

[Supreme Court of Pakistan]**Present: Mushir Alam, Syed Mansoor Ali Shah and Munib Akhtar, JJ**

Civil Appeals Nos. 1498 and 1499 of 2018

(On appeal under section 9(5) of the Elections Act, 2017 against the order dated 1.10.2018 passed by the Election Commission of Pakistan in Cases Nos. 30(26)/2018-Leg and 1(19)/2018)

And

Civil Petitions Nos. 972-L and 973-L of 2019

(On appeal from the judgment dated 26.2.2019 passed by the Lahore High Court, Multan Bench in W.Ps. Nos.14893/18 and 16234/18)

MUHAMMAD SALMAN---Petitioner

Versus**NAVEED ANJUM and others---Respondents**

Civil Appeals Nos. 1498 and 1499 of 2018 and Civil Petitions Nos.972-L and 973-L of 2019, decided on 17th August, 2021.*

Per Syed Mansoor Ali Shah, J; agreeing with Munib Akhtar, J. but with a different view on the scope of Explanation to section 9(1) of the Elections Act, 2017.

(a) Constitution of Pakistan---

---Arts. 62, 63 & 218(3)---Elections Act (XXXIII of 2017), S. 9(1)---Qualification/disqualification/eligibility of a candidate or member of Parliament---Power of the Election Commission ('the Commission')---Scope---Commission had no jurisdiction, either under Art. 218(3) of the Constitution or under S. 9(1) of the Election Act, 2017, to deal with and decide the matter of alleged pre-election qualification or disqualification of a returned candidate.

(b) Elections Act (XXXIII of 2017)---

---S. 9(1)--- Representation of the People Act (LXXXV of 1976), S. 103AA [since repealed]---Powers and jurisdiction of the Election Commission ('the Commission') to declare a poll void under S. 9 of the Elections Act, 2017 ('the 2017 Act')---Scope---Power of the Commission to declare the poll at one or more polling stations or in the whole constituency void, being ancillary and incidental, was implied in the power conferred on the Commission by S. 9(1) of the 2017 Act to declare that grave illegalities or violations of the provisions of the 2017 Act or the Rules had materially affected the result of the poll and in its power to call upon the voters in the polling station or stations concerned or in the whole constituency, as the case may be, to recast their votes---Such was also the mandate of S. 103AA of the erstwhile law, i.e., the Representation of the People Act, 1976---Without declaring the result of the earlier poll(s) void (i.e., cancelled) the Commission could not call upon the voters to recast their votes, as results of two polls could not co-exist---Therefore, it was inevitable for the Commission to declare the result of the earlier poll(s) void before calling upon the voters to recast their votes.

(c) Elections Act (XXXIII of 2017)---

---S. 9(1), Explanation ---Representation of the People Act (LXXXV of 1976), S. 103AA(1) [since repealed]---Conditions under which the Election Commission ('the Commission') could declare a poll void under S. 9 of the Elections Act, 2017 ('the 2017 Act')---Scope---Section 9(1) of the 2017 Act read with its "Explanation" specified two conditions in which the Commission could exercise its jurisdiction under that section, namely; (i) grave illegalities and (ii) violation of the provisions of the 2017 Act or the Rules ---Implementation of an agreement restraining women from casting their votes as provided in S. 9(1) of the 2017 Act, was not, an independent third condition rather was part of the first two conditions.

(d) Interpretation of statutes---

---Explanation provided after a section/provision of the statute---Scope---Ordinary purpose that an Explanation was supposed to serve was to facilitate the proper understanding of a provision---Meaning of an Explanation could not generally go beyond the controlling main provision.

(e) Elections Act (XXXIII of 2017)---

----S. 9(1), Explanation---Representation of the People Act (LXXXV of 1976), S. 103AA(1) [since repealed]---Conditions under which the Election Commission ('the Commission') could declare a poll void under S. 9 of the Elections Act, 2017 ('the 2017 Act')---Scope---Implementation of an agreement restraining women from casting their votes in the constituency---Explanation to S. 9(1) of the 2017 Act simply added a presumption in the context of the ground of "implementation of an agreement restraining women from casting their votes" and provided that if the turnout of women voters was less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters had been restrained through an agreement from casting their votes---In pith and substance, this was all what the Explanation explained---Word "election" used in the Explanation was though somewhat confusing, but in order to harmonize and balance the meaning and import of the "Explanation" and also to keep it within the fold of the main provision, the word "election" may be read to mean "poll"---Explanation to S. 9(1), did not attract any "special case," where the "election" instead of the "poll" in the whole constituency may be declared void.

Muhammad Shahzad Shaukat, Advocate Supreme Court for Appellant/Petitioner (in call cases).

Tahir Munir Malik, Advocate Supreme Court, Kh. Waseem Abbas, Advocate Supreme Court and Imran Humayun Cheema, Advocate Supreme Court for Respondent No. 1 (in C.A. 1498/18).

Waqar Ahmed Rana, Advocate Supreme Court for Respondent No.4 (in C.A. 1498/18).

Hamid Khan, Senior Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Respondent No. 1 (in C.A. 1499/18).

Sajeel Shehryar Swati, Advocate Supreme Court for Respondent No.5 (in C.Ps. 972-L and 973-L/18).

Ch. Aamir Rehman, Additional A.G.P. on Court's Notice on 28 and 29/1/2020.

Dates of hearing: 28th, 29th January and 3rd February, 2020.

JUDGMENT

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

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

3. My learned brother has held that Section 9(1) read with its "Explanation" specifies three conditions in which the Commission could exercise its jurisdiction under that Section, namely; (i) grave illegalities,

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

4. My next concern is as to the finding of my learned brother to the effect that the "Explanation" to Section 9(1) can render in some "special case" the entire election in the constituency void meaning thereby that fresh elections shall be held in the constituency, as opposed to declaring the poll(s) void resulting in recasting of the votes for the same contesting candidates afresh. In my humble understanding, the "Explanation" to section 9(1) serves the ordinary purpose that an Explanation is supposed to serve, i.e., to facilitate the proper understanding of a provision. The power of the Commission under section 9(1) is only to declare the poll at one or more polling stations or in the whole constituency void, which then leads to recasting of the votes for the same candidates. The grounds of declaring the polls to be void are: (i) grave illegalities, or (ii) violation of the provisions of the Act or the rules including "the implementation of an agreement restraining women from casting their votes." The Explanation simply adds a presumption in the context of the ground of "implementation of an agreement restraining women from casting their votes" and provides that if the turnout of women voters is less than ten percent of the total votes polled in a constituency, the Commission may presume that the women voters have been restrained through an agreement from casting their votes. In pith and substance, this is all what the Explanation explains. The word "election" used in the Explanation is though somewhat confusing, but in order to harmonize and balance the meaning and import of the "Explanation" and also to keep it within the fold of the main provision, the word "election" may be read to mean "poll"; as the meaning of an Explanation cannot generally go beyond the controlling main provision. The Explanation to section 9(1), in my understanding, does not attract any "special case," where the "election" instead of the "poll" in the whole constituency may be declared void. However, we are not faced with the interpretation of the word "election" in this case, therefore, it is best to leave it to be considered more elaborately in an appropriate case, where the facts of the case would so require.

MWA/M-52/SC Appeals/Petitions allowed.