

P L D 2010 Lahore 138

Before Umar Ata Bandial and Ijaz ul Ahsan, JJ

MUHAMMAD AZHAR SIDDIQUE and another---Appellants

Versus

**GOVERNMENT OF PUNJAB through Chief Secretary, Lahore and 18 others---
Respondents**

I.-C.As. Nos.843, 851, 852 of 2009, decided on 25th November, 2009.

Appellant in person (in ICA No.843 of 2009).

Dr. Farooq Hassan for Appellant (in ICA No.852 of 2009).

Shafqat Mahmood Chohan for Appellant (In ICA No.851 of 2009).

Kh. Haris Ahmad Assisted by Mustafa Ramday, and Adnan Tariq for Respondents Nos.1 and 2 along with Raza ul Karim Butt, AAG.

Aamir Rehman, DAG for Respondents Nos.3 and 4 along with Ch. Shahid Sarwar, Law Officer, Provincial Election Commission of Pakistan, Lahore.

Abdul Rashid Qureshi for Respondent No.7.

Muhammad Asad Manzoor Butt for Respondent No.8.

Date of hearing: 11th November, 2009.

JUDGMENT

UMAR ATA BANDIAL, J.---Three Intra-Court Appeals are filed before this Court making a common grievance against the judgment of the learned Single Judge in Chambers dated 9-10-2009 passed in Writ Petition No.18515 of 2009 titled Government of Punjab and another v. The Chief Election Commissioner and seven others. This judgment sets aside four Notifications dated 16-9-2009 issued by the Election Commission of Pakistan ("Commission") giving schedules of bye-elections in two National Assembly constituencies and two Provincial Assembly constituencies in the Province of Punjab; it also sets aside the order dated 15-9-2009 passed by the Honourable Chief Election Commission of Pakistan ("CEC") directing the issuance of the said notifications. The challenge to the impugned judgment is directed against maintainability of the writ petition before the learned Single Judge and on merits

against the two substantive findings given to sustain the afore-said relief granted in the said judgment. Detailed Submissions and a Statement have been filed before us on behalf of the Honourable CEC and the Commission wherein the judgment of the learned Single Judge is disputed only on the substantive findings given therein.

2. The writ petition was filed by the Government of Punjab ("Provincial Government") for, inter alia, the relief granted by the impugned judgment. The jurisdictional and maintainability objections raised before us by the appellants question firstly, the locus standi of the Provincial Government to file a writ petition as an "aggrieved party", against an order passed by the Honourable CEC; and secondly, assert the non-justiciability of the decision dated 15-9-2009 by the Honourable CEC passed in the performance of a constitutional function. The substantive findings given in the impugned judgment include firstly, the application of the rule of "audi alteram partem" to the proceedings before the Honourable CEC, whereby the Provincial Government was found entitled to a hearing by the Honourable CEC on the point of law and order before he passed his afore-noted order directing issuance of the schedules of bye-elections. The second substantive finding given in the impugned judgment is that a constitutional convention has developed in the dealings between the Honourable CEC and the Provincial Government which recognizes a right of the latter to be heard before the issuance of an election schedule.

3. In order to deal with the foregoing objections the essential legal and factual features of the controversy may be outlined briefly. The Honourable CEC occupies an office constituted by Article 213 of the Constitution which specifies that he must be a serving or retired Judge of the Honourable Supreme Court or such a Judge of a High Court who qualifies to be appointed a Judge of the Honourable Supreme Court. Apart from his judicial credentials, the independence of the Honourable CEC is further assured by the security of his tenure of three years in office under Article 215 of the Constitution, the bar against his removal except under Article 209 of the Constitution prescribing the manner for removal of a Judge of the superior Court and by his disqualification from holding an office of profit in the service of Pakistan after completing tenure as CEC. Article 81 of the Constitution secures the financial autonomy of the CEC as his expenditure is charged upon the Federal Consolidated Fund which is not voted upon in the National Assembly. With the foregoing constitutional guarantees and as the Chairman of the Commission, the Honourable CEC is given the duty laid down in Article 218(3) of the Constitution "to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against" Article 210(b) of the Constitution casts a duty on the CEC to organize and conduct bye-elections for seats in the National Assembly or a Provincial Assembly. In the foregoing context, Article 220 of the Constitution imposes on all executive authorities in the Federation and in the Provinces a duty "to assist" the CEC and the Commission in the discharge of his or their functions. The Representation of the People Act, 1976 ("ROPA") and the Conduct of General Elections Order, 2002 make legislative provisions to elaborate the powers and functions of the CEC and the Commission.

