

Ayesha A. Malik, J.- I have read the judgment authored by my learned colleague Syed Mansoor Ali Shah, J. and agree with it, however, I have given additional reasons in a concurring judgment as it is essential to examine the constitutional role of the Election Commission of Pakistan (**ECP**) and its conduct while hearing the matter of defection under Article 63A of the Constitution of the Islamic Republic of Pakistan, 1973 (**Constitution**) as during the course of the arguments, a great amount of emphasis was placed on the fact that the ECP is a constitutional body with constitutional powers and that the decisions taken under Article 63A of the Constitution in the instant case are in accordance with its constitutional functions.

2. The subject of elections is dealt with in Part VIII Chapters 1 and 2 of the Constitution wherein the ECP is constituted¹ and the appointment of the Chief Election Commissioner,² the term of office of the Commissioner and Members³ and the terms of their service⁴ are provided for. Importantly, Article 218 (3) of the Constitution provides that it is the duty of the ECP to organize, conduct and make arrangements for honest, just and fair elections in accordance with law and free from corrupt practices. In furtherance of this constitutional duty, Article 219 of the Constitution confers specific duties on the ECP which include preparing the electoral rolls for the elections to the National Assembly, Provincial Assemblies and the local governments. It also places the duty of organizing and conducting elections to the Senate and the duty to fill casual vacancies in a House or a Provincial Assembly along with the duty to appoint Election Tribunals and hold the general elections to the National Assembly, Provincial Assemblies and the local governments. In this manner, the Constitution provides the duties and establishes constitutional standards that the ECP must uphold in matters related to the elections.

3. Article 218 (3) of the Constitution has been interpreted by this Court time and again holding that the primary duty of the

¹ Article 218 of the Constitution.

² Article 213 of the Constitution.

³ Article 215 of the Constitution.

⁴ Article 216 of the Constitution.

ECP is to ensure free, fair and transparent elections⁵. This Court has also consistently reiterated that the ECP is required to adhere to the constitutional standards of honesty, justice and fairness while making all necessary arrangements for holding elections, ensuring therein that all election related activities both individually and collectively adhere to the given constitutional standards.⁶ This Court has also clarified that in execution of its duty of organizing and conducting elections, the ECP is not a law making body rather works within the legal framework provided by Parliament.⁷ This is because legal competence for enacting electoral laws is found in Article 222 of the Constitution which gives Parliament legislative competence to enact electoral laws on specific subjects such as allocation of seats, delimitation, preparation of electoral rolls, matters relating to corrupt practices, etc. In the *Zulfiqar Ali Bhatti* case⁸ while interpreting Article 222 of the Constitution, this Court has specifically stated that the competence to make electoral law is one which regulates the constitutional duty to conduct elections. The Court further stated that the use of the word *power* in Article 222 of the Constitution⁹ actually confers and means the duties and functions entrusted to the ECP under the Constitution.

4. What is fundamental to the constitutional role of the ECP is the duty to organize and conduct free and fair elections for the benefit of the citizen who enjoys the fundamental right to not only contest elections but also the right to vote for the candidate of their choice under Article 17 (2) of the Constitution. This fundamental right is also an expression of the choice of the voters under Article 19 of the Constitution. In the exercise of these fundamental rights which culminate through the electoral process and voting, voters are able to

⁵ Imran Khan v. Election Commission of Pakistan (2012 SCMR 448).

⁶ Worker's Party Pakistan v. Federation of Pakistan (PLD 2012 SC 681) (**Worker's Party Pakistan**).

⁷ Muhammad Tahir-ul-Qadri v. Federation of Pakistan (PLD 2013 SC 413).

⁸ Zulfiqar Ali Bhatti v. Election Commission of Pakistan (2024 SCMR 997) (**Zulfiqar Ali Bhatti**)

⁹ 222. Subject to the Constitution, Majlis-e-Shoora (Parliament) may by law provide for:-

- (a) the allocation of seats in the National Assembly as required by clauses (3) and (4) of Article 51;
- (b) the delimitation of constituencies by the Election Commission including delimitation of constituencies of local governments;
- (c) the preparation of electoral rolls, the requirements as to residence in a constituency, the determination of objections pertaining to and the commencement of electoral rolls;
- (d) the conduct of elections and election petitions the decision of doubts and disputes arising in connection with elections;
- (e) matters relating to corrupt practices and other offences in connection with elections; and
- (f) all other matters necessary for the due constitution of the two Houses, the Provincial Assemblies and local governments;

but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part.

choose the composition of their government by exercising their choice and ability to participate.¹⁰ These rights are so integral that their violation results in the denial of other fundamental rights such as the right to be protected and treated in accordance with the law, the right to life and liberty, and the inviolability of dignity.¹¹ This constitutional duty of the ECP was discussed in the *Muhammad Sibtain Khan* case¹² wherein this Court differentiated between the legal concept of *power* and *duty* and concluded that a constitutional duty is not the same as a constitutional power and that the ECP had failed to maintain the distinction between these two distinct legal concepts. The Court explained that Article 218 (3) of the Constitution imposed a constitutional duty on the ECP and that Articles 220 and 224 were in furtherance of that duty and cannot be read as a constitutional power which would make the ECP the master of all electoral matters. The reason given was simple, that on a constitutional plane, the ECP is not the master rather the forum or organ that must perform the task which lies at the heart of the constitutional democracy.

