

IN THE HIGH COURT OF SINDH AT KARACHI

Present: **Munib Akhtar and Agha Faisal, JJ.**

Constitution Petition D-1054 of 2018

Ishrat Ali Lohar

Petitioner

Versus

Federation of Pakistan and Others

Respondents

For the Petitioner : Mr. Khadim Hussain
Soomro, Advocate
Mr. Khalil Ahmed Memon,
Advocate
Respondents No.1, 2 & 3 : Mr. Mir Hussain Abbasi,
Assistant Attorney General
Respondent No. 6 : Mr. Salahuddin Khan
Gandapur, Advocate
in person
Respondent No.7 : Mr. Pir Darwesh Khan
Kheshgi, Advocate
Ms. Kanwal Anjum,
Advocate
Respondent No.8 : Mr. Mumtaz Alam Leghari,
Advocate in person
Dates of Hearing : 03.04.2018, 11.04.2018 &
12.04.2018

JUDGMENT

Agha Faisal, J: This matter pertains to the elections of the High Court Bar Association Hyderabad (“**HCBA**”), held on 03.02.2018. The Petitioner’s case is that on election day, when the votes were counted on the close of the poll, it was determined that he had got

the highest number of the votes cast for the post of general secretary. The runner up for the post of general secretary, being the Respondent No. 8 herein, sought a recount of the votes cast and it is this issue of recount, which gives rise to the present Petition.

2. The Respondent No. 8 preferred an application of recount of the votes polled for the position of general secretary of the HCBA ("**Recount Application**") before the returning officer ("**RO**"), being the Respondent No. 6 herein, on the very day of the election, i.e. 03.02.2018. The RO allowed the Recount Application, vide an Order dated 03.02.2018 ("**RO Order**") and determined 08.02.2018 as the date upon which the recount was to take place.

3. The petitioner challenged the RO Order before the Sindh Bar Council ("**SBC**"), being the Respondent No. 4 herein, and the chairman of the Executive Committee of the Sindh Bar Council ("**CEC SBC**") made an interim order, dated 07.02.2018 ("**CEC Order**"), and suspended the RO Order.

4. The Respondent No. 8 then assailed the CEC Order before the Respondent No. 2 Pakistan Bar Council ("**PBC**"), which suspended the CEC Order, vide its Order dated 08.02.2018 ("**Impugned Order**").

5. The Impugned Order is assailed in the present petition and this Court was pleased to pass ad interim orders herein, dated 09.02.2018, suspending the Impugned Order.

6. On 10.02.2018 the SBC issued a notification (referenced as 91/18/SBC) and declared the petitioner as the successful candidate for the post of general secretary of the HCBA ("**SBC Notification**").

7. The primary issue before this Court is to determine whether the Impugned Order, being an ad-interim order issued by the PBC suspending the operation of the CEC Order, is sustainable in law or

otherwise. Certain other issues, allied to or arising of the primary issue also require consideration.

8. Learned counsel for the Petitioner submitted that the Impugned Order was illegal, void ab-initio and without lawful authority on the basis of the arguments encapsulated herein below:

- i. It was contended that the Petitioner contested the election for the post of general secretary of the HCBA and that the result in respect thereof reflected that he had obtained 416 votes, whereas the runner up, being the Respondent No.8 herein, had obtained 398 votes.
- ii. It was further contended that at the conclusion of the election, on 03.02.2018, the Petitioner was the general secretary elect of the HCBA.
- iii. The Petitioner submitted that a notice issued by the RO, dated 06.02.2018, was served upon him on 06.02.2018 and that the said notice stated as follows:

“Whereas an application regarding Re-Counting of Votes filed by Mr. Mumtaz Alam Laghari for the post of General Secretary, HCBA, Hyderabad Elections-2018. Which was received on 03.02.2018, after completion of counting votes. The application is allowed and recounting of the votes for the post of General Secretary will be held on 08.02.2018 at 03:30 pm in the office of the Sindh Bar Council, Sindh High Court Building (Annexe) Karachi.

You are, requested, to be present personally or your representative at the time of re-recounting votes. In case of failure, the votes will be count in your absence.”

(Underline added for emphasis)

- iv. Learned counsel for the Petitioner submitted that the aforesaid notice was issued by the RO upon the Recount Application, the contents whereof are reproduced herein below:

“It is respectfully requested that undersigned contesting candidate for the post of general secretary of HCBA Election 2018 is requesting to during the counting of have been obtained 450 votes but your good officer announces 390 votes instead of 450 votes.

Therefore may kindly be recount my votes at the time of official counting in front of all candidates.

The prayer is made in the larger interest of justice.”