4. On 28-8-2009 Sh. Rashid Ahmed, the appellant in ICA No.852 of 2009 a candidate in the National Assembly Constituency NA-55 Rawalpindi, filed a petition before the Honourable CEC under section 103 of ROPA, praying for a fresh schedule of bye-elections in his constituency to be announced. That National Assembly seat became vacant after its returned candidate resigned soon after the general election were held in February, 2008. The Commission had issued a Notification dated 28-5-2009 announcing a schedule of bye-elections in the said constituency for polling on 4-7-2009; but subsequently, on an adverse law and order report dated 8-6-2009 submitted by the Provincial Government, the Honourable CEC postponed the said bye-elections on 10-6-2009. The petition under section 103 ROPA criticizes as mala fide, false and frivolous, the law and order report dated 8-6-2009 submitted by the Provincial Government before the CEC for the postponement of, inter alia, the said bye-elections. By order of the Honourable CEC, the Commission issued notice in this petition on 4-9-2009 to the Chief Secretary of the Provincial Government requiring him to appear before the Honourable CEC in person or through counsel on 15-9-2009 for hearing in the afore-noted petition. On 9-9-2009 the Home Secretary of the Provincial Government wrote to the Honourable CEC stating the inability of the Chief Secretary as well as himself to attend the scheduled hearing on account of "important assignment regarding law and order and price control in the Province of Punjab during the month of Ramzan." On the appointed date of hearing, that is 15-9-2009, the Honourable CEC passed the following order directing the announcement of the schedule of bye-elections in five constituencies:--

"ELECTION COMMISSION OF PAKISTAN

ORDER

Heard Mr. Raheel Malik, learned counsel for Sheikh Rashid Ahmed, petitioner and Rashid Hafiz, Assistant Advocate General, Punjab for the respondent-Chief Secretary, Punjab. Mr. Rashid Hafiz was given time to seek instructions from the concerned person so far as the fixation of date of Poll for Bye-elections on vacant National and Provincial Assemblies' seats but he insisted for adjournment, which is vehemently opposed by the petitioner on the ground that already sufficient period has passed and constitutional obligation imposed upon this body has not been complied with.

In view of Article 224(4) of the Constitution bye-elections are to be held within 60 days of the occurrence of a vacancy and this statutory period has long been over. In the circumstances, I direct the office to issue Schedule for Bye-elections and fix the date of poll as the 7th November, 2009 for all the vacant seats of National and Provincial Assemblies constituencies, namely NA-123 Lahore-VI, NA-55 Rawalpindi-VI, NA-271 Khara-cum-Washuk-cum-Panjgur, PP-82 Jhang-X, PP-284 Bahawalnagar-VIII.

The application of Sheikh Rashid Ahmed stands disposed of.

(Sd.)
Justice (R) Hamid Ali Mirza
Chief Election Commissioner
15-9-2009."

The impugned judgment has set aside the afore-noted order and the bye-elections notified thereunder. We shall now take up the objections made to the said judgment.

MAINTAINABILITY:

5. It is the constitutional duty of the Provincial Government to maintain law and order in the province by ensuring the safety and security of citizens and the protection of their property. The parawise comments filed by the Honourable CEC and the Commission in answer to the writ petition admit that in the holding of elections "the security and safety of human life is of paramount consideration"; that the said consideration is a constitutional imperative along with the preservation of the integrity of the State, protection of property of the people. It is also acknowledged that the responsibility for maintaining law and order within the province lies on the Provincial Government. With its foregoing responsibility for maintaining law and order, if the Provincial Government perceives itself to have been by-passed by the Honourable CEC or to have been subjected by him to obligations beyond its capabilities indicating the possibility that the Provincial Government may be embarrassed in the performance of its constitutional duty to maintain law and order, then it seems justifiable that a grievance is nurtured by the Provincial Government. Under Article 199 of the Constitution the meaning of the expression "aggrieved party" is not to be narrowly construed. It is not necessary for a party to have a right in the strict juristic sense nor for the loss or curtailment of a benefit, privilege or liberty. In cases involving a public element a "sufficient interest" in the performance of a legal duty is adequate to sustain recourse to the constitutional jurisdiction of this Court. Reference in this regard may be made to *Ardeshir Cowasjee v. Karachi Building Control Authority* 1999 SCMR 2883. The expertise of the applicant, the civic or community interest that he projects and the gravity of issue in a grievance are all relevant to the establishment of sufficient interest. The exclusivity of responsibility of the Provincial Government for maintaining law and order in the province, including a constituency during an election, the constitutional basis of such a responsibility and the public interest involved in the discharge thereof, all demonstrate the credibility and effectiveness of the provincial executive machinery and therefore, its sufficient interest in a lis of the present nature.