5. The facts of the instant case compel us to once again reiterate that the constitutional duty of the ECP cannot be considered as an overarching constitutional power vis-à-vis other constitutional provisions and institutions. The ECP is, as per the constitutional mandate, an independent body, duty bound to conduct free and fair elections and duty bound to ensure that those elected by the people remain in government. The independence of the ECP is the fundamental safeguard in a democratic system which maintains the integrity of the elections, and ensures that the will of the people translates into their consent to be governed by the elected representatives. This is what gives legitimacy to the government because it is based on the choice of the people. This is what builds public confidence, protects the rule of law and protects people from political manipulation.

6. The Constitution expressly provides that the authority of government rests solely on the will of the people. This will manifests itself through the peoples exercise of their right to vote and participate in the electoral and political process. Elections are the

¹⁰ Tahir Sadiq v. Faisal Ali (2024 SCMR 775)

¹¹ Supreme Court Bar Association of Pakistan v. Federation of Pakistan (PLD 2024 Supreme Court 1).

¹² Muhammad Sibtain Khan v. Election Commission of Pakistan (2023 SCMR 2165) (**Muhammad Sibtain Khan**).

primary manner in which registered voters elect representatives who will govern on their behalf and exercise the powers of the government. This is a fundamental right guaranteed by the Constitution.¹³ The facts of this case show that the ECP failed to perform its constitutional duty to actualize the will of the people. The Appellant in these cases is an elected member of the National Assembly against whom a reference for defection was filed under Article 63A of the Constitution. The allegation against him is that he defected from his party being PML(N). The Appellant in his defence clearly and unequivocally stated that he was elected as an independent candidate for NA-262 (Quetta-I) and was accordingly notified on 15.02.2024.¹⁴ He then joined Sunni Ittehad Council (**SIC**) on the basis of his affidavit dated 20.02.2024 along with a letter dated 20.02.2024 issued by the Chairman SIC to the ECP informing them of his joining SIC. However, on account of the judgment passed in the *SIC* case¹⁵, he remained an independent member of the National Assembly. He also clearly stated that he never submitted the affidavit dated 16.02.2024 wherein it is alleged that he has joined PML(N), that this affidavit is a fake and fabricated document for which he has instituted a civil suit as well as a criminal complaint. In the civil suit, the said affidavit was suspended by the Senior Civil Judge-I, Quetta on 02.11.2024 and in the criminal complaint, on the basis of a report filed by the SHO the said affidavit was stated to be fake and fabricated. Hence, the Appellant's entire case before the ECP was premised on the fact that he was never a candidate for or a member of the PML(N). When the issue of defection came up, the ECP did not consider any of the material evidence relied upon by the Appellant nor did they consider his stance with reference to the affidavit of 16.02.2024. Given that there were two affidavits before the ECP, it had to thoroughly examine the documents in order to determine whether it could proceed under Article 63A of the Constitution. Instead, the ECP accepted the version of the party head of PLM(N) without any scrutiny and proceeded on that basis. The ECP did not specifically considered the denial of the affidavit of 16.02.2024 and denial of the letter of the party head dated

¹³ Imran Ahmed Khan Niazi v. The State (2024 SCMR 1284).

¹⁴ Notification No.F.2(5)/2024-Cord(1), Dated 15.02.2024, issued by the ECP.

¹⁵ Sunni Ittehad Council v. Election Commission of Pakistan (PLD 2024 SC 642) (**SIC**).

17.02.2024, nor did they provide the Appellant with these documents until he sought a direction from the High Court of Balochistan on 31.10.2024 to provide him the required documentation. Instead, the ECP opted to act on the letter of the party head of PML(N) dated 17.02.2024 without following due process which not only violated the Appellant's right to due process and fair hearing but also violates the right to vote of the people who voted for the Appellant. In doing so, the ECP also disregarded the stay order dated 02.11.2024 issued by the Senior Civil Judge-III, Quetta and ignored the proceedings in the criminal complaint. These actions of the ECP demonstrate a leaning by the ECP in favour of a political party and the government which totally negates its constitutional duty and the Constitution's standards to act honestly, justly and fairly. Consequently, when political competitors are not afforded equal opportunities during the election period, it results in a violation of the citizens' fundamental rights. In terms of the judgment in this matter, authored by Justice Syed Mansoor Ali Shah, the ECP should have confirmed that the affidavit of 16.02.2024 was a genuine document and should have confirmed the genuineness of the declaration made by the party head of PML(N). Without tentative appraisal of these documents, the ECP's decision is not sustainable and violates the fundamental right to vote of the people who actually voted for the Appellant.