- v. Learned counsel contended that the date on the Recount Application shows that the same was received on 03.12.2018, being the election-day itself.
- vi. Learned counsel further contended that no grounds were invoked by the Respondent No.8 in the Recount Application.
- vii. It was further stated that even though the recount application had been received by the Retuning Officer on election-day, no intimation or notice in respect thereof was ever served upon the Petitioner, despite the fact that the Petitioner was also present there at all material times.
- viii. It was submitted that the manner in which a dispute arising out of such election proceedings was to be determined is delineated in rule 31 of the SBC Rules for Bar Associations, which stipulates that the appropriate forum for the adjudication of such a dispute was a petition to be filed before, and adjudicated upon by, the Executive Committee of the Provincial Bar Council, and hence not the RO.
- ix. It was contended, without prejudice to the above, that in any case the RO had become *functus officio* after announcing the result of the election and therefore had no jurisdiction to entertain the Recount Application.
- x. Without prejudice to the objections as to jurisdiction, it was submitted that any electoral recount had to follow the parameters laid down by the august Supreme Court in the case of *Jam Madad Ali Versus Asghar Ali Junejo and others*,

2016 SCMR 251, wherein the criteria for undertaking an exercise of recount were determined to be as follows:

“13. In the case of Bhabi (supra), the Supreme Court of India laid down the following criteria for permitting a recount in an election matter:

“15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers:

- (1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;
- (2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;
- (3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;
- (4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;
- (5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void”.

- x. Learned counsel read out the contents of the Recount Application and submitted that the same did not fall within the criteria determined by the Supreme Court.
- xi. It was further contended that the Recount Application was *prima facie* devoid of merits and in any event could not have been entertained / granted without notice to the Petitioner.
- xii. It was contended that the RO Order was appropriately petitioned against by the Petitioner before the Executive Committee of the SBC and that the said petition was still pending.

- xiv. It was submitted that the Chairman of the Executive Committee of the SBC passed the CEC Order, which, *inter alia*, suspended the operation of the RO Order. It may be pertinent to reproduce the contents of the said CEC Order herein below:

“Today, an appeal has been filed by Mr. Ishrat Ali Lohar Candidate for the Post of General Secretary against the order dated 06.02.2018 passed by the Returning Officer, in the application filed by Mr. Mumtaz Alam Laghari who contested the Election for the post of General Secretary of Elections-2018 HBCA Hyderabad.

The appellant being aggrieved and dissatisfied, impugned the order passed by the R.O and also contended that the Election Process was completed without any objection by either party, in free, fair and transparent manner. At the time of announcement of result the R.O repeatedly called to the candidates for objections on the election, but according to appellant there is no any objection raised by any Member or file any application before R.O.

Today, the notices of the R.O. has been served through TCS for tomorrow without inviting the objections from the appellants and there is no any time is granted to the appellants to file any objection on the application of recounting and also there is no any chance for hearing was provided to the appellants.

As per schedule the R.O should issue result within the two days after Poll. In view of above the Election Committee is required to complete the Election Schedule and announce the Official Result.

The matter required consideration, issue notice to the parties and also called comments from the R.O, meanwhile the operation of the notice dated 06.02.2018 is hereby suspended. To come up on 10.02.2018.”

- xv. The aforesaid CEC Order was challenged by the Respondent No. 8 before the PBC and on the very next date, during the said proceedings, the CEC Order was suspended vide the order of the Chairman of the Appeal Committee of the PBC dated 08.02.2018 (“**Impugned Order**”).

- xvi. It is pertinent to reproduce the content of the Impugned Order herein below:

“This appeal is filed against the order of re-counting of votes for the post of General Secretary of High Court Bar Association Hyderabad held on 03.02.2018. It is contended by the appellant that the elections were held on the orders passed by the appeal committee of PBC and on account of serious irregularities in counting, this application was filed on the same day and the orders were passed. This Respondent No.2 suspended the process of re-counting without notice illegally.

In my view the election process should be completed without delay, the recounting of vote only for the post of General Secretary will not prejudice any candidate, therefore, recounting process completed transparently with notice to all parties and compliance be submitted to PBC as ordered earlier, meanwhile order dated 07.02.2018 passed by this Respondent No.2 is suspended.”

- xvii. It was submitted by learned counsel that the Impugned Order was issued by a functionary of the PBC, which could not be equated to a competent order issued by the PBC itself.
- xviii. Learned counsel drew attention of the Court to Rule 3(i) of the Pakistan Bar Council Appeals Rules 1986 (“**Appeal Rules**”) and stated that the Appeal Committee of the PBC could not consist of less than 3 members, whereas the Impugned Order was made by the just the Chairman thereof.
- xix. It may be pertinent to reproduce the contents of the aforementioned rule herein below:
- “(i) The Pakistan Bar Council shall constitute for each province one or more Appeal Committees from amongst its members consisting of not less than three members and not more than five members.”
- xx. It was thus prayed that the Impugned Order be declared by this Court as illegal, without lawful authority and void ab-initio.