6. To re-inforce the above view constitutional challenges by the Provincial Government have in a number of cases been entertained by the superior Courts of our country. *Muhammad Shafiq Chaudhry v. The Province of Punjab* 1998 SCMR 1957 is such a precedent which is considered elaborately later in this judgment. Judgment by a learned Division Bench of the Honourable Sindh High Court dated 23-2-1993 given in C.P-D-2599 of 1992 titled *Shamim Ahmad v. Deputy Speaker*, and others is another case in point. In the Indian jurisdiction as well recourse by a State

government to the constitutional jurisdiction of the superior Courts has been recognized in *Election Commission of India v. State of Haryana* AIR 1984 SC 1406. Indeed for that reason the Honourable CEC and Commission have not in their Detailed submissions disputed before us the locus standi of the Provincial Government to approach this Court in constitutional jurisdiction. It goes without saying that the duty of a Provincial Government under Article 220 of the Constitution to assist the Honourable CEC and the Commission in the discharge of his or their functions cannot diminish the locus standi of the Provincial Government in respect of matters touching the law and order situation during elections. Consequently, the objection regarding the locus standi of the Provincial Government before this Court is untenable and without force.

7. The second jurisdictional objection asserts the immunity of the orders passed by the Honourable CEC from judicial scrutiny. In the judgments noted above learned Courts have proceeded to examine the merits of the challenges made by executive authorities to orders passed by the Honourable CEC with respect to the announcement of schedules of elections. Therefore, the present objection of justiciability has been surmounted before. However, to put the matter at rest it must be observed that the constitutional jurisprudence in Pakistan does not recognize non-justiciability of any action taken or done by a constitutional functionary of the State. The thresh-hold for attracting judicial review may differ based upon relevant criteria but complete immunity from judicial review is a misnomer. However, strong may be a constitutional provision for ouster of jurisdiction of the superior Courts in a matter, there are three criteria upon which a superior Court shall always have jurisdiction to examine any action by a constitutional functionary. Where the action in question suffers from mala fides, is without jurisdiction or is coram non iudice, a superior Court shall have jurisdiction to scrutinize and test the validity of such an action. This principle was laid down with great clarity in the case of *Federation of Pakistan v. Ghulam Mustafa Khar* PLD 1989 SC 26. It has been reiterated subsequently by the Honourable Supreme Court without modification. With utmost respect therefore, the actions taken by the Honourable CEC in the discharge of his functions and duties do not enjoy absolute immunity. Therefore, the discretion of the Honourable CEC in directing the issuance of schedule of elections or bye-elections cannot be absolute but is fettered by such constraints that are imposed under the law. The ambit of his discretion may vary depending on the nature of a case; it would be limited in the exercise of judicial functions by the Honourable CEC as laid down in *Raheem Shah v. The Chief Election Commissioner of Pakistan* PLD 1973 SC 24. However, such discretion would be much wider where his autonomy to apply his mind to his constitutional function is involved. In this context his discretion as a constitutional functionary shall be exercisable, reasonably, fairly and in terms of the statute. The satisfaction of the said tests shall suffice to avoid interference in judicial review. Reference in this behalf may be made to *Federation of Pakistan v. Haji Muhammad Saif Ullah Khan* PLD 1989 SC 166. Under Article 225 of the Constitution, Dr. Farooq Hassan, Advocate, pressed another limb of the objection to justiciability of the actions taken by Honourable CEC. That provision bars challenge to an election to the National Assembly or a Provincial Assembly except by an election petition presented

before an Election Tribunal. An election is deemed to commence from the date of commencement of its election schedule. In the present case the election schedule commenced with the issuance of public notice by the Returning Officer on 24-9-2009. This petition was filed on 29-9-2009 one day prior to the filing of nomination papers by candidates in the bye-elections. Accordingly, learned counsel for the appellant contended that the election schedule having commenced, the bye-election could not be challenged other than before the Election Tribunal appointed for the purpose. On this point two authorities may be referred briefly and relevantly to note that an election petition provides a remedy to the contesting candidates and not a third party like the Provincial Government. Consequently, Article 225 of the Constitution is not a hurdle in the filing of the present petition on the principles recognized by the Honourable Supreme Court in Ghulam Mustafa Jatoi's case 1994 SCMR 1299 and Aftab Shahban Mirani's case 1998 SCMR 1863. Consequently, with due deference to the wide amplitude of the discretion vesting in the Honourable CEC, the present objection claiming non justiciability of the exercise thereof, is without legal foundation.