7. This Court has reminded the ECP that elections are the lifeline to democracy and the ECP is the guarantor of electoral integrity.¹⁶ The independence of the ECP, therefore, is fundamental to the election process without which the very foundation of democracy is undermined. This Court has also recognized and declared that the ECP should not become subservient to political influences, or political engineering rather remain an impartial custodian of democracy as any leaning of the ECP in favour of the government would compromise the legitimacy of the political system.¹⁷ At the heart of protecting electoral integrity is the right to vote and the exercise of this right, by the people. The supremacy of the vote underscores the idea, that power and legitimacy in a democratic system derives its consent from the governed which is why an independent constitutional body is required to ensure that the will of

¹⁶ SIC (*ibid*).

¹⁷ Worker's Party Pakistan (*ibid*).

the people by way of election is actualized. It is unfortunate that despite clear pronouncements by this Court, the ECP conducts itself in a manner that is not in line with its constitutional duty rather aligned with the notion that they have the constitutional power to disregard other constitutional institutions and the basic right of the vote.

Sd/-
JUDGE

I agree. Sd/-
JUDGE

Sd/-
JUDGE

Islamabad
12.12.2024
‘APPROVED FOR REPORTING’
*Azmat/Nurayn Qasim L.C.**

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench-I:

Mr. Justice Syed Mansoor Ali Shah
Mrs. Justice Ayesha A. Malik
Mr. Justice Aqeel Ahmed Abbasi

Civil Appeals Nos.1507 and 1508 of 2024

(Against the orders dated 21.11.2024 passed by Election Commission of Pakistan in Case No.F.6(28)/2024-Law-III and Case No.F.17(3)/2024-Coord.)

Adil Khan Bazai. (In both cases) **.... Appellant**

Versus

Election Commission of Pakistan and another. (In both cases) **.... Respondents**

For the appellant: Mr. Taimoor Aslam Khan, ASC.
(In both cases)

For respondent No.1 (ECP): Rana Asad Ullah, Addl. AGP.
(In both cases) Mr. Muhammad Arshad, Spl. Secy. ECP.
Mr. Khurram Shehzad, D.D. Law, ECP.
Ms. Saima Tariq, D.D. Law, ECP.
Mr. Falak Sher, A.D. Law, ECP.

For respondent No.2 (PML-N): Barrister Haris Azmat, ASC.
(In both cases)

Date of hearing: 12 December 2024

JUDGMENT

Syed Mansoor Ali Shah, J.- These two appeals have been filed under clause (5) of Article 63A of the Constitution of the Islamic Republic of Pakistan (“Constitution”) to challenge the orders dated 21 November 2024 (“impugned orders”) passed by the Election Commission of Pakistan (“Commission”) regarding the declarations made by the Party Head of the Pakistan Muslim League (N) (“PML-N”), which were referred to the Commission by the Speaker of the National Assembly under clause (3) of Article 63A of the Constitution. In the declarations, dated 21 and 31 October 2024, the Party Head of PML-N declared that the appellant had intentionally defected from the Parliamentary Party of PML-N, on the grounds of his sitting on the opposition benches in the National Assembly with the Parliamentary Party of the Sunni Ittehad Council (“SIC”) and his abstaining from voting on the Finance Bill 2024 (Money Bill) and the Constitution (26th Amendment) Bill, in contravention of the directions issued by the Parliamentary Party of PML-N. By the impugned orders, the Commission confirmed these declarations under clause (4) of Article 63A of the Constitution. Consequently, the appellant was de-

seated from his membership in the National Assembly, and his seat (NA-262) was declared vacant.

2. Briefly, the background facts of the case are that the appellant contested for a seat in the National Assembly from NA-262, Quetta-I, in the 2024 general elections held on 8 February 2024. In the poll, the appellant secured 20,278 votes as an independent candidate, while the runner-up candidate, belonging to the Jamiat Ulema-e-Islam Pakistan, secured 12,887 votes and the PML-N candidate received 2,510 votes. Having secured the highest number of votes, the Commission declared the appellant elected as a returned candidate to the said seat in the National Assembly as an independent candidate, through its notification dated 15 February 2024, issued under Section 98 of the Elections Act 2017 ("Elections Act"). Subsequently, on 18 February 2024, a letter was submitted to the Commission by Mr. Muhammad Shahbaz Sharif, the then President of PML-N, under Rule 92(6) of the Election Rules 2017, informing the Commission that the appellant had joined PML-N through a consent affidavit dated 16 February 2024; whereas, on 20 February 2024, a similar letter was submitted to the Commission by Sahibzada Muhammad Hamid Raza, the Chairman of the Sunni Ittehad Council ("SIC"), notifying the Commission that the appellant had joined SIC through a consent affidavit dated 20 February 2024. The Commission accepted the letter received of the President of PML-N but rejected the letter of the Chairman of SIC. However, during the sessions of the National Assembly, the appellant used to sit on the opposition benches with members of the Parliamentary Party of SIC, and also did not vote on the Finance Bill 2024 and the 26th Constitutional Amendment Bill, contrary to the directions issued by the Parliamentary Party of PML-N. Consequently, the President of PML-N declared the appellant's defection from the political party, PML-N, and the Commission, by the impugned orders, confirmed these declarations. Hence, these appeals have been filed by the appellant.