9. The case for the respondents was opened by learned counsel for the Respondent No. 8, and the submissions made may be summated as follows:

- i. At the very onset learned counsel drew the Court's attention to rule 5(i) of the Appeal Rules, which is reproduced herein below:

“(i) The Appeal shall normally be laid before the Committee within fifteen days of receipt of an Appeal for admission of the appeal and grant of interim relief if prayed for:

Provided that the Chairman may in appropriate cases grant the interim relief and his order shall be placed before the Committee for approval in its next meeting”.

- ii. It was argued that the proviso in the aforesaid rule clearly permitted the Chairman of the Appeal Committee of the PBC to grant interim relief and hence the Impugned Order was passed in due consonance with the law.
- iii. It was contended that the purported margin of victory of the Petitioner was 18 votes, whereas 24 votes stood rejected. Since the rejected votes exceeded the margin of victory therefore it was only proper that a recount should have been conducted in the interest of all concerned.
- iv. It was submitted that while the count was going on and the votes for the respective candidates were being read out aloud, the polling agent(s) of the Respondent No.8 counted 450 votes as having been polled in favor of the Respondent No.8. This tally was in stark contrast to the result which showed that the Respondent No.8 had obtained 396 votes.
- v. The Respondent No.8 submitted the schedule of the HCBA election, under scrutiny, and submitted that the official count of

the said election was to be declared on 06.03.2018 and therefore the request for recount was made prior to the official declaration.

vi. The issue of maintainability of the subject petition was also called in question and in such regard learned counsel for the Respondent No.8 relied upon the case of *Muhammad Ashraf Samoo and others Versus Sindh Bar Council and others*, PLD 2016 Sindh 318 ("**Ashraf Samoo**"), and drew the Court's attention to the following passages:

"15. Moreover, the grievance expressed through instant petition, otherwise, could have been agitated by the petitioner at the relevant point of time in terms of rules 61 to 65 of the Rules, 1976 before the Election Tribunal instead of directly approaching this Court by invoking provisions of Article 199 of the Constitution. It would be advantageous to reproduce the relevant rules 61 to 65, which read as under:

"61. An objection to the election under paragraph (h) of sub-rule (1) of rule 5 or under paragraph (h) of sub-rule (1) of rule 30, may be filed by any candidate at the election or by any five voters to contest the validity of the election of a candidate, by letter signed and delivered to the Chairman of the Bar Council who shall refer such objection to the Election Tribunal concerned for disposal within fifteen days of the date fixed for filing objections. The objection shall be accompanied by a deposit of Rs.100.

62. The letter shall state clearly the grounds upon which the validity of the election is challenged.

63. The objections to the validity of an election of a member shall be heard by the Election Tribunal concerned.

64. The election shall be set aside if the Tribunal finds that an irregularity which has materially affected the rules of the election or an illegality has been committed.

65. No irregularity in any proceeding, not even a change of date, as stated in the programme, if such change be due to unavoidable reasons, shall invalidate any proceeding, if it does not materially affect the result of the election."

16. From perusal of above quoted rules, it is clear that an objection to the election can be raised before the

Election Tribunal provided under aforesaid rules, whereas, the Election Tribunal, constituted for such purpose, is competent to decide all such election disputes either in respect of one member or more than one member. The term 'member' as used in the aforesaid rules does not refer to only a singular member, as such interpretation would lead to restricting the scope and mandate of Election Tribunal for redressal of grievance in respect of election disputes. Moreover, in terms of section 12 of the West Pakistan General Clauses Act, 1956 "words in singular would include the plural and vice versa". It will not be out of place to refer to the hereinabove provisions of rule 65 of the Rules, 1976, which provide that even an irregularity in proceedings, including a change of date of election, would not invalidate the elections if it does not materially affect the result of the election.

17. We may further observe that the petitioners have not been able to demonstrate through evidence nor could produce any material which may suggest that any such illegality or irregularity has been committed by the official respondents during the election process which has materially affected the result of the impugned elections. While invoking the jurisdiction of this Court under Article 199 of the Constitution, the petitioner has to satisfy that the petitioner is an aggrieved party either seeking enforcement of any of the fundamental rights conferred by Chapter I of Part II of the Constitution, or he is aggrieved by an act done or proceeding taken within the territorial jurisdiction of the Court by a person performing functions in connection with the affairs of the Federation, a province or a local authority, by showing that the act done or proceeding taken is without lawful authority, whereas, there is no adequate remedy provided under law for redressal of such grievance.