SUBSTANTIVE DISPUTE:

8. There is serious contest between the parties on the merits of the findings given by the learned Single Judge. The fact that the Honourable CEC has also disputed the findings given in the impugned judgment lends weight to the stand taken by the appellants. Firstly, it is asserted that no person, including the Provincial Government can claim a right of hearing before the Honourable CEC prior to the announcement by the Commission of an election schedule. Equally in this behalf there is emphatic denial of the existence of any constitutional convention that entitles the Provincial Government to be consulted or be heard before the announcement of an election schedule. Reference in this regard is made to Article 220 of the Constitution which confines the role of the Provincial Government to the rendering of assistance to the Honourable CEC and the Commission in the discharge of his or their functions. The word 'assist' as defined in different dictionaries has been read to the Court. The Oxford Dictionary, Blacks Law Dictionary and Strouds Law Dictionary each express the salient meaning of the word 'assist' to be 'to help'. Corpus Juris Secundum, Vol. VI defines 'assist' to mean "to aid; to facilitate; to help." In the capacity of a helper of the Honourable CEC, it is argued that a Provincial Government cannot interfere with or encumber with its claims, the constitutional duties of the Honourable CEC and the Commission. In this behalf, Article 224(4) of the Constitution directs that if a casual vacancy in the National or Provincial Assembly occurs four months prior to the expiry of the Assembly's term, it shall be filled through an election to be held within 60 days of the occurrence of such vacancy. It is said that a mandatory duty is cast upon the Honourable CEC and the Commission by the terms of Article 224(4) of the Constitution and the neglect of such a duty may incur penal consequences as laid down by the Honourable Supreme Court in President's Reference No.1 of 1988 PLD 1989 SC 75. Therefore, the autonomy of the Honourable CEC in the matter of holding elections cannot be qualified by any rights belonging to other parties, whether under natural justice or by constitutional convention vesting in any stake holder including

the Provincial Government. No constraint on the constitutional powers and function of the Honourable CEC and the Commission is therefore visualized by the Constitution.

9. After adopting the foregoing formulation learned Deputy Attorney-General acknowledges on behalf of the Honourable CEC and the Commission that the Provincial Government has locus standi to seek postponement of election after an election schedule has been announced. This can be done by making out a case on the basis of relevant and valid law and other criteria, including the safety and security of citizens and their property. It is emphasized that the occasion for the Provincial Government to raise an objection, ex post facto the election schedule, in effect asserts and establishes the autonomy of the decision making process of the Honourable CEC from external check, influence or interference. Accordingly, in the present case it is urged by the learned Deputy Attorney General that the Provincial Government ought to have expressed its objections to the election schedule ordered by the Honourable CEC on 15-9-2009 rather than to have filed its writ petition before this Court. In that sense the writ petition was filed prematurely, as the Provincial Government had an alternative forum of redress available.

10. Khawaja Haris Ahmad, Advocate, has rebutted the foregoing contentions forcefully on behalf of the Provincial Government. He has submitted that the rule laid down in Article 224(4) of the Constitution has been elaborated through legislative provision. In this behalf, section 11-A of the ROPA expressly authorizes the Commission to alter a schedule of election notified by it. Likewise, Article 6 of the Election Commission Order, 2002 gives plenary powers to the Commission to pass orders and directions for discharging its duties and functions. Section 103 of the ROPA empowers the Commission to stop the poll at any stage of the election if the conduct of the election justly, fairly and in accordance with law cannot be ensured. These powers are vested in the Honourable CEC and the Commission so that adverse events, circumstances and actions cannot deprive an election from being conducted honestly, justly, fairly and in accordance with law by the Commission which are attributes that Article 218(3) of the Constitution demands. With reference to the time stipulation contained in Article 224(4) of the Constitution he submitted that the case of President's Reference No. 1 of 1988 (ibid) enunciates the principle that such limitations of time are to be read as directory so that late performance of the constitutional duty or function remains valid to avoid inconvenience to the general public which cannot control and enforce compliance by the person responsible within the time stipulated. Indeed for this reason there are several instances when elections have been postponed at the behest of the Provincial Government and, more pertinently in the present context, upon apprehensions about the law and order situation in the relevant constituency. He concedes that the discretion of the Honourable CEC to announce an election schedule is not subject to any check, influence or interference from a third party including the Provincial Government; but prior to the exercise of such discretion to announce an election schedule the Honourable CEC is under a duty to consider the material presented by the Provincial Government and to hear the views of such government thereon. This sequence of

