

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
C.P. No. D- 1504 of 2023

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Date	Order with signature of Judge
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1.	For hearing of CMA No. 10217 of 2023
2.	For hearing of CMA No. 10218 of 2023
3.	<u>For hearing of main case</u>
Date of Hearing	: 9 October 2023
Petitioners	: Ahsanuddin and Habibullah through Mr. Syed Amir Shah, Advocate along with Tassadaq Nadeem, Advocate.
Respondent No. 1:	: ECP through S. Arshad Naqvi, Assistant Attorney General and Nisar Ali Naushad Babbar Assistant Attorney General
Respondent No. 2	: Nemo
Respondent No. 3	: Returning Officer through Sandeep Malani Assistant Advocate General S along with Mr. Abdullah Hinjra Senior Law Officer
Respondent No. 4	: Essa Khan through Huzaifa Khan, Advocate and Shiraz Ahmed Siddiqui, Advocate

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**ORDER**

**MOHAMMAD ABDUR RAHMAN J.** The Petitioner maintains this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan as against the Order dated 8 March 2023 passed by the ECP (hereinafter referred as to the “ECP”) and by which the ECP had directed for the withdrawal of a notification indicating the names of the returned candidates for the Seat of Chairman and Vice Chairman for UC-07, Town Municipal Committee, Sultanabad, Kemari, Karachi in the elections carried out for the Sindh Local Government (2<sup>nd</sup> Phase) for the year 2023.

2. The Petitioner No. 1 and the Petitioner No. 2 were respectively the candidates for the position of Chairman and Vice Chairman of UC-07, Town Municipal Committee, Sultanabad, Kemari, Karachi in the Sindh Local Government Elections, 2022 (2<sup>nd</sup> Phase) and which were held on 15

January 2023. The Respondent No. 4 was also a candidate for the position of Chairman in the same election. On the date of the election, as per the official results that were announced by a Mr. Abdul Ghaffar Sheikh i.e. the Returning Officer and as submitted in the Form XIV to the ECP, the Petitioner No. 1 secured 2808 votes while the Respondent No. 4 secured 1890 votes and a total of 120 votes were rejected for the position of the Chairman of UC-07, Town Municipal Committee, Sultanabad, Kemari, Karachi in the Sindh Local Government Elections, 2022 (2<sup>nd</sup> Phase).

3. The Respondent No. 4 maintained a Petition before the ECP bearing Case No. F.6(63)/2023-Law-III, alleging that Mr. Abdul Ghaffar Sheikh had been part of a larger conspiracy to manipulate the election results, not only for the election in respect of Union Council No. 7, Town Municipal Committee Mauripur, Kemari Town, Karachi but also in Union Council No. 5, 6 and 8 for the same Town Municipal Committee and for the same town. It was alleged by the Respondent No. 4, that as per the Form XI's that had been submitted by the Presiding Officers' the Petitioners had only obtained 1546 votes while the Respondent No. 4 had obtained 1900 votes.

4. It was contended by the Respondent No. 4 that the returning officer i.e. Mr. Abdul Ghaffar Sheikh had overwritten and made insertions on the Form XI that had been submitted to him and who had thereafter submitted the Form XIII and who had thereafter submitted the Form XIV on the basis of the manipulated Form XI's. This, it was alleged, was achieved in the following manner:

- (i) in the Form XI submitted for PS No. 3, where the Petitioner No. 1 had secured 91 votes, the number 2 was inserted by hand to indicate that the Petitioner No. 1 had in fact secured 291 votes;

- (ii) in the Form XI submitted for PS No. 4,, where the Petitioner No. 1 had secured 51 votes, the number 1 was inserted by hand to indicate that the Petitioner No. 1 had in fact secured 151 votes;
- (iii) in the Form XI submitted for PS No. 6, where the Petitioner No. 1 had secured 49 votes, the number 4 was modified by hand to look like a 9 and to indicate that the Petitioner No. 1 had in fact secured 99 votes;
- (iv) in the Form XI submitted for PS No. 7, where the Petitioner No. 1 had secured 134 votes, the number 3 was modified by hand to look like an 8 to indicate that the Petitioner No. 1 had in fact secured 291 votes;
- (v) in the Form XI submitted for PS No. 8, where the Petitioner No. 1 had secured 37 votes, the number 1 was inserted by hand to indicate that the Petitioner No. 1 had in fact secured 137 votes;
- (vi) in the Form XI submitted for PS No. 11, where the Petitioner No. 1 had secured 78 votes, the number 2 was inserted by hand to indicate that the Petitioner No. 1 had in fact secured 278 votes;
- (vii) in the Form XI submitted for PS No. 13 (Female), where the Petitioner No. 1 had secured 37 votes, the number 1 was inserted by hand to indicate that the Petitioner No. 1 had in fact secured 137 votes;