3. Before the Commission, as well as before this Court, the appellant took the stance that he never joined PML-N; therefore, the question of his defection from that political party does not arise. The consent affidavit dated 16 February 2024, purporting to show his joining of PML-N, is fake and fabricated. In this regard, he has instituted a civil suit and filed a criminal complaint. In the civil suit, the said consent affidavit has been suspended, and in the preliminary inquiry conducted in the criminal

complaint, it has been found to be fake and fabricated. The appellant elaborated that he belongs to Pakistan Tehreek-e-Insaf ("PTI") and initially filed his nomination paper to contest the seat of NA-262, Quetta-I, under the PTI party ticket. However, due to a dispute regarding PTI's intra-party elections and its election symbol, his nomination paper as a PTI candidate was rejected. Consequently, he filed another nomination paper as an independent candidate, and contested and won the election for the said seat as an independent candidate. Subsequently, he joined SIC through a consent affidavit dated 20 February 2024, in accordance with PTI's party decision. However, the joining of independent candidates to SIC has not been recognized as constitutionally valid by the Supreme Court in its judgment passed in Civil Appeal No. 333 of 2024 (*Sunni Ittehad Council v. Election Commission of Pakistan*); therefore, he remains an independent member of the National Assembly.

4. On the other hand, the stance of the Party Head of PML-N was that the appellant joined PML-N through his consent affidavit dated 16 February 2024 and did not challenge the said affidavit until he was declared to have defected from PML-N. The civil suit and criminal complaint filed by the appellant disputing the genuineness of the consent affidavit are an afterthought, intended solely to evade the consequences of defection. Once a consent affidavit for joining a political party is filed, it becomes irrevocable and cannot be substituted or withdrawn.

5. By the impugned orders, the Commission accepted the stance of the Party Head of PML-N and concluded that, after being elected as an independent candidate, the appellant joined PML-N on 16 February 2024. It further held that the appellant acted contrary to the directions issued by the Parliamentary Party of PML-N by abstaining from voting on the Finance Bill 2024 and the 26th Constitutional Amendment Bill. Consequently, the Commission confirmed the declarations made by the Party Head of PML-N and pronounced that the appellant had ceased to be a member of the National Assembly and that his seat had become vacant.

6. In addition to the above respective stances of the parties, the learned counsel for the appellant vehemently contended that the Commission does not possess jurisdiction under Article 63A of the Constitution to decide the disputed question of whether the consent affidavit dated 16 February 2024 is genuine or fake, and consequently, whether the appellant is a member of the Parliamentary Party of PML-N.

He argued that only a Civil Court, not the Commission, is competent to adjudicate upon this disputed fact. Furthermore, he contended that the Commission's decision on this matter is not just, fair and reasonable. These contentions were refuted by both the learned counsel for the Party Head of PML-N and the Commission, who submitted that the Commission has the power to decide this question and has rightly determined the genuineness of the said consent affidavit.

7. We have considered the respective stances and contentions of the parties and, with the able assistance of their learned counsel, examined the material available on the record of the case.

8. Before examining the correctness of the Commission's decision regarding the genuineness of the appellant's consent affidavit dated 16 February 2024 and his alleged defection from PML-N, it would be expedient to first address the question of the Commission's jurisdiction: Does a Civil Court or the Commission have the jurisdiction to determine whether the member concerned is a member of the Parliamentary Party of a political party in proceedings under clauses (3) and (4) of Article 63A of the Constitution, for the purpose of determining his alleged defection from that political party?

9. A plain reading of Article 63A of the Constitution reveals that it grants power to the Party Head of a political party to declare that a member of the Parliamentary Party¹ of that political party has defected, if the member: (a) resigns from the membership of their political party or joins another Parliamentary Party; or (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to: (i) election of the Prime Minister or the Chief Minister, (ii) a vote of confidence or a vote of no-confidence, or (iii) a Money Bill or a Constitution (Amendment) Bill.² The use of the word

¹ Although the term 'Parliamentary Party' is not defined in the Constitution, in common parliamentary parlance it refers to the group consisting of all the members of a House who belong to a particular political party. See explanation (d) to Section 8-B of the erstwhile Political Parties Act 1962, which provided that 'Parliamentary Party' in relation to a member of a House belonging to political party, means the group consisting of all the members of the House for the time being of that political party.

² **63A. Disqualification on grounds of defection, etc.** (1) If a member of a Parliamentary Party composed of a single political party in a House—

- (a) resigns from membership of his political party or joins another Parliamentary Party; or
- (b) votes or abstains from voting in the House contrary to any direction issued by the Parliamentary Party to which he belongs, in relation to—
 - (i) election of the Prime Minister or the Chief Minister; or
 - (ii) a vote of confidence or a vote of no-confidence; or
 - (iii) a Money Bill or a Constitution (Amendment) Bill;

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 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. —“Party Head” means any person, by whatever name called, declared as such by the Party.