18. In the instant case, the petitioners could not refer to any illegality or irregularity which may require this Court to interfere in the election process, particularly, in view of seriously disputed facts and availability of alternate remedy provided in terms of the Rules, 1976.

19. We are, also mindful of the fact that right of franchise is substantial legal right, therefore, the process of election, in the absence of any express violation of law or the relevant rules, cannot be hampered or disturbed on mere allegations, by this Court while exercising its constitutional jurisdiction under Article 199 of the Constitution, particularly when certain disputed facts have been agitated in the petition. We may further observe that the parties hereto being practicing Advocates ought to have resolved their disputes through their own forum in terms of Pakistan Legal Practitioners and Bar Councils Act and the Rules framed thereunder/whereby, a domestic alternate remedy has been, provided to the aggrieved person for resolution of election disputes, instead of directly approaching this Court through instant petition by

invoking the constitutional jurisdiction of this Court. Reference in this regard can be made to the decision of Hon'ble Supreme Court in the case of Taria Mehmood A. Khan and another v. Sindh Bar Council (2012 SCMR 702) wherein the issue of maintainability of constitutional petition Under Article 199 of the Constitution relating to election disputes has been dealt with by the Hon'ble Supreme Court of Pakistan. We may further rely on the case of Javed Iqbal and another v. Returning Officer and others (PLD 2008 Quetta 121), wherein, it has been held that "Constitutional jurisdiction under Article 199 cannot primarily be invoked for making probe into controversial facts based on two conflicting documents as equitable relief sought for resulting into disfranchising the candidates cannot be availed." Similarly, in the case reported as Sanallah Khan Gandapur v. Advocate General, NWFP/Returning Officer and others (PLD 1997 Pesh. 80), it has been held that where any irregularity had taken place during process of election of Provincial Bar Council materially affecting Result thereof; same had to be resolved by Election Tribunal being the only forum provided for election disputes by the Pakistan Legal Practitioners and Bar Councils Rules, 1976.

20. We may observe with respect that the case law relief upon by the learned counsel for the petitioners is not relevant to the subject controversy, hence of no assistance to the petitioners' case. In view of the hereinabove facts and circumstances of the case, we are of the opinion that the above petition is misconceived in facts and law, which is hereby dismissed along with listed applications."

vii. It was submitted that the Respondent No.8 had reasonably prayed for a recount of the votes polled and that the denial of the same was contrary to the interests of the electoral process.

viii. It was further argued that the issuance of the SBC Notification, declaring the Petitioner as the returned candidate, during the pendency of the present petition was contrary to law.

10. The Respondent No.6, who while being the vice chairman of the Respondent No.4 was also the designated RO for the HCBA

election, was next at the bar and his arguments are summarized herein below:

- i. The learned respondent referred to section 20 of Legal Practitioner and Bar Council Act, 1973 (“**LPBCA**”) and stated that in view thereof it was legally inadmissible for the Petitioner to have arrayed the bar councils and members thereof in the present Petition. It may be pertinent to reproduce the aforesaid section herein below:

“20. **Indemnity.**—No suit or other legal legal proceedings shall lie against any Bar Council or any Committee, Tribunal, member, officer or servant of the Bar Council for any act in good faith done or intended to be done in pursuance of the provisions of this Act or the rules made thereunder”

- ii. The learned respondent cited the judgments reported as *Munir A. Malik Versus Malik Muhammad Qayyum and others* PLD 2007 SC 262 (“**Munir Malik**”) and *Tariq Mehmood A. Khan and others Versus Sindh Bar Council and another* PLD 2007 SC 262 (“**Tariq Mehmood**”) and submitted that in view of the findings contained therein the proper forum for adjudication of the present dispute was the relevant bar council and not this Court.

- iii. The learned respondent drew the Court’s attention to the following passage from *Munir Malik*:

“5. For what has been discussed above, the order passed by the Executive Committee of the Pakistan Bar Council dated 7th November, 2006 and the order passed by the learned Single Judge of the Lahore High Court dated 8.11.2006 in CMA No.1 of 2006 filed in Writ Petition No.2801 of 2006 are set aside. The Executive Committee of the Pakistan Bar Council is directed to dispose of the appeal filed by the petitioner expeditiously as far as possible within a period of two weeks. In the meantime, as an interim arrangement, the Vice-President elected from the Province of Sindh shall hold the charge of the office of

the President. Pending decision of the appeal before the Appellate Authority, the petitioner as well as Respondent No.4 shall not claim themselves to be the President of the SCBAP.”