events for deliberation and decision by the Honourable CEC is claimed by learned counsel to have support of long standing practice in the dealings of the Honourable CEC with the Provincial Government as well as the backing of prudence because it lends certainty and credibility to an election schedule that is not liable to be objected later. Learned counsel for the Provincial Government has placed on record materials that are claimed to suggest the existence of a convention since 1991 or so that the Provincial Government has a right to be heard before the announcement of an election schedule.

11. We have carefully considered the points raised by the learned counsel for the Provincial Government, the Honourable CEC and Commission, and the appellants. Whereas the object of and effort made on behalf of the appellants was for the reinstatement of the election schedule announced by the Commission, however, the real and crucial dispute that has emerged for resolution through pleadings and submissions at the Bar, lies between the Provincial Government on the one hand and the Honourable CEC and the Commission on the other hand. The essence of this dispute concerns the stages of the decision making process of the Honourable CEC to determine and direct an election schedule for a vacancy in the National or Provincial Assemblies. Although the Provincial Government admits the complete autonomy of the Honourable CEC in this behalf, but its claim to be heard prior to the determination of an election schedule is perceived by the Honourable CEC and the Commission to constitute an encumbrance outside the contemplation of the Constitution and the law. Whereas the Honourable CEC accepts the right of the Provincial Government to object to the contents of an election schedule he disputes the right of the Provincial Government to block the announcement of such a schedule. What appears to be a difference in form for objecting to an election schedule, has according to the learned Deputy Attorney General, significant constitutional implications that impinge upon the autonomy and consequently the impartiality of the Honourable CEC and the Commission in the performance of his or their duties and functions.

12. To appreciate the difference in the respective stands taken by the learned counsel for the Provincial Government and the learned Deputy Attorney General, a cursory reference may be made to the obligations of the Honourable CEC and the Commission in case a prior right of hearing of the Provincial Government is to be recognized. The rule of "*audi alteram partem*" encapsulates the basic principle that no person should be condemned unheard. This principle therefore, postulates a right of hearing of the affected person in respect of an adverse decision likely to be taken against him. A fair hearing has in turn been interpreted to require that the affected person is first confronted with the adverse material and then he is given an opportunity to rebut or explain the same. The foregoing principles may, accordingly, involve the issuance of notices and the filing of replies before the hearing. In essence the elements of the rule of natural justice suggest its relevance and application to quasi judicial or determinative proceedings in relation to a personal interest. This rule cannot be imported into the decision making process of the Honourable CEC without extraordinary care. The said process involves the organization and conduct of elections under the constitutional duty of the Honourable CEC and the Commission to make an appeal to the

political sovereign. Therefore, to claim that the rule of natural justice as a matter of course characterizes the interaction of the Provincial Government with the Honourable CEC and the Commission would amount to an over-simplification. The material filed on record by the learned counsel for the Provincial Government indeed discloses documents going back to the year, 1991 when postponement of the bye-elections in the Provincial Assembly Constituency No.PP-65, Jhang V and National Assembly Constituency NA-68, Jhang-II was requested by the Provincial Government on account of sectarian killing that had occurred in the constituency. Likewise, the proceedings of the Honourable Sindh High Court in Constitutional Petition No.D-255 of 1992 titled Shamim Ahmad v. The Deputy Speaker Sindh Provincial Legislative Assembly and others, also shows that the learned Division Bench of the Court heard the stakeholders including the Provincial Government of Sindh and the Commission before fixing a date for the bye-election. Finally there is the decision dated 28-5-2004 by the then learned CEC, who revisited the bye-election of National Assembly Constituency NA-89, Jhang-IV after the order dated 11-5-2004 passed by learned Division Bench of this Court directing that the Provincial Government be heard prior to the announcement of schedule of election for the said constituency.