- (viii) in the Form XI submitted for PS No. 14, where the Petitioner No. 1 had secured 32 votes, the number 2 was inserted by hand to indicate that the Petitioner No. 1 had in fact secured 132 votes; and
- (ix) in the Form XI submitted for PS No. 15 where the Petitioner No. 1 had secured 75 votes, the number ` was inserted by hand to indicate that the Petitioner No. 1 had in fact secured 175 votes;

On this basis, the Respondent No. 4 prayed that the Presiding Officers of each of the Polling Stations should be summoned so as to confirm that the results as to the voting that they had submitted to the Returning Officer, were in fact as had been represented by the Returning Officer in the form XIII and the Form XIV that had been submitted by the Returning Officer to the ECP.

5. The ECP at the request of the Respondent No. 4 issued notices to the three Presiding Officers of Polling Station No, 3, Polling Station No. 11 and Polling Station No. 14 each of whom appeared before the ECP and confirmed that Mr. Abdul Ghaffar Sheikh i.e. the Returning Officer had in fact manipulated the Form XI that had been submitted by them. On this basis the ECP passed an order on 8 March 2023 (hereinafter referred to as the “Impugned Order”) holding that:

- “ ..
- (i) results prepared by the Returning Officer on Appendix A, Form XIII and Form XIV for the seat of Chairman and Vice Chairman UC-07 TMC Mauripur, Kemari, Karachi is declared unlawful, illegal, null and void ab initio;
- (ii) Since the conduct of Abdul Ghaffar Sheikh, Returning Officer for the seat of Chairman/Vice Chairman, UC-07, TMC Mauripur, Kemari Karachi has become dubious in the matter hence he be suspended under section 55 (3) of the Election Act , 2017
- (iii) Notification of Abdul Ghaffar Sheikh Returning Officer to the extent of election for the seat of Chairman/Chairman UC-07, TMC Mauripur, Kemari, Karachi is withdrawn forthwith;

(iv) *inquiry committee (comprising PEC, Sindh and REC, Karachi Division (Field) be constituted under section 55(4) of the Elections Act, 2017 against Mr. Abdul Ghaffar Sheikh, Returning Officer to conduct fact finding inquiry regarding tempering Form XI & XII and submit report to the Commission within shortest possible time but not later than 30. The Committee shall highlight the role of the accused involved in the corrupt practice including manipulation/fabrication of Form(s) XI & XII as well as recommendations for initiating disciplinary or criminal proceedings or both against accused;*

(v) *Regional Election Commissioner, Karachi Division (field) is appointed as Returning Officer to the extent of Chairman/Vice Chairman UC-07, TMC Mauripur, Kemari, Karachi under section 55(8) of the Election Act, 2017;*

(vi) *Office is directed to send a copy of the petition along with replies of Returning Officer and returned candidate to the Regional Election Commission/Returning Officer and District Returning Officer;*

(vii) *Regional Election Commissioner/Returning Officer and District Returning Officer are directed to fix a suitable time, date & Venue and call all the contesting candidates and Presiding Officers along with their record for the seat of Chairman/Vice Chairman UC-07; TMC Mauripur, Kemari, Karachi and obtain Written Statements from the Presiding Offices regarding which Form XI & Form XIII are genuine either supplied by the Returning Officer or by the petitioner and prepare afresh Appendix-A, Form XIII and Form XIV and send the results within seven days after receipt of this Order of the Commission for notifying in the official gazette."*

6. Being aggrieved by the Impugned Order, the Petitioner now maintains this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973. Mr. Syed Amir Shah appeared on behalf of the Petitioners and argued that the Impugned Order was not sustainable. He contended that the election as to Union Council No. 7, Town Municipal Committee Mauripur, Kemari Town, Karachi came to be challenged in three more cases before the ECP and in each of which cases the matter was referred by the ECP to the Election Tribunal constituted under clause (b) of Sub-Section (1) of Section 140 of the Elections Act, 2017 read with Sub-Section (1) and (3) of Section 47 of the Sindh Local Governments Act, 2013 and Rule 63 of the Sindh Local (Council) Election Rules, 2015. In this regard he referred to:

- (i) an Order dated 14 March 2023 passed in Case No. F-6 (77)/2023-Law III passed by the ECP in respect of the election also conducted for Union Council No. 7, Ward-03 Sultanabad, Town Municipal Committee Mauripur, Kemari Town, Karachi on the same grounds as raised in Case No. F.6(63)/2023-