“may” in granting this power to the Party Head indicates that its exercise is discretionary, not obligatory. Even if a member defaults under grounds (a) or (b), the Party Head is not obligated to declare defection necessarily and he may choose not to exercise this power. Furthermore, the requirement of providing the member concerned an opportunity to show cause as to why such a declaration should not be made against him underscores that the Party Head must exercise this power justly, fairly and reasonably, rather than whimsically or arbitrarily. The original jurisdiction conferred upon the Commission, as well as the appellate jurisdiction of this Court, to confirm or otherwise the declaration made by the Party Head, therefore, extends to examining whether the Party Head has exercised this power justly, fairly and reasonably.³

10. A plain reading of clause (1) of Article 63A also makes it evident that the power to make a declaration of defection has been granted only to the Party Head of a political party, not to any other office-bearer of the party, and that it can be exercised only in relation to a member of the Parliamentary Party of that political party in the House, not to any other member of the House. The existence of these two facts is a condition precedent for the exercise of the power to make the declaration of defection against a member of the House and for the exercise of jurisdiction by the Commission to confirm such a declaration.

11. However, Article 63A has not expressly conferred power on the Commission to determine the existence of these facts before exercising its jurisdiction to confirm, or otherwise, the declaration. Therefore, the question as to the power of the Commission to decide these preliminary or collateral facts, also referred to as jurisdictional facts, arose in the

(2) A member of a House shall be deemed to be a member of a Parliamentary Party if he, having been elected as a candidate or nominee of a political party which constitutes the Parliamentary Party in the House or, having been elected otherwise than as a candidate or nominee of a political party, has become a member of such Parliamentary Party after such election by means of a declaration in writing.

(3) Upon receipt of the declaration under clause (1), the Presiding Officer of the House 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 clause (1) shall cease to be a member of the House 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 Supreme Court which shall decide the matter within ninety days from the date of the filing of the appeal.

³ This examination includes consideration of the defences raised by the member concerned, such as the non-existence of a direction by the Parliamentary Party, the failure to communicate such a direction to the member, or the direction being contrary to the member’s highest duty to obey, preserve, protect and defend the Constitution, which necessarily encompasses its salient features or basic structure. (See Article 5 of the Constitution and Oath prescribed in the Third Schedule to the Constitution, for the members of the National Assembly and Senate under Article 65. See also Al-Jehad Trust v. Federation of Pakistan PLD 1997 SC 84 per Ajmal Mian, wherein his lordship observed: “I am unable to subscribe to the above broad proposition of law to the effect that the President is bound to act, on the Prime Minister’s advice even when it is in violation of the certain provisions of the Constitution and the judgment of the Apex Court. I am inclined to hold that if there is no ambiguity as to the law declared by the Apex Court, the President cannot in breach of such law act upon the advice of the Prime Minister as it will not only be violative of the judgment of the Apex Court but would also be in breach of the oath of office.”)

cases of *Bahadur Khan Bangulzai*⁴ and *Giyan Chand*.⁵ In *Bahadur Khan Bangulzai*, the fact in dispute was whether the person who made the declaration of defection was the Party Head of the political party concerned; while in *Giyan Chand*, the dispute was whether the person (a member of the House) against whom the declaration of defection had been made was a member of the Parliamentary Party of the political party whose Party Head had made the declaration, as is the case in the present matter.

12. In *Bahadur Khan Bangulzai*, the Balochistan High Court, after referring to several academic and judicial expositions on the doctrine of jurisdictional fact, concluded that “the Chief Election Commissioner has the jurisdiction to determine as to who is the head of the political party, being a jurisdictional fact. However, no powers are available to the Chief Election Commissioner for resolving inbuilt organisational structural disputes which might have cropped up in the folds of a political party.” On appeal, this Court endorsed this conclusion and elaborated it further by holding that “if a plea is raised before the Chief Election Commissioner that the person who made the reference on account of alleged defection is not the head of the political party involved, the Chief Election Commissioner is obliged to examine the bona fides of such a plea. If the person who has made the reference as the Head of the political party involved has been acting as such in the past, the Chief Election Commissioner is supposed to proceed on the assumption that he is the Head of the political party involved. However, if he finds no reliable material to conclude that the person who made the reference is factually the Head of the political party involved, and the question relates to inbuilt organisational structural disputes within the political party, he may direct the parties to resolve the question through civil proceedings [in a Civil Court].”

13. In *Giyan Chand*, the Peshawar High Court observed that “the Chief Election Commissioner did not determine whether or not the jurisdictional fact in terms of Article 63-A of the Constitution existed in order to disqualify the petitioner” and that “Article 63-A of the Constitution prescribes certain facts as sine qua non for its application but none of the facts either existed or were proved against the petitioner by ANP inasmuch as the petitioner did not contest the election as a

⁴ *Bahadur Khan Bangulzai v. Attaullah Khan Mengal* 1999 SCMR 1921 [7MB] upholding *Attaullah Khan Mengal v. Chief Election Commissioner* 1999 CLC 1460 [Quetta-FB].

⁵ *Giyan Chand v. Chief Election Commissioner* 2000 MLD 709 [Pesh-DB].

candidate or a nominee of ANP nor was he a member of ANP in terms of the requirements prescribed by the Constitution of ANP nor did he join ANP after being elected Member of the Assembly.”

14. Since the decisions in both the above cases were primarily based on the doctrine of jurisdictional fact, we find it appropriate to briefly outline this doctrine as expounded in various judicial pronouncements.

