

Syed Mansoor Ali Shah, J.- I have had the privilege of perusing the eloquent opinions recorded by my learned brethren, Justice Mushir Alam and Justice Munib Akhtar. With all deference, I could not make myself agree to the opinion of Justice Mushir Alam. I concur with the opinion handed down by my learned brother Justice Munib Akhtar that the Election Commission ("Commission") has no jurisdiction, either under Article 218(3) of the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution") or under Section 9(1) of the Election Act 2017 ("Election Act") to deal with and decide the matter of alleged pre-election qualification or disqualification of a returned candidate, and that the present appeals should therefore be allowed. I also agree with the interpretation of the provisions of Article 218 of the Constitution and generally on the construction of the provisions of Section 9 of the Election Act, by Justice Munib Akhtar. With respect, I have a slightly different view on the construction of Section 9(1) and its Explanation, which I consider my solemn obligation to express; hence this note.

2. I respectfully disagree with the view of my learned brother stated in para 20 of the judgment that "the Commission no longer has the power to declare the poll in a constituency (or in any one or more polling stations) void except in the special case." To my humble understanding, the power of the Commission to declare the poll at one or more polling stations or in the whole constituency void, being ancillary and incidental, is implied in the power conferred on the Commission by Section 9(1) to declare that grave illegalities or violations of the provisions of the Act or the Rules have materially affected the result of the poll and in its power to call upon the voters in the polling station or stations concerned or in the whole constituency, as the case may be, to recast their votes. This was also the mandate of Section 103AA of the erstwhile law, i.e., the Representation of the People Act 1976. It is obvious that without declaring the result of the earlier poll(s) void (i.e., cancelled) the Commission cannot call upon the voters to recast their votes – the result of two polls cannot co-exist. Therefore, it is inevitable for the Commission to declare the result of the earlier poll(s) void before calling upon the voters to recast their votes.

3. My learned brother has held that Section 9(1) read with its "Explanation" specifies three conditions in which the Commission could exercise its jurisdiction under that Section, namely; (i) grave illegalities, (ii) violation of the provisions of the Act or the rules, and (iii) implementation of an agreement restraining women from casting their votes, while Section 103AA(1) of the erstwhile law stipulated only the first two conditions. I, with respect, differ and find that the conditions still continue to be two under the new law, as were the case under the old law: (i) grave illegalities, and (ii) violation of the provisions of the Act or the rules. "The implementation of an agreement restraining women from casting their votes" is not, in my opinion, an independent third condition rather is part of the first two conditions. The word 'including' used in Section 9(1) has led me to this finding. The Election Act contains several provisions to ensure participation of women in the election process¹, and preventing women from exercising their right to vote has been made an offence of corrupt practice under its Section 167(a) read with Section 170(vii). The implementation of an agreement restraining women from casting their votes is thus a grave illegality and violation of the provisions of the Act, which materially affects the result of the poll.

4. My next concern is as to the finding of my learned brother to the effect that the "Explanation" to Section 9(1) can render in some "special case" the entire election in the constituency void meaning thereby that fresh elections shall be held in the constituency, as opposed to declaring the poll(s) void resulting in recasting of the votes for the same contesting candidates afresh. In my humble understanding, the "Explanation" to Section 9(1) serves the ordinary purpose that an Explanation is supposed to serve, i.e., to facilitate the proper understanding of a provision. The power of the Commission under Section 9(1) is only to declare the poll at one or more polling stations or in the whole constituency void, which then leads to recasting of the votes for the same candidates. The grounds of declaring the polls to be void are: (i) grave illegalities, or (ii) violation of the provisions of the Act or the rules including "the

¹ (See Section 12(c) about measures for public awareness regarding participation of women in elections, Section 47 about special measures for enrolment of women voters, Section 91(1) about preparing statement about turnout of women voters, Section 91(3) about making special report regarding restraining the women voters from exercising their right to vote, etc.)

implementation of an agreement restraining women from casting their votes." The Explanation simply adds a presumption in the context of the ground of "implementation of an agreement restraining women from casting their votes" and provides that if the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes. In pith and substance, this is all what the Explanation explains. The word "election" used in the Explanation is though somewhat confusing, but in order to harmonize and balance the meaning and import of the "Explanation" and also to keep it within the fold of the main provision, the word "election" may be read to mean "poll"; as the meaning of an Explanation cannot generally go beyond the controlling main provision. The Explanation to Section 9(1), in my understanding, does not attract any "special case," where the "election" instead of the "poll" in the whole constituency may be declared void. However, we are not faced with the interpretation of the word "election" in this case, therefore, it is best to leave it to be considered more elaborately in an appropriate case, where the facts of the case would so require.

Judge