13. In addition to the foregoing references, learned counsel for the Provincial Government has read from the documents on record pertaining to correspondence between the Provincial Government and the Commission on the subject of holding the presently relevant bye-elections. The date for these was ultimately fixed by the order dated 15-9-2009 passed by the Honourable CEC. The said correspondence discusses material concerning the law and order situation in the Province on account of widespread terrorist activities in the North Western Frontier Province and also the Province of Punjab and comments upon a grave and exceptional situation that is a matter of both public knowledge and concern. These dealings between the Provincial Government and the Honourable CEC reflect the gravity of the situation and not the existence of a practice or usage that has legally enforceable standing. The said material is dealt with separately on its merits whilst considering the meaning and effect of the order dated 15-9-2009 passed by the Honourable CEC. Reverting to the historical material cited by the learned counsel for the Provincial Government, the strongest inference to be drawn therefrom is the locus standi of a Provincial Government firstly, to seek a postponement of an election announced by the Commission and secondly to approach a superior Court for judicial review of an election schedule announced by the Commission. A right of hearing provided by the Honourable CEC or the Commission to a Provincial Government by order of a Court of law bears reference to the facts of that case and does not impose a binding obligation on the Honourable CEC or the Commission to hear the Provincial Government prior to the fixing of an election schedule. Equally, in the matter of constitutional conventions the illuminating passages read by learned counsel from the case of Malik Asad Ali v. Federation of Pakistan PLD 1998 SC 161 that quote Al-Jehad Trust v. Federation of Pakistan PLD 1996 SC 324 holding that "once it is established to the satisfaction of the Court that a particular convention exists and is operating then the convention becomes a part of the constitutional law and can be enforced in the like manner". The enforceability of a constitutional convention is a step forward taken by our apex Court. However, it is necessary first to establish the existence of a convention

before demanding its enforcement. On this subject the learned counsel for the parties cited a number of academic works. The simple point that emerges from a reading of the said works, in particular Constitutional and Administrative Law by Hilaire Barrett, (Third Edition) is that the development of a convention represents a process a primary characteristic of which is that both parties to the convention acknowledge its existence. The element of a consistent practice between constitutional functionaries would point to the existence of a usage that is accepted by both parties; that may, therefore, be treated to be constitutional convention existing between them. In the dealings between the Provincial Government and the Honourable CEC there is no such consistent or consensual usage that would justify the existence of a constitutional convention to justify prior right of hearing before the announcement of an election schedule. Consequently, notwithstanding a superbly argued and well-documented case presented by its learned counsel, the Provincial Government fails to establish the existence of a right in law of the Provincial Government to make its submissions before the Honourable CEC ahead of the latter's decision to announce an election schedule in a constituency in the province. This conclusion is re-inforced by the duty of the Provincial Government to assist the Honourable CEC and the Commission under Article 220 of the Constitution in the discharge of his or their functions. The rendering of assistance by the Provincial Government necessarily includes the liberty and privilege to apprise the Honourable CEC and the Commission about the situation on the ground and to make suggestions as to when and if so under what arrangements an election that meets the requirements of Article 218(3) of the Constitution may be held. Such a liberty and privilege cannot authorize the Provincial Government to block the announcement of an election schedule by the Honourable CEC or the Commission until a hearing, the attributes of which remain unsettled, is granted to the Provincial Government. Such a course may subordinate the autonomy of the Honourable CEC and the Commission to perform his or their duty of holding a bye-election expeditiously pursuant to Article 224(4) of the Constitution which ought to have a mandatory effect in order that the political sovereign in that constituency does not go unrepresented and is not disenfranchised.

THE LEGAL VALIDITY OF THE ORDER DATED 15-9-2009.

14. The order dated 15-9-2009 by the Honourable CEC emanates from proceedings under section 103 of the ROPA launched by one of the candidates in the National Assembly constituency NA-55 to criticize the report dated 8-6-2009 of the Provincial Government on the basis of which the bye-elections schedule announced on 28-5-2009 had been postponed by the Honourable CEC on 10-6-2009. The petition contains allegations of mala fides and falcity in the report dated 8-4-2009 filed by the Provincial Government upon which the Honourable CEC directed notice to the Provincial Government. By issuing such notice the Honourable CEC in the facts of that case decided to hear the Provincial Government before passing any order announcing a fresh schedule of election as was sought by the petitioner before him. By conscious application of his mind in this matter, the Hon'ble CEC gave an opportunity of a hearing to the Provincial Government before taking any decision in the matter. Section 103 of the ROPA does not lay down the procedure to be followed by the Honourable CEC or the Commission in the disposal of personal grievances of interested parties. It is in this context that guidance may be sought

from the ordinary jurisprudence of the land to deploy the principle of "audi alteram partem" in such proceedings. The impugned notice dated 4-9-2009 by the Commission to the Provincial Government applied the principle of natural justice to summon them for a hearing on 15-9-2009. From a proceeding that could potentially be of a purely administrative nature not requiring any notice to or hearing of the parties, the petition under section 103 was treated in the exercise of discretion by the Honourable CEC to be a quasi judicial matter and rightly so because serious allegations had been made against the Provincial Government. Having done so, it was appropriate that the said matter was dealt with and disposed of within the same framework of the law.