15. The doctrine of jurisdictional fact connotes that if a certain state of facts must exist before a tribunal or authority can exercise the jurisdiction vested in it, such tribunal or authority may inquire into those facts to determine whether it has jurisdiction but cannot confer jurisdiction upon itself by making an erroneous decision regarding them. As per this doctrine, when a tribunal or authority is vested with jurisdiction limited to decide on a particular matter, it generally has the ancillary power to inquire into and ascertain the existence of facts collateral to that matter when their existence is disputed before it. This power to ascertain collateral facts—referred to as jurisdictional facts—forms the foundation for the exercise of its jurisdiction. A jurisdictional fact is, thus, one upon whose existence the assumption and exercise of jurisdiction by a tribunal or authority depend. It is a prerequisite fact whose existence must be ascertained before jurisdiction over a particular matter can be properly assumed and exercised. Its existence is a *sine qua non* or condition precedent to the assumption and exercise of jurisdiction. However, a tribunal or authority with jurisdiction limited to a particular matter cannot assume jurisdiction over a matter not conferred upon it by erroneously deciding the jurisdictional fact. An error in determining a jurisdictional fact constitutes a jurisdictional error, rendering the order passed without jurisdiction. Therefore, when a tribunal or authority is established by law to exercise jurisdiction over a particular matter, the legislature defines the scope of its powers. It may, either expressly or by necessary implication, stipulate that jurisdiction can only be assumed and exercised if a particular state of facts exists or is shown to exist. In such cases, though the tribunal or authority is obligated to objectively ascertain, in the event of a dispute, whether that state of facts exists before exercising jurisdiction over the matter, its decision on the existence of that state of facts—the jurisdictional fact—is not conclusive. Instead, the decision is subject to challenge before and final determination by the civil courts of plenary jurisdiction or is subject to correction by the constitutional courts through judicial review.

However, where the legislature grants the power to determine not only the substantive matter but also the preliminary or collateral facts—referred to as jurisdictional facts—upon which further jurisdiction depends, the tribunal or authority has the power to conclusively determine whether the jurisdictional fact exists. In the latter case, its decision on jurisdictional facts stands on the same footing as a decision on the fact in issue or the adjudicatory fact regarding the substantive matter, and is likewise final, subject to any right of appeal to a higher forum; it cannot be challenged before a Civil Court of plenary jurisdiction.⁶

16. There is, therefore, a distinction in the legal effect of the ascertainment or determination of a jurisdictional fact by a tribunal or authority with limited jurisdiction, as expounded by Lord Esher, M.R.,⁷ and subsequently adopted by this Court⁸ and the Indian Supreme Court,⁹ in two scenarios: (1) where the legislature entrusts a tribunal or authority with jurisdiction to adjudicate upon a matter, including the power to determine whether the preliminary state of facts on which its jurisdiction depends exists; and (2) where the legislature confers

⁶ Queen v. Commissioner of Income Tax (1888) 21 QB 313 per Lord Esher, M.R.; Keramat Ali v. Muhammad Yunus PLD 1963 SC 191; Jamil Asghar v. The Improvement Trust PLD 1965 SC 698; Raunaq Ali v. Chief Settlement Commissioner PLD 1973 SC 236; Mehr Dad v. Settlement and Rehabilitation Commissioner PLD 1974 SC 193; Hamid Husain v. Govt. of West Pakistan 1974 SCMR 356; Hamida Begum v. Murad Begum PLD 1975 SC 624; Muhammad Hafeez v. Additional Commissioner 1981 SCMR 1171; Rehmatullah v. Ali Muhammad 1983 SCMR 1064; Ehsanul Haq Kiani v. Allied Bank 1984 SCMR 963; Aminullah v. Qalandar Khan 1993 SCMR 2307; Shah Muhammad v. Abdul Rauf 1998 SCMR 1363 and Umar Ikram-Ul-Haque v. Shahida Hasnain 2016 SCMR 2186. For Indian jurisprudence, see S.B.P. and Co. v. Patel Engineering Ltd. AIR 2006 SC 450 (Many previous cases are also cited in it).

⁷ Queen v. Commissioner of Income Tax (1888) 21 QB 313. His Lordship observed: "When an inferior court or tribunal or body, which has to exercise the power of deciding facts, is first established by Act of Parliament, the legislature has to consider what powers it will give that tribunal or body. It may in effect say that, if a certain state of facts exists and is shown to such tribunal or body before it proceeds to do certain things, it shall have jurisdiction to do such things, but not otherwise. There it is not for them conclusively to decide whether that state of facts exists, and, if they exercise the jurisdiction without its existence, what they do may be questioned, and it will be held that they have acted without jurisdiction. But there is another state of things which may exist. The legislature may entrust the tribunal or body with a jurisdiction which includes the jurisdiction to determine whether the preliminary state of facts exists as well as the jurisdiction, on finding that it does exist, to proceed further or do something more. When the legislature are establishing such a tribunal or body with limited jurisdiction, they also have to consider, whatever jurisdiction they give them, whether there shall be any appeal from their decision, for otherwise there will be none. In the second of the two cases I have mentioned it is an erroneous application of the formula to say that the tribunal cannot give themselves jurisdiction by wrongly deciding certain facts to exist, because the legislature gave them jurisdiction to determine all the facts, including the existence of the preliminary facts on which the further exercise of their jurisdiction depends; and if they were given jurisdiction so to decide, without any appeal being given, there is no appeal from such exercise of their jurisdiction."