Law-III and wherein the ECP referred the matter to the Election Tribunal;

- (ii) an Order dated 15 March 2023 passed in Case No. F-6 (79)/2023-Law III passed by the ECP in respect of Union Council No. 7, Ward-01, Town Municipal Committee Mauripur, Kemari Town, Karachi on the same grounds as raised in Case No. F-6(63)/2023-Law-III and wherein the ECP referred the matter to the Election Tribunal
- (iii) an Order dated 15 March 2023 passed in Case No. F-6 (81)/2023-Law III passed by the ECP in respect of Union Council No. 7, Ward-02, Town Municipal Committee Mauripur, Kemari Town, Karachi on the same grounds as raised in Case No. F-6(63)/2023-Law-III and wherein the ECP referred the matter to the Election Tribunal.

He contended that the ECP was clearly behaving inconsistently and in fact by holding that these three matters, which related to the same election in the same constituency with the same allegations as against the same returning officer, were liable to be instituted before the Election Tribunal and while conversely passing the Impugned Order in Case No. F.6(63)/2023-Law-III the ECP was discriminating in favour of the Respondent No. 4 and on the basis of which the Impugned Order was not sustainable. He next contended that the ECP lacked the jurisdiction to entertain the Petition that had been maintained by the Respondent No. 4 before it and which should have instead, been instituted before the Election Tribunal. He relied on the decisions of the Supreme Court of Pakistan reported as **Aurangzeb Khan vs Election Commissioner of Pakistan, Islamabad**,<sup>1</sup> and **Syed Fakhar**

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<sup>1</sup> PLD 2010 SC 34

**Imam vs. Chief Election Commission of Pakistan**,<sup>2</sup> and of the High Court of Peshawar reported as **Ghani ur Rehman vs. Pir Haider Ali Shah**<sup>3</sup> in which while examining the scope of an election that was held under the Representation of the People Act, 1976 it was held that any challenge to an irregularity that was committed in the process of the election could not be challenged in the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and could only be challenged before the Election Tribunal. Reliance was also placed on an unreported decision of the Lahore High Court, Lahore bearing WP No. 3905 of 2016 entitled **Syed Khurram Abbas Bukhari vs. ECP** wherein while interpreting various provisions of the Punjab Local Government Act, 2014 and the Punjab Local Governments (Conduct of Elections) Rules 2013, it was held that under Rule 78 of the the Punjab Local Governments (Conduct of Elections) Rules 2013 the ECP did not have the requisite jurisdiction to order for a recount of voting and where a recount was necessitated the jurisdiction to pass such an order vested with the Election Tribunal.

7. Conversely, Mr. Huzaifa Khan, on behalf of the Respondent No. 4, supported the Impugned Order and argued that ample power existed under Sub-Section (1) of Section 9 of the Elections Act, 2017 to pass any order to ensure fair elections. He contended that the provisions of this Section were examined by the Lahore High Court, (Rawalpindi Bench) in the decision reported as **Mst. Saima Ashiq vs. Election Commission of Pakistan**<sup>4</sup> which followed and applied a decision of the Supreme Court of Pakistan reported as **Muhammad Salman vs. Naveed Anjum and others**<sup>5</sup> wherein it was held that under Sub-Section (1) of Section 9 of the Elections Act, 2017 the ECP could not adjudicate on the eligibility of a person to stand for election and that the jurisdiction of the ECP to act under Sub-Section (1) of Section 9 of the Elections Act, 2017 would be limited to “what happens on

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<sup>2</sup> PLD 2008 SC 730

<sup>3</sup> 1997 CLC 1092

<sup>4</sup> 2022 MLD 2018

<sup>5</sup> 2021 SCMR 1675

polling day i.e. towards the process of the actual conduct of the election itself” and that too only if it “affects the result of the poll.” It was further contended that in the event that the ECP exercised its jurisdiction under Sub-Section (1) of Section 9 of the Election Act , 2019 then it could not hold the entire election as void and could only allow for a “recasting of votes to be ordered” and that “the slate of candidates remains the same.” It was further considered that in the event that the ECP passed an order under Sub-Section (1) of Section 9 of the Election Act , 2017, then an appeal as against that Order would lie to the Supreme Court of Pakistan under Sub-Section (5) of Section 9 of the Elections Act, 2017 and not to this Court. In this regard it was contended that the Impugned Order being related to actions that had occurred on the polling day rendered the Impugned Order having been passed within the jurisdiction of the ECP and as such the Petition maintained by the Petitioner was not maintainable under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and the Impugned Order should have instead been appealed under Sub-Section (5) of Section 9 of the Elections Act, 2017 before the Supreme Court of Pakistan. The Assistant Attorney General of Pakistan supported the arguments that were led by the Mr. Huzaifa Khan.