15. A perusal of the order dated 15-9-2009 which is reproduced earlier in this judgment, shows that the failure by the Provincial Government to give instructions as to "the fixation of date of roll for bye-elections of vacant National and Provincial Assemblies seats" is one of the operative grounds for the said order to direct a schedule of bye-elections for the vacant seats to be issued. Under the constitutional scheme it is not for the Provincial Government but for the Honourable CEC to nominate the date of poll. Surely the Honourable CEC has mentioned the point in his order with reference to some discussion or interaction between the Provincial Government, the Honourable CEC and the Commission. Therefore, the reason for the Honourable CEC to reject the first request for adjournment made in writing on 9-9-2009 stating executive obligations of the Provincial Government Officers for preventing their attendance, is connected more with the Provincial Government's default to give a date for the polls than the insufficiency of its ground for adjournment. The order dated 15-9-2009 passed by the Honourable CEC exercises a discretion vested in him. In the context of section 103 ROPA proceedings that discretion was exercised to apply the rules of natural justice to the proceedings. Neither the parawise comments filed in the writ petition nor the detailed submissions filed before this Court on behalf of the Honourable CEC and the Commission state the reason for refusing one adjournment to the Provincial Government or the new and emergent circumstances for disposing of the section 103 ROPA immediately. High constitutional functionaries cannot be made accountable for the subjective decision that they make in the discharge of their constitutional functions. It is merely the test of existence of relevant material and the application of mind for taking an action that may be applied to assess the validity of their discretionary order. The Courts thus avoid to probe subjective element of a discretionary decision but may examine its structural elements as pointed out above to consider its validity. The Honourable Supreme Court has time and again reiterated the justiciability of constitutionally protected action on the touchstone of the triad criteria of an impugned action being coram non judice, without jurisdiction or mala fide. These criteria recognized in Ghulam Mustafa Khar's case (ibid) represent a settled rule for granting judicial review. Therefore, it cannot be maintained that a discretionary order passed by an autonomous high constitutional functionary as the Honourable CEC is immune from judicial review under all circumstances. Moreover in the context of discretionary orders passed by constitutional functionaries that are not protected by an emphatic ouster of judicial review by express constitutional provision, the apex Court has applied a broader test to assess their legal validity. In this regard a series of cases pertaining to the exercise of power by the President under Article 58(2)(b) of the Constitution have settled the principle. The case of Haji Saif Ullah has already been

referred above; its dicta was adopted with approval by the Honourable Supreme Court subsequently in the case of *Mian Muhammad Nawaz Sharif v. President of Pakistan* PLD 1993 SC 473. The basic test in such cases is that a constitutional functionary must arrive at his decision on the basis of some material. What is, therefore, curtailed by judicial action is arbitrariness in the decision of a constitutional functionary. The existence of the material and application of mind thereto are the two essential ingredients for obtaining immunity from judicial review. In the case of the section 103 proceedings the record of the Commission does not show the existence of new material that could sustain an immediate decision of the proceedings.