⁸ Keramat Ali v. Muhammad Yunus PLD 1963 SC 191; Jamil Asghar v. The Improvement Trust PLD 1965 SC 698. In the last-mentioned case, it was held: "A purely administrative officer who is empowered to pass an order if certain circumstances exist has no jurisdiction to determine those circumstances and the objective existence of those circumstances is an essential condition of the validity of his order. ... Of course although the officer has been granted no jurisdiction to determine, he will have to ascertain whether the requisite circumstances exist for otherwise he cannot pass the order, but his conclusion as to the existence of those circumstances binds nobody and it is open to any person affected to challenge his act, on the ground that those circumstances do not in fact exist. ... So far as special judicial tribunals are concerned, they are given jurisdiction to determine certain facts but they are not judges of the facts which are the foundation of their jurisdiction nor can they define the limits of their own jurisdiction. If an election tribunal is empowered to hear election petitions in respect of particular elections it will always have to determine whether the petition lodged before it relates to such an election, but if as a matter of fact that petition does not relate to such an election any proceedings taken by the tribunal in that petition will be void in spite of a finding by the tribunal to the contrary. It is possible, of course, that a special tribunal may be made the judge of its own jurisdiction, but this would be a very exceptional provision and one which should be made by altogether clear words."

⁹ Jagdish Prasad v. Ganga Prasad AIR 1959 SC 492 and Addanki Tiruvankata v. State of Andhra Pradesh AIR 1964 SC 807.

jurisdiction on such a tribunal or authority to proceed only if a certain state of facts exists or is shown to exist. In the former case, the tribunal or authority has the power to conclusively determine jurisdictional facts, whereas in the latter case, it only objectively ascertains the existence of the state of facts before exercising the jurisdiction conferred upon it. Such a finding must, of course, be based on the weight of the material placed before the tribunal or authority and not made arbitrarily or whimsically, as it remains subject to correction by an appellate forum, if any, or by constitutional courts through judicial review, in addition to final determination by civil courts of plenary jurisdiction.¹⁰

17. Article 63A of the Constitution does not explicitly entrust the Commission with the power to determine the preliminary state of facts—jurisdictional facts—on which its jurisdiction to confirm the declaration depends. Therefore, the present matter falls within the second of the two categories described above. The Commission has no power to conclusively determine jurisdictional facts but has only the power to objectively ascertain the existence of jurisdictional facts before exercising the jurisdiction conferred upon it under clauses (3) and (4) of Article 63A of the Constitution, for the purpose of determining the alleged defection of a member from his political party. Its finding on a jurisdictional fact, such as whether the member concerned belongs to the Parliamentary Party of a political party, is not conclusive; rather, it is subject to correction by this Court, as its appellate forum, and ultimately to final determination by a Civil Court of plenary jurisdiction. The question regarding the Commission’s jurisdiction is answered accordingly.

18. Having thus answered the question of law, we now proceed to examine the correctness of the Commission’s decision regarding the genuineness of the appellant’s consent affidavit dated 16 February 2024 and consequently the ascertainment of the jurisdictional fact whether the appellant is a member of the Parliamentary Party of PML-N.

19. Clause (2) of Article 63A specifies two instances in which a member of a House becomes a member of a Parliamentary Party: (i) if the member is elected as a candidate or nominee of a political party, he automatically becomes a member of the Parliamentary Party constituted by that political party in the House, or (ii) if the member, having been elected as

¹⁰ Ehsanul Haq Kiani v. Allied Bank 1984 SCMR 963. In this case, it was observed: “Where, however, the objection relates to the existence or non-existence of special relationship between the parties before the Tribunal and not to the Tribunal itself, an inquiry into the jurisdictional fact must ordinarily take place before that special tribunal itself. Like any other finding, the finding on jurisdictional fact, the one recorded by Special Tribunal will not be conclusive but it has to be recorded on proper material by the Tribunal so as to enable its judicial review.”

an independent candidate (i.e., not as a candidate or nominee of any political party), subsequently joins a Parliamentary Party through a written declaration. In the first instance, where no act by any person or authority is required for a member of the House to become part (member) of a Parliamentary Party in the House, no dispute can arise regarding the status of such a member. However, in the second instance, where the member's action—namely, a written declaration of joining a Parliamentary Party—is required, a dispute may arise concerning the genuineness or validity of such a written declaration. It is in the latter case that the necessity arises for the Commission, before confirming the declaration made by the Party Head, to ascertain the genuineness or validity of the written declaration made by the member, showing his joining of a particular political party.

20. As observed above, the finding on a jurisdictional fact must be based on the weight of the material placed before the court, tribunal or authority and cannot be made arbitrarily or whimsically. Therefore, it is incumbent upon us to examine and evaluate the weight of the material submitted by the parties before the Commission, as well as before this Court, in support of their respective assertions.