8. We have heard the Mr. Syed Amir Shah for the Petitioners, Mr. Huzaifa Khan for the Respondent No. 4 and the Assistant Attorney General of Pakistan and have perused the record. The ECP is a constitutional body that has been established under Article 218 of the Constitution of the Islamic Republic of Pakistan, 1973. Its duty to hold elections is enshrined in Sub-Article (3) of Article 218 of the Constitution of the Islamic Republic of Pakistan, 1973 and wherein it has been held that:

“ ... (3) It shall be the duty of the Election Commission to organize and conduct the election and 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.



In respect of elections to be held under the Sindh Local Government Act, 2013 it has been clarified in Section 34 that:

“ ... 34.(1) *The ECP shall conduct elections for the Councils under this Act...*

(3) *Upon announcement of the date or dates of elections of the Councils under sub-section (2), the ECP shall organize and conduct the elections and to make necessary arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and the corrupt practices are guarded against.”*

The responsibility to conduct an election for local government under the Sindh Local Government Act, 2013 having been conferred on the ECP by Sub-Section (1) of Section 34, the duty on the ECP to conduct the election has been clarified in the Sub-Section (3) of Section 34 of the Sindh Local Government Act, 2013 and which parallels with its duty under Sub-Article (3) of Article 218 of the Constitution of the Islamic Republic of Pakistan, 1973.

9. While the election to an office under the Sindh Local Government Act, 2013 is to be notified by the ECP under Section 45 of that statute, Section 46 of the Sindh Local Government Act, 2013 prescribes that:

“ ... 46. (1) ***Subject to this Act***, an election to an office of a council shall not be called in question except by an election petition.

(2) *A candidate may, in the prescribed manner, file an election petition before the Election Tribunal challenging an election under this Act.”*

(Emphasis is added)

It would follow that where a candidate has been notified by the ECP under Section 45 of the Sindh Local Government Act, 2013 to an office, then subject to any provisions of the Sindh Local Government Act, 2013, the only manner in which an election to an office of a council under the Sindh Local Government Act, 2013 can be challenged is by filing an election petition before the Election Tribunal constituted under Section 46 of the Sindh Local Government Act, 2013. Finally, Section 71 of the Sindh Local Government Act, 2017 clarifies that unless specifically excluded, the provisions of the Elections Act, 2017 would be applicable to the elections and the election

process for the conduct of elections under the Sindh Local Government Act, 2013.

10. The powers conferred to the ECP under the Elections Act, 2017 to declare a poll void are to be found in Section 9 of that statute and which are generally analogous to the provisions of Section 103 AA of the Representation of the Peoples Act, 1976. While generally the same there were some variations between the two provisions existed and which are better identified when compared in the table below:

Elections Act, 2017	Representation of the Peoples Act, 1976
<p>9. Power of the Commission to declare a poll void. –</p> <p>(1) Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such enquiry as it may deem necessary, the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of this Act or the Rules <u>as have materially affected the result of the poll at one or more polling stations or in the whole constituency including implementation of an agreement restraining women from casting their votes, it shall make a declaration accordingly and call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections.</u></p> <p>Explanation. – 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 and may declare, polling at one or more polling stations or election in the whole constituency, void.</p> <p>(2) Notwithstanding the powers conferred on it by sub-section (1), the Commission may order filing of complaint under this Act before a court of competent jurisdiction against persons who entered into the agreement referred to in sub-section (1).</p> <p>(3) Notwithstanding the publication of the name of a returned candidate under section 98, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have become final, subject to the decision of an Election Tribunal on an election petition, if any.</p>	<p>103AA. Power of Commission to declare a poll void. –</p> <p>(1). Notwithstanding anything contained in this Act, if, from facts apparent on the face of the record and after such summary inquiry as it may deem necessary, the Commission is satisfied that, by reason of grave illegalities or violation of the provisions of this Act or the rules, the poll in any constituency ought to be declared void, the Commission may make a declaration accordingly and, by notification in the official Gazette, call upon that constituency to elect a member in the manner provided for in section 108.</p> <p>(2) Notwithstanding the publication of the name of a returned candidate under sub-section(4) of section 42, the Commission may exercise the powers conferred on it by sub-section (1) before the expiration of sixty days after such publication; and, where the Commission does not finally dispose of a case within the said period, the election of the returned candidate shall be deemed to have</p>