- iv. In respect of *Tariq Mehmood*, the learned respondent highlighted the following segment:

“9. Though Section 16 of the Act provides that the vacant seat will be filled during the term of the Council, however, no specific provision has been pointed out by the learned counsel for the parties; that in the circumstances of the case, the Bar Council ought to have held re-election. We refrain ourselves from expressing any opinion on the issue involved in the present petition, as we are of the opinion that in such like situation the petitioners and the respondents who are practicing Advocates ought to have resolved their disputes before their own forums in terms of Legal Practitioners and Bar Councils Act, 1973, which provides a domestic alternative remedy to the aggrieved persons for redressal of their grievances.

10. This being the position, the listed petition is dismissed with the observation that if the petitioners file an appeal, the same shall be decided expeditiously without being influenced from any observations made hereinabove or in the impugned order.”

- v. It was submitted that the result of the HCBA Election, announced on 03.03.2018, was unofficial and also that the same announcement did not originate from the RO. It was contended that Rules 25 and 26 of the Pakistan Legal Practitioners and Bar Councils Rules 1973 (“**Bar Council Rules**”) delineated the manner in which count of the votes was to be conducted. It may be pertinent to reproduce the cited provision of law herein below:

“25. (1) At the close of the polling, the [Polling Officer] shall count in the presence of the candidates or their agents the votes cast for the various candidates and shall forward the ballot papers and the result of counting in a sealed cover to the Returning Officer.”

“26. The Returning Officer shall prepare a report of the votes received by each candidate and the votes held to be invalid and shall declare the result. In case of equality of votes the decision shall be taken by drawing of lots. The ballot papers as well as report shall be preserved in a sealed box for the term of the members elected.”

- vi. It was contended that the announcement with regard to the Petitioner having obtained the largest number of votes did not qualify as a result of the election and hence the same could not be subjected to the process of appeal/petition.
- vii. It was submitted that unless the election result was officially declared by the RO no dispute in regard thereof could arise. In the present circumstances since no official result was declared by the RO, therefore, there was no question of an electoral dispute having arisen.
- viii. It was further submitted that a proper reading of Rule 31 of the SBC Rules for Bar Associations made it clear that an election dispute could only be subjected to appeal post declaration of the official result thereof and since the same was not the case here, therefore, the Petitioner's appeal before the SBC was prima facie premature and not maintainable.
- ix. It was argued that the CEC Order was prima facie invalid as the Chairman of the Executive Committee was not empowered to act unilaterally in place of the Executive Committee of the SBC itself.
- x. However, it was contended that the Impugned Order was valid as the proviso to Rule 5(i) of the Appeal Rules sanctioned the manner of issuance of the same.

11. Learned counsel for the Respondent No.7 adopted the arguments of the Respondent No.6 in respect hereof.

12. Learned counsel for the Petitioner exercised the right of rebuttal and the submissions made are particularized herein below:

- i. It was submitted that the contention of the Respondents, that no official result was declared in respect of post of general secretary of the HCBA, was duly dispelled by the result issued/notified by the SBC vide the SBC Notification.
- ii. It was next contended that it is settled law that while passing interim orders, the merits of the case could not be adverted to as the same could prejudice the outcome of the entire case. According to learned counsel, the narrative contained in the Impugned Order amounted to acceptance of the appeal and that the operative part thereof would in fact amount to grant of the final relief vide an ad-interim order.
- iii. It was contended that the illegalities contained in the Impugned Order were compounded by the fact that the same was issued without any notice to the Petitioner. It was thus contended that the Impugned Order was void ab initio and hence the Petitioner was duly entitled to challenge the same in the present proceedings.
- iv. It was argued by learned counsel that the case of *Ashraf Samoo*, relied upon for the Respondent No.8, was distinguishable as it pertained to disputed questions of fact which were sought to be agitated in writ jurisdiction. Learned counsel stated that there was no factual dispute in the present Petition and hence the cited judgment could not be deemed to be a bar to the present Petition.

- v. It was contended by learned counsel that if the arguments of learned counsel for the Respondent No.8, stating that the count of the HBCA election was not completed on the day of election being 03.03.2018, were accepted then it would be anomalous for the same Respondent to have sought, and for the RO to have ordered, a recount in respect thereof.
- vi. It was contended that the very fact that the RO ordered a recount, albeit (according to the Petitioner in a manner contrary to law), demonstrated that the result of the count had been duly declared.
- vii. With regard to the proviso to Rule 5(i) of the Appeal Rules it was submitted that the same was being misread by the Respondents. The said proviso could not be read in isolation. It was contended that the proper interpretation of the Appeal Rules required that the proviso be read in conjunction with sub rules 5(ii) and 5(iii) thereof.
- viii. Learned counsel relied on a Divisional Bench judgment of the Lahore High Court in the case of *Muhammad Saleem Chotia Advocate Versus Zafar Iqbal Awaisi Advocate and Others*, PLJ 2000 Lahore 434 ("**Muhammad Saleem Chotia Advocate**"), in support of his aforementioned contention.
- ix. It was contended that the Chairman of the Appeal Committee of the PBC was not empowered to pass the Impugned Order, as the same was the prerogative of the Appeal Committee of the PBC.
- x. It was reiterated that the jurisdiction to entertain an application for a recount vested with the Executive Committee of the SBC and not with the RO, as provided by rule 31(a) of the SBC

Rules for Bar Associations, and therefore the RO order was wholly without jurisdiction.

