convinced that M/s Ali Khan Jadoon and Sadar Waqar Nabi were duly nominated by the PTI for the seats of *Nazim* and *Naib Nazim* and this fact was well in the knowledge of all the appellants; therefore, in terms of Section 78A *ibid* were bound to cast their vote in favour of the party nominated candidates. When they failed to follow the party directions, to cast vote in favour of party nominated candidates, they have to suffer the consequences of Section 78A *ibid* to be declared to have defected from the party. As we have already held in the preceding paragraphs that any order passed by a bench of ECP comprising lesser number of members shall not be *void* on this score alone, it is therefore held that the order dated 25.1.2016 passed by three members of ECP whereby declaration of defection of all the appellants was upheld, was validly passed. Thus, Civil Appeal No. 508 of 2017 is dismissed.

19. In Civil Appeal No.681/2017, all the appellants were elected as Members of Union Council on the party ticket of JUI (F), but in the next round of election for District *Nazim/Naib Nazim* for

the said District, they cast their vote in favour of candidates of opposite coalition (*PPP and PTI*) which resulted in the defeat of candidates nominated by JUI(F). The show cause notices were issued to the appellants on 07.09.2015 by Moulana Fazal-ur-Rehman, the party head of JUI(F), asserting therein that instead of voting for the candidates by the party, they (*the appellants*) in fact voted for the candidate of opposite coalition and, therefore, have defected in terms of Section 78A *ibid*. Reply to the show cause notices was submitted by the appellants. Thereafter, the declaration of defection was made by the Party head (*Moulana Fazal-ur-Rehman*), the head of the JUI(F) on 16.9.2015 and the matter was referred to the ECP through a reference which (*ECP*) allowed the same *vide* impugned judgment dated 03.11.2015 (*Note: in this case the full strength of ECP has rendered the decision, therefore, the question of its composition is not in issue*). Be that as it may, the appellants filed an Election Appeal against that order before the learned High Court which was dismissed through the impugned judgment.

20. Qazi Muhammad Anwar, learned ASC appearing for the appellants, while referring to paragraph No.6 of the impugned judgment of the learned High Court, has argued that the learned High Court has admitted that the appellants have not voted for the candidate of the other side; besides, it is not established on the record whether the JUI(F) had in fact boycotted the election and whether any direction was issued in terms of Section 78A *ibid* directing the appellants to refrain from voting for any other candidate. According to him there was an adjustment between JUI(F), ANP and PPP in the entire province of KPK and the Provincial President of JUI(F) had appealed all the members to support the

candidate of PPP. Further, on the election day, M/s Salahuddin Khan and Samiullah, the candidates nominated by JUI(F) for the seats of *Nazim* and *Naib Nazim* announced boycott from the election, as such, the appellants had no other option except to cast their vote in favour of candidate of coalition partner, i.e., PPP. It is also argued that the show cause notice did not meet the requirement of Section 78A *ibid* for the reason that when the declaration was made by Moulana Fazal-ur-Rehman on 16.9.2015, allegedly he was on Hajj and therefore, such declaration is not valid in law (*in lukewarm manner it is alleged to be a forged document*).

21. In response, Mr. Kamran Murtaza, learned ASC for respondent No.3 has submitted that there is no force in the allegation that the declaration of defection of the appellants was a forged document or not signed by the party head as he had proceeded to perform Hajj, inasmuch as, the letters were signed on 16.9.2015 by the party head and on the same day after signing the same (*letters*) he proceeded for Hajj. He further submitted that Salahuddin Khan (*Nazim*) and Samiullah (*Naib Nazim*) were nominated candidates of JUI(F) and when they announced boycott the appellants should have refrained from casting their vote in favour of any other candidate. He has further submitted that the party had nominated M/s Salahuddin Khan and Samiullah as its candidates for the seats of *Nazim* and *Naib Nazim*, therefore, the appellants were bound to follow the party direction to cast vote in their favour. Inasmuch as, when the nominated candidates had boycotted the election, the appellants were bound to abstain from voting in favour of rival candidate.

22. Learned counsel has also made reference to Chapter VIII of the KPK Local Councils (Conduct of Elections) Rules, 2014

(hereinafter referred to as “the Rules, 2014”). At this stage, it is appropriate to consider the scope of the Rules, 2014 with regard to the conduct of the election of Local Government. As per Rule 67 of the Rules, 2014, the elections of the *Nazim/Naib Nazim* shall be conducted in the first meeting of the Tehsil Council, Town Council or District Council, as the case may be, without any debate. For that purpose, the procedure has been provided in sub-Rule (2) thereof, in that, any member may propose or second the name of any member who, in his opinion, commands the confidence of the majority of the members of the council, on a nomination paper in Form XXXI; and every nomination paper shall be delivered by the candidate or his proposer or seconder to the secretary of the Local Council by 1300 hours, on the day fixed for the ascertainment. Thereafter, the election of *Nazim* is to be conducted as per Rule 70 thereof, by an open division, and the candidate who secures the support of the majority of the members of the Local Council shall be declared to be the member commanding the confidence of the majority of the members of the Local Council and administer him oath of office in the manner provided in the Schedule-II thereof. As per Rule 71 thereof, the election of *Naib Nazim* shall be conducted in the like manner. However, there is no requirement that the election of *Nazim/Naib Nazim* shall be conducted on party basis or a party ticket shall be attached with the nomination Paper. The same is also evident from the nomination papers of M/s Salahuddin Khan (*Nazim*) and Samiullah (*Naib Nazim*) produced in Court, wherein neither the party affiliation has been mentioned nor is there any column for that purpose.