21. The material supporting the stance of the Party Head of PML-N comprises the consent affidavit dated 16 February 2024, showing the appellant's joining of PML-N. In disputing the genuineness of this affidavit, the appellant produced a copy of his consent affidavit dated 20 February 2024, demonstrating his affiliation with SIC. This affidavit bears both his thumb impressions and signatures, and by its submission to the Commission, the appellant implicitly negated the existence of any prior consent affidavit. Furthermore, the appellant submitted a record of his tweet dated 23 February 2024, wherein he expressly denied joining any other party, stating: *"I, returned candidate of NA-262 Qta-1, have joined Sunni Ittehad Council. The details of which are: I have voluntarily joined SIC, and all the required documents have been handed over to and received [by the] Election Commission on 20.2.24 at 9:35 PM. I strongly deny joining any other party."*

22. The appellant also produced photographs taken during the first session of the National Assembly on 29 February 2024, showing him wearing a badge bearing the photograph of the founding chairman of PTI, Mr. Imran Khan, while taking the oath and signing the roll of members. Additionally, Bulletin No. 1 of the National Assembly (1st Session 2024),

available on the official website of the National Assembly, mentions the appellant as an independent member of the Assembly at serial No. 254. Extracts from the official website of the National Assembly, dated 27 September 2024, which also shows that even till the said date the appellant was an independent member of the National Assembly. The appellant further presented a Civil Court order dated 2 November 2024, suspending the operation of the consent affidavit dated 16 February 2024, as well as an inquiry report dated 5 November 2024 prepared by the SHO, PS, Civil Lines, Quetta, which concluded that the said affidavit appeared to be false and fabricated. Moreover, the appellant produced copies of an affidavit and a statement by Saeed Ahmad, Oath Commissioner, whereby the said Oath Commissioner categorically denied having attested the disputed consent affidavit.

23. The weight of the material produced by the parties in support of their respective assertions is self-evident and requires no elaborate discussion. The Commission, as well as this Court acting as its appellate forum, is obligated to objectively assess the genuineness and validity of the consent affidavit dated 16 February 2024, based on the *prima facie* probative value of the material produced before it. Upon such assessment, the consent affidavit dated 16 February 2024 attributed to the appellant is found to be neither genuine nor valid.

24. Additionally, the Party Head of PML-N has failed to demonstrate a single instance where the appellant acted as a member of PML-N's Parliamentary Party in the National Assembly. On the contrary, the Party Head himself stated in his declarations that the appellant sits on the opposition benches with members of SIC. In *Bahadur Khan Bangulzai*, this Court observed: "*If the person who has made the reference as the Head of the political party involved has been acting as such in the past, the Chief Election Commissioner is supposed to proceed on the assumption that he is the Head of the political party involved.*" Applying the principle underlying this observation to the present case, where the appellant is not shown to have ever acted as a member of PML-N's Parliamentary Party but has consistently conducted himself as a member of SIC and PTI, the Commission ought to have proceeded on the assumption that the appellant is not a member of PML-N's Parliamentary Party.

25. Therefore, in our considered view, the Commission's findings on the genuineness and validity of the consent affidavit dated 16 February 2024 are contrary to the weight of the material on record and are,

therefore, legally unsustainable. Since the appellant is not found to be a member of PML-N's Parliamentary Party, the declarations made by the Party Head of PML-N regarding the appellant's defection from that party, and the confirmation thereof by the Commission through the impugned orders, were without jurisdiction. Consequently, these appeals are allowed. The impugned orders passed by the Commission are set aside, and the declarations made by the Party Head of PML-N that the appellant had defected from the said political party are not confirmed. Accordingly, the appellant's membership of the National Assembly from seat NA-262 stands restored as an independent member, not as a member of the Parliamentary Party of PML-N.

26. We may, however, clarify that the finding of this Court regarding the genuineness and validity of the consent affidavit dated 16 February 2024, as explained above, is subject to final determination by the Civil Court. Given the seriousness of the appellant's allegations regarding the fabrication and use of a false consent affidavit against Mr. Muhammad Shahbaz Sharif, the then President of PML-N and now the Prime Minister of Pakistan, we expect that the Civil Court, where the civil suit is sub judice, and the Magistrate, before whom the criminal complaint is pending adjudication, shall decide the same as early as possible.

27. These are the reasons for our short order dated 12 December 2024, which is reproduced hereunder for the completion of the record:

For reasons to be recorded later, these appeals are allowed. The impugned judgments passed by the Election Commission of Pakistan are set aside, and the declarations made by the Party Head of PML(N) that the appellant had defected from the said political party are not confirmed. Accordingly, the appellant's membership of the National Assembly from seat NA-262 stands restored as an independent member, not as a member of the Parliamentary Party of PML(N).

Sd/-
Judge

I agree with the judgment and have
appended my separate judgment.

Sd/-
Judge

Islamabad,
12 December 2024.

Approved for reporting.
Iqbal/Umer A. Ranjha

Sd/-
Judge