- xi. Learned counsel sought to distinguish the case of *Munir Malik* and submitted that since the same was made by consent of all the parties concerned. Therefore, the same could not be deemed to preclude the jurisdiction of the Court in such matters.
- xii. Learned counsel submitted that the *Tariq Mehmood* case was also distinguishable on the facts as it pertained to a petition seeking the writ of quo warranto.
- xiii. It was further submitted that the petitioner did approach the prescribed statutory forum for adjudication of his dispute, being the SBC, but that such an adjudication was frustrated by virtue of the Impugned Order and hence the Petitioner was left with no option but to approach this Court for redressal.

13. We have heard learned counsel as above, and considered the record and material and the case law relied upon. It may be proper to approach this issue by referring first to the applicable law in this regard, the fountainhead whereof is the LPBCA. Section 56(n) of the said act stipulates as follows:

“56. Power of Provincial Bar Council to make rules.—A Provincial Bar Council may, by notification in the official Gazette, make rules to provide for: ...

(n) the recognition, derecognition and functioning of Bar Associations.”

14. In exercise of powers conferred by the aforesaid provision, the SBC has formulated the Memorandum, Rules and Bye-laws for the Bar Associations (“**Memorandum**”, “**Rules**” and “**Bye-Laws**”

respectively), which regulate bar associations functioning under its auspices.

15. Bye-law No.7 of the Bye-Laws as follows:

“Subject to appointment of a Returning Officer that may be made by the Executive Committee of the Provincial Bar Council under Rule 30, the Managing Committee of the Association may appoint an Election Commission Returning Officer for the conduct of election and as many President Officers as it may deem necessary.”

16. It follows that the returning officer to conduct an election of a bar association is to be appointed in the aforesaid manner.

17. Since there was no challenge from either side to the appointment of the RO in the present case, therefore the appointment is not under discussion herein.

18. Bye-law No.12 of the Bye-Laws stipulates as follows:

“Subject to the Provisions of Rule[s] all questions relating to the scrutiny of Ballot and declaration of result shall be decided by the Chief Election Commissioner or Returning Officer nominated by the Bar Council.”

19. It could be implied that since the scrutiny of the ballot and the declaration of result is to be undertaken by a returning officer nominated in the manner above, therefore, any dispute arising in respect thereof may also be determined by the said returning officer.

20. However, the Bye-laws have to be read subject to the Rules and Rule 31(a) thereof (“**31a**”) reads as follows:

“31 (a) Any dispute arising out of or concerning the election of an Officer Bearer or Member of the Managing Committee of the Association shall be decided by the Executive Committee of the Provincial Bar Council whose decision shall be final and binding on all Members of the Association.”

21. A plain reading of 31a states that the Executive Committee shall determine the disputes arising out of or concerning bar elections and that the decision of the said committee shall be final.

22. The Rules do not provide for the provision of an appeal from a decision of the Executive Committee. However, section 13(2) of the LPBCA contains a provision for appeal *inter alia* from an order of a provincial bar council and stipulates as follows:

“(2) Any person aggrieved by an order or decision of a Provincial Bar Council, Islamabad Bar Council the Supreme Court Bar Association or a Bar Association at the national level may, within thirty days of such order or decision, prefer an appeal to the Pakistan Bar Council, where decision in such appeal shall be final.”

23. In the present case a dispute arising out of or concerning the election of an office bearer of a bar association did arise in the form of the Recount Application.

24. This dispute led to the rendering of the RO Order in the first instance, which in itself is the subject matter of an appeal filed by the Petitioner before the SBC.

25. The issues of whether or not the RO had the requisite jurisdiction to entertain the Recount Application, whether the rendering of the RO Order in the manner that it was rendered was in consonance with the law or otherwise, and matters connected, related and/or ancillary to the recount itself are pending adjudication before the SBC and therefore the consideration thereof and pronouncement of any findings thereupon is avoided herein. It must be kept in mind that what we have before us are orders of an interim nature and not by way of any final adjudication.

26. As noted above, a challenge to the very maintainability of the present petition was raised by the respondents and it was argued that the present petition could not be entertained by this Court in view of the decisions in *Ashraf Samoo*, *Munir Malik* and *Tariq Mehmood*.