<p>(4) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be an Election Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter IX, regulate its own procedure.</p> <p><u>(5) Any person aggrieved by a declaration of the Commission under this section may, within thirty days of the declaration, prefer an appeal to the Supreme Court.</u></p>	<p>become final, subject to a decision of a Tribunal.</p> <p>(3) While exercising the powers conferred on it by sub-section (1), the Commission shall be deemed to be a Tribunal to which an election petition has been presented and shall, notwithstanding anything contained in Chapter VII, regulate its own procedure</p>
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The Provisions of these two Sections came to be considered by the Supreme Court of Pakistan in the decision reported as **Muhammad Salman vs. Naveed Anjum**<sup>6</sup> wherein after comparing and considering these two provisions, the difference between the two sections was identified by the Supreme Court of Pakistan as follows:

“ ... 16. Now, the language of section 9, when compared with that of section 103AA has clearly been altered in part and left unchanged in some respects. Focusing for the time being on the first subsections in the two provisions, we find that section 103AA stipulated two conditions in which the Commission could exercise its jurisdiction, being either (i) grave illegalities, or (ii) violation of the provisions of the 1976 Act or the rules. Section 9 specifies three conditions. We will come to the third condition later. Looking at the first two, it is clear that the language used is the same as before, but with the additional requirement that the result of the poll at one or more polling stations or in the whole constituency must have been "materially affected". Whether this additional requirement applies only to the second of the conditions or to both is a matter that does not require determination here. But it would seem that the additional words used are intended to alter the situation in which the Commission can exercise its jurisdiction. What is crucial for present purposes is what it is that the Commission can do if either of the conditions is fulfilled. Under section 103AA, it could declare the poll in the constituency to be void. A judicial gloss put on these words was that the poll for the whole constituency need not be voided: a declaration could even be made in respect of one or more polling stations (see, e.g., Ch. Muhammad Ashraf Warraich and another v. Muhammad Nasir Cheema and others 2016 SCMR 998 (para 23) and Aftab Shaban Mirani and others v. Muhammad Ibrahim and others PLD 2008 SC 779, 817). The relevance of this gloss will become clear presently. Under section 9 however, the language used is different. The Commission can now "call upon the voters in the concerned polling station or stations or in the whole constituency as the case may be to recast their votes in the manner provided for bye-elections". **Is it the legislative intent to alter the law by this change in language? In our view, the answer must be in the affirmative. There is a difference between the voters being asked simply to recast their votes on the one hand, and the election to be declared void on the other.** Learned counsel for the appellant was, in our view, correct in submitting that under section 9 everything (and especially, for present purposes, the list of candidates) remains the same. Voters simply get another chance of choosing the person who is to represent them, but from the same slate as before. Under section 103AA the entire election (subject to the judicial gloss just

<sup>6</sup> 2021 SCMR 1675

mentioned) was, as it were, scrapped and the whole exercise done afresh. Obviously, if the matter were limited to one or more polling stations, the practical result under both section 103AA (on account of the judicial gloss) and section 9 (on account of the statutory language) would be more or less the same. However, if the poll in the entire constituency was to be redone then there would be a fundamentally different position, as just indicated. In our view, this clearly shows that Parliament intended to bring about a change when it used the modified language. To hold that the law has been left unaltered would be to defeat the legislative intent.

17. The conclusion just arrived at is bolstered when one looks at the third condition in which the jurisdiction under section 9 can now also be invoked. It is that there be an agreement (which has been implemented) to restrain women from casting their votes. This condition is new and was not to be found in section 103AA (unless, tangentially, it could have been regarded as constituting a "grave illegality", on which point we need not express an opinion). What is of relevance for present purposes is not the condition itself (which could not have arisen in the facts and circumstances before us) but rather what the Explanation to subsection (1) has to say about it...