16. However, that view cannot apply to the decision made in the order dated 15-9-2009 passed by the Honourable CEC with respect to the three other constituencies for which the polling date was also fixed and election schedule was ordered notwithstanding the lack of their nexus with the section 103 proceedings. It is in this context that the observation in the order regarding default by the Provincial Government to give a date for holding polls in bye-elections to be held in the Province becomes plausible probably for the said constituencies. Very briefly it may be noted that the casual vacancies in the two National Assembly constituencies in the Province had occurred soon after the general elections were held in February, 2008. The vacancies in the Provincial Assembly seats occurred more recently in June, 2009 consequent upon disqualification of their returned candidates. As is already noted above the election to NA-55, Rawalpindi was scheduled to be held on 4-7-2009; likewise the bye-election to National Assembly constituency NA-123 Lahore VI was scheduled to be held on 30-6-2009. On the request of the Provincial Government, both these bye-elections were postponed on 10-6-2009 on account of reports on law and order submitted by the Provincial Government. Then again the Commission notified bye-election for the Provincial Assembly constituency PP-82, Jhang on 12-8-2009 for the poll to be held on 30-9-2009. However, again by Notification dated 21-8-2009 the Commission postponed that bye-elections "in view of the report dated 21-8-2009 received from the Chief Secretary, Government of Punjab and detailed briefing given by him regarding precarious law and order situation in the Province particularly in the areas where bye-elections are being held." It is in the briefing given by the Chief Secretary of the Provincial Government to the Honourable CEC that the task for giving a date for holding the bye-elections was assigned to the former. The assignment of this task suggests that whilst accepting the view of the Provincial Government to postpone the bye-elections to PP-82, Jhang the Honourable CEC recognized that there was a law and order problem in the constituencies where the bye-elections were scheduled and therefore, the Provincial Government was given an opportunity to indicate the date when in its estimation polls may be held. Such a reference by the Honourable CEC indicates his consideration and courtesy apart from his emphasis on the necessity of holding the bye-elections without indefinite delay. It also implies that the Provincial Government should indicate the earliest date when by its own and other available resources bye-elections in the respective constituencies could be held. As on 21-8-2009 the Honourable CEC was apprised with material upon which he applied his mind to postpone elections but with a resolve that the Provincial Government must indicate the date when his obligation under Article 224(4) of the Constitution could be performed.

17. There are two judicial precedents that become relevant at this stage of the discussion. The first one which was quoted by the Honourable CEC in his Detailed Submissions is the case of Muhammad Shafique Chaudhry v. The Province of Punjab 1998 SCMR 1957. In this case the Honourable Supreme Court disagreed with the Provincial Government to postpone elections principally on the ground that "order of the learned Chief Election Commission dated 18-5-1998 dealt with the question of law and order problem also". The Honourable Supreme Court approved the schedule announced by the Honourable CEC because it reflected application of mind to material existing on his record. The other precedent from the neighbouring jurisdiction is titled Election Commission of India v. State of Haryana AIR 1984 SC 1406. There it was observed that it would be naive to hold the Election Commission was not aware of the notorious law and order situation in Punjab and to some extent in Haryana. Nevertheless it was observed that the Government of Haryana was in the best position to assess the situation of law and order in areas within its jurisdiction and under its control "but the ultimate decision as to whether it is possible and expedient to hold the elections at any given point of time must rest with the Election Commission. Arbitrariness and mala fides destroys the validity and efficacy of all orders passed by public authorities. It is, therefore, necessary that on an issue like the present, which concerns a situation of law and order, the Election Commission must consider the views of the State Government and all other concerned bodies or authorities before coming to the conclusion that there is no objection to the holding of the elections at this point of time".

18. The rule of law that emerges from the foregoing precedents is that the Honourable CEC must consider the material submitted and views expressed by the Provincial Government in order to arrive at his informed decision in the matter. Such decision is completely autonomous but is predicated by the application of mind to the relevant material. In the present case on 21-8-2009 the Provincial Government had made out a good case for postponement of election. No doubt the said Government defaulted to give a date for holding bye-elections but once such an onerous duty has been cast upon the Provincial Government it was appropriate that an opportunity was granted to by notice or otherwise to state its views before a decision was taken in the matter by the Honourable CEC. This Court need not see the material upon which the learned CEC acted to arrive at his decision of 15-9-2009. It is noted that such decision does not as in Shafique Chaudhry's case indicate application of mind to any material containing considerations contrary to those that led to his decision of 21-8-2009 to postpone the Jhang PP-82 bye-elections. To the mind of this Court a case for judicial review on the said score is made out.

OUR FINDINGS:

19. It is held that the writ petition filed by the Provincial Government is maintainable; the discretionary orders passed by the Honourable CEC are justiciable on the judicial criteria reserved for order passed by constitutional functionaries; the order dated 15-9-2009 by the Honourable CEC applied the rules of natural justice to the section 103 ROPA proceedings regarding NA-55 bye-elections which were not followed; for the remaining three bye-elections ordered by the Honourable CEC on 15-9-2009 the materials and view

of the Provincial Government asked for by the Honourable CEC remain to be considered by him before announcing a fresh schedule of bye-elections in the four constituencies in the Province. Consequently, these appeals fail on the challenges to maintainability of the petition and the jurisdiction of the Court, they succeed on the substantive findings assailed. Appeal partly allowed with the consequential directions mentioned above.

M.H./M-854/L

Order accordingly.