27. *Ashraf Samoo* pertained to an electoral dispute arising out of an election of a provincial bar council and not a bar association. In the said matter there were serious disputed questions of fact that were laid before the Court. The present petition does not deal with any disputed questions of fact and the issue before the Court is confined to the legality of the Impugned Order and certain allied matters.

28. *Tariq Mahmood* pertained to a writ of quo warranto having been sought in respect of a member of a bar council and is therefore, in our respectful view, also distinguishable.

29. *Munir Malik* was a matter described by the august Supreme Court itself in the following terms: “Both the sides have raised a number of disputed questions of fact and law which require adjudication in the first instance by a Tribunal of plenary jurisdiction”. In addition thereto the decision therein was correctly referred to before us by learned counsel for the petitioner as a consent order. In our respectful view, this decision does not therefore have the effect as sought to be placed upon it by learned counsel for the respondents.

30. In view of the foregoing, we respectfully conclude that the above cited decisions are distinguishable from the facts and circumstances of the present case *inter alia* for the reason that the issue before this Court is not that which is pending adjudication before the relevant forum, the SBC, but is restricted to the legality of the interim order(s) that have arisen ancillary thereto.

31. It is also pertinent to address the issue, raised by learned counsel for the petitioner, in respect of the legality of the Impugned Order on the ground that the same could not have been rendered singly by the Chairman of the Appeal Committee of the PBC.

32. Learned counsel relied on *Muhammad Saleem Chotia Advocate*, wherein it was held by the Lahore High Court that “This express provision leaves no room whatsoever for the Chairman of the Committee sitting singly to take any decision or pass any order either for admission of the appeal or grant of interim relief”.

33. In order to address this objection it is crucial to refer to the relevant excerpt from paragraph 3 of *Muhammad Saleem Chotia Advocate* wherein the constituents of rule 5 of the Appeal Rules have been reproduced:

“5. Functions of the Appeal Committee - (i) The appeal shall normally be laid before the Committee within fifteen days of receipt of an Appeal for admission of the appeal and grant of interim relief if prayed for.

(ii) For the admission of appeal and grant of interim relief it shall not be necessary to call a meeting of the Committee and it will be sufficient if the appeal is circulated amongst the Members of the Committee.

Every order or decision of Committee shall be taken by the majority.

(iii) The Appeal Committee shall hear the appeal, examine the record of the case, and record such evidence as it may deem necessary after providing opportunity of hearing to the parties. The Appeal Committee shall decide the appeal within two months and its decision shall be deemed to be the final decision of the Pakistan Bar Council.”

34. It is prima facie apparent from the aforesaid that the proviso to rule 5(i) of the Appeal Rules was never placed before the Lahore High Court. The said proviso reads as follows:

“Provided that the Chairman may in appropriate cases grant the interim relief and his order shall be placed before the Committee for approval in its next meeting”

35. The decision in *Muhammad Saleem Chotia Advocate* was rendered on 27.01.1999 in W.P. No 2233 of 1999. The proviso to Rule 5(i) was reportedly added to the Appeal Rules per notification of the PBC dated 25.07.1987. Therefore, it would appear that

despite the said proviso having been in the field at the relevant time, the same was not brought to the notice of the Lahore High Court.

36. It is for this reason that, with respect, we find ourselves unable to agree with the view expressed in *Muhammad Saleem Chotia Advocate* and hold that by virtue of the proviso to Rule 5(i) of the Appeal Rules, the Chairman of the Appeal Committee of the PBC is duly empowered singly to grant interim relief, upon the terms stipulated therein.

37. The next issue to consider is the argument of the Respondent No. 6 that the proceedings before the SBC, filed by the petitioner, were not maintainable since 31a had to be read in conjunction with rule 31(b) of the Rules ("**31b**"), which stipulates as follows:

"Any contesting candidate aggrieved by the result of an election may within 15 days of the declaration of the result of the election present a Petition to the Executive Committee of the Provincial Bar Council and Every such Petition shall be accompanied by a Deposit Slip of Rs. 500/- in favour of the Bar Council"

38. It was thus contended that since the official result was not declared by the RO, being the Respondent No. 6, hence the question of there being anyone aggrieved was premature at best and therefore the appeal before the SBC was not maintainable.

39. This issue is to be determined irrespective of the argument, submitted in rebuttal by the petitioner, that if the count had not been completed/declared by the RO then an order for a recount could have been passed by the same RO. The determination of this issue is also best entrusted to the appellate forum of the SBC whereat the petitioner's appeal awaits adjudication.

40. The legal question to be determined by this Court is whether 31a and 31b are to be read conjunctively or disjunctively.