18. The manner in which an "explanation" found in statutory provision is to be interpreted is well understood. In this Court, it was observed as follows in *Naveed Textile Mills Ltd. v. Assistant Collector (Appraising) Custom House Karachi and others* PLD 1985 SC 92 (at pg. 96; emphasis supplied):

"We have heard the learned counsel at length. We are in agreement with him that the ordinary function of an explanation is to clarify, to facilitate the proper understanding of a provision, to serve as a guide, as held in the case of *Muhammad Hussain Patel* [PLD 1981 SC 1]. Nevertheless, it does not exhaust or complete the function and the purpose of an explanation. In the Privy Council case of *Krishna Ayyangar: In re* ([1920] ILR 43 Mad. 550), it was held that "The construction of the Explanation must depend upon its terms, and no theory of the purpose can be entertained unless it is to be inferred from the language". In another case from Indian Jurisdiction, *State of Bombay v. United Motors* (AIR 1953 SC 252), the Explanation was found to contain a legal fiction, to provide a simpler and workable test directed at facilitating the operation of the statute itself." The cited decision was a leave refusing order. We agree that it correctly states the law. The relevant passage from the judgment of the Indian Supreme Court referred to therein also merits being reproduced (at pg. 258):

"It may be that the description of a provision cannot be decisive of its true meaning or interpretation which must depend on the words used therein, but, when two interpretations are sought to be put upon a provision, that which fits the description which the legislature has chosen to apply to it is, according to sound canons of construction, to be adopted provided, of course, it is consistent with the language employed, in preference to the one which attributes to the provision a different effect from what it should have according to its description by the legislature."

19. It is in the foregoing manner that, in our view, the Explanation to section 9(1) is to be construed and applied. For present purposes, it can be regarded as having two parts. The first part ("If the turnout casting their votes") permits the Commission, if the votes cast by women are less than 10% of the total, to conclude ("may presume") that there was an agreement of the sort proscribed by the third condition. Had this been the whole of it, the Explanation would be one in the "traditional" mould, i.e., merely clarifying or facilitating the third condition. However, it does not end there. The Explanation also specifies what the Commission can do once the situation set out therein is found to exist. The Commission can then declare the "polling at one or more polling stations or

*election in the whole constituency, void". As it at once obvious, this accords with the language of section 103AA(1), when that provision is read in light of the judicial gloss noted above. In our view, the Explanation, when read in its totality constitutes a special case. In contrast to what is set out in the main part of subsection (1) it allows for the election to be voided, in whole or in part. Thus, in the same subsection different outcomes are possible as and when the various conditions become applicable. For the most part, the Commission can only order a recasting of votes. In one special case, it can declare the election to be void. That Parliament considered it expedient to set out a special case in this manner and repeat therein alone the language that had been used in section 103AA(1) while eschewing it in the main part of section 9(1) also, in our view, makes the legislative intent clear. By allowing the Commission power only to order a recasting of votes in the main part of the subsection Parliament intended to bring about a substantive change in the law. The jurisdiction earlier conferred on the Commission now applies only in respect of the special case, and not otherwise.*

*20. The conclusion therefore is inescapable. Since 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, in making such a declaration with regard to the appellant's election it made a fundamental error of law and clearly went beyond its jurisdiction. No such declaration was permissible under section 9 on the facts and circumstances of the present case.*

(Emphasis is added)

As such under Sub-Section (1) of Section 9 of the Elections Act, 2017 the ECP has two distinct powers:

- (i) where it comes to the conclusion that there has been "grave illegalities" or "violations of the provisions of the Election Act, 2017" which have "materially affected" the result of the polls and where such illegalities or violations are "apparent on the face of the record" it **cannot** under Sub-Section (1) of Section 9 of the Elections Act, 2017 declare the election to be void and can only direct that the "voters in the concerned polling station or stations or in the whole constituency as the case may be, to recast their votes in the manner provided for bye-elections." This would necessarily imply that the same candidates that were standing for elections would once again be subject to the ballot and the entire election process for the polling station or stations or for the whole constituency would not commence de novo; and

- (ii) where the turnout of women voters is less than ten percent of the total votes polled in a constituency, the ECP may under a statutory presumption assume that the such voting has been manipulated pursuant to an agreement and “may declare, polling at one or more polling stations or election in the whole constituency, void” i.e. the entire election in the polling stations or stations or in the whole constituency is to commence de novo.

11. In an unreported decision of the Supreme Court of Pakistan bearing Civil Appeal No. 142 of 2019 entitled **Zulfiqar Ali Bhatti vs. Election Commission of Pakistan** further clarity has been given to the jurisdiction of the ECP under Sub-Section (1) of Section 9 of the Elections Act, 2017 wherein it was held that:

“ ... 26. The words “from facts apparent on the face of the record” used in Section 9(1) are of vital importance in this regard. They restrict the jurisdiction of the Election Commission to such grave illegalities or violations of the Election Act or the Rules which are evident “from the facts apparent on the face of the record”. **The Election Commission can, therefore, exercise its jurisdiction under Section 9(1) only when the allegation or issue of grave illegalities or violations of the Election Act does not require a full-fledged trial and recording of pro and contra evidence of the contesting parties which can only be undertaken by the Election Tribunal.**