23. Coming to the facts of instant appeal, it is to be noted that though the candidates were nominated by the party head of

JUI(F) but at the relevant point of time i.e. on the election day, they declared boycott from the election. Therefore, notwithstanding the fact that whether there was any specific or implied direction issued by the party head to cast the vote in favour of party nominated candidate or not, the same (*direction*) even if issued became redundant when the party nominated candidates boycotted the election. In the show cause notice it was alleged that the appellants cast their votes against the party candidates as such have defected in terms of Section 78A *ibid*. In the reply thereto, it was specifically mentioned by appellant No.1 has stated that the future plan and the party policy regarding the election of *Nazim/Naib Nazim* was not clear, even certain meeting in that regard were also conducted; at the time of voting only five votes were cast by the members of JUI(F) and then at once they left the house; in those circumstances, in absence of direction from the party leadership, they cast their votes in favour of PPP candidate to avoid the dissolution of the house. It was further stated that appellant No.1 was ready to take oath that no member of party issue directions or information regarding casting the vote. The similar stance was taken by the other appellants in their respective replies. In the circumstances, when the appellants had specifically denied the issuance of party instructions, especially when the party nominated candidates had boycotted the election, it was incumbent upon the respondent to prove through sound evidence that the necessary direction was issued by the party head or his nominee to vote in favour of certain candidate or to refrain from casting their vote. When we asked the learned counsel for respondent No.3 to provide any credible evidence to establish that fact, he could not produce any letter issued in this regard except producing copy of the

nomination forms of Salahuddin Khan (*Nazim*) and Samiullah (*Naib Nazim*) to contend that they were nominated candidates of JUI(F). However, as noted above, neither the nomination papers contained any column for mentioning the party affiliation nor this has been mentioned in the nomination forms produced by the learned counsel. When confronted with this situation, the learned counsel candidly conceded that there is no written proof that the direction was issued, however, submitted that such direction was communicated verbally to the appellants. Even no a single affidavit has been produced by the party leadership to produce that when, how and who communicated the verbal direction to the appellants. We are therefore not persuaded to accept the stance of the learned counsel. Thus, it is held that, in absence of specific direction of the party head with regard to abstaining from casting the vote, the appellants have not defected the party, as such, the impugned order dated 6.4.2017 is not sustainable. Resultantly, declaration of their defection dated 16.9.2015, upheld by ECP vide order dated 3.11.2015, is declared void. Civil Appeal No.681 of 2017 is therefore allowed.

24. In Civil Petition No.1640 of 2017, the petitioner was elected as Female Councilor on the party ticket of PML(N), but in the elections for the seat of Tehsil and District *Nazim/Naib Nazim* for the said District, she in violation of party direction cast her vote in favour of rival candidate belonging to PTI instead of her own party candidate. Thus, a show cause notice was served upon the petitioner by the nominee of PML(N). It was categorically stated in the show cause notice that specific directions were issued to the petitioner to cast her vote in favour of candidate of PML(N) for the seat of Tehsil *Nazim* and candidate of coalition party (*ANP*) for the seat of Tehsil

*Naib Nazim*; in this regard she was served with a notice to follow the party directions and take oath in this regard, but she remained absent on 29.8.2015 at the time of taking oath, and ultimately, she cast her vote in favour of PTI candidate for the seat of Tehsil *Nazim* and disloyal candidate of JUI(F) for the seat of Tehsil *Naib Nazim*. The show cause notice was served upon the petitioner through registered AD but she did not make any reply thereto; resultantly, the declaration of defection was issued *vide* letter dated 11.9.2012 by the nominee of the party head and the copy whereof was transmitted to ECP for confirmation. A three member Bench of ECP, after providing the opportunity of hearing to the petitioner, *vide* order dated 29.10.2015, confirmed the declaration of defection of the petitioner. It is to be noted that ECP in the said order specifically mentioned that the petitioner appeared in person and admitted all the facts narrated in the letter dated 11.9.2015; she candidly admitted having voted for the candidate of PTI, which was also confirmed from the register for maintaining record of support extended to the respective candidates. There is no dispute that there was no party direction by the party head or his nominee to vote in favour of party nominated candidate; rather, it is clear from the contents of show cause notice, which were not denied by the petitioner through reply or before the ECP, that directions were issued to the petitioner to cast her vote in favour of party nominated candidate and was also served with a notice to follow the party directions and take oath in this regard. But despite all that, she cast her vote in favour of in favour of rival candidate, which clearly entails the consequences entailed in Section 78A *ibid* of defection. Thus, no case is made out to interfere in the

judgment impugned in the instant petition. The petition is therefore dismissed.

25. For the foregoing, Civil Appeal No. 508 of 2017 and Civil Petition No. 1640 of 2017 are dismissed; whereas, Civil Appeal No. 681 of 2017 is allowed.

CHIEF JUSTICE

JUDGE

JUDGE

Announced in open Court

on **20.12.2017** at **Lahore**

Approved For Reporting

Waqas Naseer/\*

CHIEF JUSTICE