41. It appears that 31a provides for adjudication of any dispute arising out of or concerning the relevant election. There appears to be no bar upon who may prefer the adjudication of such disputes.

42. On the other hand 31b is more restrictive as it permits only a contesting candidate aggrieved by the result of a relevant election to invoke the adjudication proceedings. There is also a time period specified for initiating such a challenge and it states that the same may only be done within 15 days of the result of a relevant election.

43. In our view, the phrases used in the two sub-rules, being respectively “Any dispute arising out of or concerning the election” and “Any contesting candidate aggrieved by the result of an election ...” cannot be read in the manner as contended by Respondent No. 6. The scope of 31a appears to be wider than the ring fenced scope of 31b.

44. It is also to be noted that while 31a provides a forum for any dispute arising out of or concerning an election, 31b can only be invoked to assail the result of an election.

45. Further that while in 31a there is no restraint upon the nature of the person authorized to file proceedings, 31b restricts the challenge to be maintained only by an aggrieved contesting candidate.

46. If the two provisions were to be read conjunctively then the necessary result would be to render 31a so restrictive as to virtually make it redundant and that appears to be contrary *inter alia* to even the literal reading of the Rules.

47. We are therefore of the view that 31a and 31b are intended to apply separately and hence we hold them to be disjunctive in their application and scope.

48. Accordingly, we are also of the view that the present case the petitioner was within his rights to approach the Executive Committee of the SBC for the resolution of the dispute as raised in relation to the issue of recount.

49. The next question that requires consideration is whether the interim order made, i.e., the CEC Order, was in consonance with law or otherwise.

50. Rule 31 of the Rules provides for the adjudication of election disputes by the executive committee of the provincial bar councils. In the present case the appropriate forum could therefore only be as stipulated and not otherwise.

51. Since the executive committee has the power to render the final decision in the matters with which it is seized, it would follow that the same executive committee would also be empowered to pass interim orders in such matters.

52. Unlike the proviso to rule 5(i) of the Appeal Rules, there is no provision in the Rules to empower the chairman of the executive committee to render interim orders, and therefore the said power would also vest in and rest with the executive committee.

53. The CEC Order was made by the chairman executive committee of the SBC and not by the executive committee of the SBC and therefore we are of the view that it was without jurisdiction and hence cannot be sustained.

54. From the foregoing conclusion it also follows that the PBC, while empowered to take cognizance of an appeal against any order or decision of the SBC under section 13(2) of the LPBCA, could not exercise jurisdiction over the CEC Order as it was prima facie the order of an individual office bearer of the SBC and not the SBC itself.

55. Quite independently of the foregoing discussion and conclusions, we are of the view that the Impugned Order also appears to have, in effect, granted final relief by way of an ad-interim order. This is contrary to the settled principles of law. Reference in this regard made to *Asad I A Khan Versus Federation of Pakistan and Others* 2014 SCMR 320.

56. In any event once the CEC Order has been declared void and set aside, any appellate proceedings wherein the same was under challenge would be rendered infructuous.

57. Since the CEC Order has already been determined to be an order without lawful jurisdiction, therefore, the appeal of the Respondent No. 8 before the PBC is prima facie rendered infructuous.

58. Keeping in mind all of the foregoing, this petition is disposed of in terms of the following declarations and directions:

- i. The CEC Order dated 07.02.2018, the Impugned Order dated 08.02.2018 and the proceedings initiated by the Respondent No. 8 before the Respondent No. 3, the PBC, are hereby set aside. The appeal filed by the Respondent No. 8 before the Appeal Committee of the PBC is declared to be infructuous and is deemed disposed off as such.
- ii. The executive committee of the SBC, Respondent No. 4, is directed to hear the Petitioner's appeal, as an appeal under rule 31a of the Rules, and decide the same expeditiously after proper notice to the parties and filing of pleadings and preferably within two weeks from the date of receipt of the certified copy of this judgment. The Executive Committee of the SBC may from time to time extend this period for reasons to be recorded in writing but such that the total period does not

exceed four weeks. Such copy may be placed before the SBC through its Secretary by any of the parties and the date on which it is so received by the latter shall be the relevant date for determining the period within which the appeal is to be heard and decided. Till the decision of the appeal, the RO Order is suspended.

- iii. The SBC Notification, referenced 91/18/SBC and dated 10.02.2018, shall subsist during the pendency of the aforesaid appeal but shall remain suspended till the decision of the said appeal and be subject to the final outcome thereof.

59. It is pertinent to record that the observations made hereinabove, and those contained in the orders of multiple fori discussed and/or assailed herein, shall cause no prejudice to the adjudication of any dispute pertaining to the HCBA election, between the parties inter se or otherwise, before any forum of competent jurisdiction.

Judge

Judge