27. We are aware of the power of the Election Commission, under Section 9(1) of the Election Act, to conduct such enquiry as it may deem necessary for its satisfaction about the alleged grave illegalities or violations, in addition to the “facts apparent on the face of the record”, **but before initiating such inquiry by the Election Commission the facts apparent on the face of the record must prima facie indicate the commission of some grave illegality or violation of the Election Act or the Rules made thereunder, during the election process The Election Commission cannot initiate a roving enquiry to search for some illegalities or violations, on bald and vague allegations unsupported by prima facie proof, in the exercise of its jurisdiction under Section 9(1) of the Election Act.**

28. Further, the enquiry which the Election Commission can conduct under this Section can only be of a summary nature, notwithstanding the omission of the word “summary” in Section 9(1), as the Election Commission can make an order for re-poll under this Section before the expiration of sixty days after publication of the name of the returned candidate under Section 98 of the Election Act, not thereafter. Where the Election Commission does not finally dispose of a case initiated under Section 9(1) within the said period, the proceedings stand abated and the election of the returned candidate is deemed to have become final, subject to the decision of the Election Tribunal on the election petition, if any, as per section 9(3) of the Election Act. Moreover, as the dismissal of a petition or the abatement of proceedings of a case under Section 9 by the Election Commission does not bar the re-agitation before and trial by the Election Tribunal, of the same grounds of grave illegalities or

*violations of the Election Act or the Rules made thereunder, the legislature cannot be presumed to have intended two full-fledged trials of the same issue before both forums: the Election Commission and the Election Tribunal. **Therefore, we are of the opinion that the enquiry to be conducted by the Election Commission under Section 9(1) can only be of a summary nature, notwithstanding the omission of the word "summary" in this Section.***

29. The second restriction on the exercise of power under Section 9(1) by the Election Commission is that by reason of the grave illegalities or violation of the provisions of the Election Act or the Rules, the result of the poll at one or more polling stations or in the whole constituency must have been materially affected. Any illegality or violation which does not relate to holding and conducting the poll in the election process, and has thus not affected the result of the poll, cannot form the basis for invoking and exercising the power under Section 9(1) by the Election Commission. The grave illegalities or violations must be such that have materially affected the result of the poll. Although such illegalities or violations may have been committed at any stage of the election process, but not later than the final consolidation of the result of the poll by the Returning Officer under Section 95 of the Election Act ; as any illegality or violation committed after the consolidation of the final result by the Returning Officer cannot be said to have materially affected the result of the poll. It, therefore, does not fall within the scope of the provisions of Section 9(1) of the Election Act and cannot be a subject of enquiry by the Election Commission to exercise jurisdiction under this Section."

We have examined the Impugned Order against the criteria laid down by the Supreme Court of Pakistan in the decision reported a **Muhammad Salman vs. Naveed Anjum and others**<sup>7</sup> and in the unreported decision of the Supreme Court of Pakistan bearing Civil Appeal No. 142 of 2019 entitled **Zulfiqar Ali Bhatti vs. Election Commission of Pakistan**. On the facts we are clear that the illegality that was being addressed by the ECP i.e. the manipulation of the Form XI by the Returning Officer was in fact a "grave illegality" that "materially affected" the result of the election to the Seat of Chairman and Vice Chairman for UC-07, Town Municipal Committee, Sultanabad, Kemari, Karachi conferring on the ECP the requisite jurisdiction under Sub-Section (1) of Section 9 of the Elections Act, 2017 read with Section 71 of the Sindh Local Government Act, 2013 to maintain Case No. F.6(63)/2023-Law-III. We have in this regard considered the provisions of Sub-Section (1) of Section 46 of the Sindh Local Government Act, 2013 and which clarifies that the Election Tribunal would, **subject to the provisions of the Sindh Local Government Act, 2013**, have exclusive jurisdiction to adjudicate on the issues of an election

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<sup>7</sup> 2021 SCMR 1675

to the office of a council. That having been said the provisions of the Election Act, 2017, by virtue of Section 71 of the Sindh Local Government Ordinance, 2013, having been made applicable to an election conducted under the Sindh Local Government Act, 2013 to our mind must, by the words "Subject to this Act" used in Sub-Section (1) of Section 46 of the Sindh Local Government Act, 2013, be read to mean that where the Sindh Local Government Act, 2013 reserves the powers under a different provision of that Statute to adjudicate on such an issue, then that jurisdiction must be held to be concurrent with that of the Election Tribunal under Section 46 of the Sindh Local Government Act, 2013. To our mind such a power has on account of Section 71 of the Sindh Local Government Act, 2013 been created by making the provisions of the Elections Act, 2017 applicable to the elections held under the Sindh Local Government Act, 2013 and which would preserve the jurisdiction of the ECP under Sub-Section (1) of Section 9 of the Elections Act, 2017 to act in the circumstances indicated in that provision.

12. Having come to the conclusion that the ECP had acted within its jurisdiction under Sub-Section (1) of Section 9 of the Elections Act, 2017 in taking cognisance of Case No. F.6(63)/2023-Law-III under Sub-Section (1) of Section 9 of the Elections Act, 2017 we note that under Sub-Section (5) of Section 9 of the Elections Act, 2017 an appeal as against any order passed by the ECP under Sub-Section (1) of Section 9 of the Elections Act, 2017 would lie to the Supreme Court of Pakistan. There being an alternate remedy, which has not been availed by the Appellants, we are left to consider whether the Petitioner having an alternative remedy could have maintained this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 before this Court.



13. The Supreme Court of Pakistan in the decision reported as **Muhammad Abbasi vs. S.H.O. Bhara Kahu and 7 others**<sup>8</sup> has opined that:

“ ... 7. It is bounden duty of the learned High Court to examine the question as to whether the alternate remedy is adequate and efficacious remedy by considering the merits of each case and further to dilate upon the question as to whether such remedy would be more efficacious, beneficial or it would cause hardship to the petitioner. In this regard reference can be made to the case-law enunciated in a Full Bench decision of the Lahore High Court wherein the tests to be applied to determine the adequacy of the relief have been clearly stated in the following terms:

"(i) If the relief available through the alternative remedy in its nature or extent is not what is necessary to give the requisite relief, the alternative remedy is not an "other adequate remedy" within the meaning of Article 199.

(ii) If the relief available through the alternative remedy in its nature and extent, is what is necessary to give the requisite relief, the 'adequacy' of the alternative remedy must further be judged, with reference to a comparison of the speed, expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Article 199. But in making this comparison those factors must not be taken into account which would themselves alter if the remedy under Article 199 were used as a substitute for the other remedy.

(iii) In practice the following steps may be taken:-

(a) Formulate the grievance in the given case, as a generalized category;

(b) Formulate the relief that is necessary to redress that category of grievance;

(c) See if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent;

(d) If such a remedy is prescribed, the law contemplates that resort must be had to that remedy;

(e) If it appears that the machinery established for the purposes of that remedy is not functioning properly, the correct step to take will be a step that is calculated to ensure, as far as lies in the power of the Court, that that machinery begins to function as it should. It would not be correct to take over the function of that machinery. If the function of another organ is taken over, that other organ will atrophy, and the organ that takes over, will break down under the strain;

(f) If there is no other remedy that can redress that category of grievance in that way and to the required extent, or if there is such a remedy but conditions are attached to it which for a particular category of cases, would neutralize or defeat it so as to deprive it of its substance, the Court should give the requisite relief under article 199;

(g) If there is such other remedy, but there is something so special in the circumstance of a given case that the other remedy which generally adequate, to the relief required for that category of grievance, is

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<sup>8</sup> PLD 2010 SC 969

*not adequate to the relief that is essential in the very special category to which that case belongs, the Court should give the required relief under Article 199" Mehmood Ali Malik v. Province of West Pakistan (PLD 1963 Lahore 575. Majibur Rehman v. Province of East Pakistan (15 DLR (WP) 129)."*

As held by the Supreme Court of Pakistan it is incumbent on this Court to consider as to whether or not an alternative remedy to maintain a Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 would in fact be more efficacious against the criteria quoted above. It is clear that the Petitioner has a remedy available to him to appeal the decision of the ECP under Sub-Section (5) of Section 9 of the Elections Act, 2017 to the Supreme Court of Pakistan. The alternate remedy being available to the Petitioner we are of the opinion that clearly such a remedy would have been more efficacious to the Petitioner as the matter would have been directly heard by the Supreme Court of Pakistan eliminating one entire round of proceedings. That being the position we are of the considered opinion that the availability of an alternate remedy would render this Petition as not being maintainable in this Court's constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

14. For the foregoing reasons, we are of the opinion that as the Petitioner had an alternate remedy in the nature of an appeal, under Sub-Section (5) of Section 9 of the Election Act, 2017, to assail the Impugned Order and which remedy was clearly more efficacious than invoking this Court's Constitutional Jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1978, this Petition is not maintainable and which is dismissed along with all listed applications, with no order as to costs.

JUDGE

Karachi dated 21 October 2023

JUDGE