

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

**MR. JUSTICE MUSHIR ALAM
MR. JUSTICE QAZI FAEZ ISA
MR. JUSTICE SAJJAD ALI SHAH**

CIVIL PETITION NO. 4682 OF 2017

(Against the judgment dated 02.11.2017 of the Lahore High Court, Lahore passed in Intra Court Appeal No. 1839 of 2015)

Ejaz Ahmed Sandhu and another.

... *Petitioners*

VERSUS

*Election Commission of Pakistan through
Chief Election, Commissioner, Islamabad and others.*

... *Respondents*

For the Petitioners : Sh. Zamir Hussain, ASC.
Syed Rifaqat Hussain Shah, AOR (**absent**).

For the Respondents : Not represented.

Date of Hearing : 31.05.2018.

J U D G M E N T

QAZI FAEZ ISA, J. The petitioners had contested the local government elections from Union Council No. 91, Takhatpur, District Sialkot, which were held on December 5, 2015. After the poll had closed the Presiding Officer of Polling Station No. 5 *Uncha Paharang* was taking the ballot papers that had been cast to the Returning Officer when he was set upon by armed men and the ballot papers were taken away from him at gunpoint. The Presiding Officer reported the matter to the police and FIR No. 449 of 2015 of the crime was lodged on the same day. The incident was reported to the Election Commission of Pakistan ("**Election Commission**") and the Election Commission on December 10, 2015

issued a notification ordering re-poll in respect of certain polling stations, which included the polling station in respect of which the FIR was lodged ("**the said notification**"). The said notification is attached with this petition (annexure-F, at page 67) but the attachment referred to therein - "constituencies/polling stations attached" in respect whereof the re-poll was ordered has not been attached. As per the said notification polling at the said polling station was to take place on December 17, 2015 however before polling could take place the petitioners assailed the said notification in the Lahore High Court, Lahore by filing a petition (Writ Petition No. 38790 of 2015) under Article 199 of the Constitution of the Islamic Republic of Pakistan ("**the Constitution**"). The learned Judge of the High Court dismissed the petition on December 21, 2015 and observed that the Election Commission should implement the said notification and, "*proceed to fix a poll date for the constituency/polling station in question*" since the polling date mentioned in the said notification had gone by. This order of the High Court was assailed by the petitioners by filing an Intra Court Appeal ("**ICA**") No. 1839 of 2015, which was dismissed on November 2, 2017 by the learned members of a Division Bench of the High Court and the order of the learned Judge of the High Court was maintained.

2. In response to our query the learned counsel for the petitioners states that polling as ordered has still not taken place, the reason for which he states is because this petition is pending adjudication. We are surprised to learn that the said re-poll has still not taken place, particularly when no notice has been issued to the respondents, let alone passing an interim order suspending the impugned judgments and the said notification.

3. The learned counsel submits that, there is no specific provision in the law which enables a re-poll to be ordered by the Election Commission; no notice was given by the Election Commission to the petitioners before it issued the said notification; no case for re-poll was made out; and the results formulated by the Presiding Officer could be used for tabulating the votes that had been polled.

4. We shall first examine the legal objection taken by the learned counsel that the Election Commission did not have power to order re-poll. This Court in a recent judgment (announced on May 8, 2018) in the case of Malik Ameer Haider Sangha v Mrs. Sumaira Malik (CP No. 3122/2017) had examined the constitutional provisions governing the Commission and its duties, and we reproduce the relevant portions from it hereunder:

“10. Article 222 of the Constitution enables the concerned legislature to make laws in respect of election matters, however, this Article concludes by stipulating that, *“no law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission.”* Therefore, we need to examine the powers of the Election Commission. The Election Commission is required to hold local government elections (Articles 140A and 219(d) of the Constitution) and to organize and conduct them by making *“such arrangements as are necessary to ensure that elections are conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against”* (Article 218(3) of the Constitution). The powers of the Election Commission which are mentioned in the Constitution neither stipulate nor require nor are dependant on the legislature granting, amongst others, specific powers to the Election Commission to order a re-poll.” (from paragraph 10)

After setting out the constitutional provisions regarding the Election Commission the aforesaid judgment considered the powers of the Election Commission, as under:

"It would be wrong to assume that despite the directives contained in Article 218(3) of the Constitution the Election Commission is helpless or that it can elect not to implement the constitutional mandate. The Act requires the Election Commission to "*conduct the local government elections*" (section 19), without placing any fetters on the powers of the Election Commission to do so. Rule 78 of the Rules elaborates on the general power of the Election Commission, as under:

78. Powers of Election Commission.

Save as otherwise provided, the Commission may:

(a) stop the polls at any stage of the election if it is convinced that it shall not be able to ensure the conduct of the election justly, fairly and in accordance with law due to large scale malpractices, including coercion, intimidation and pressures, prevailing at the election;

(b) review an order passed by an officer under the Act or the rules, including rejection of a ballot paper; and

(c) issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly, and in accordance with the provisions of the Act and the rules."

The above mentioned rule 78 (which mentions the powers of the Election Commission), is drawn up in wide terms and there is no reason for us to exclude therefrom order of a re-poll if elections are not held in accordance with law, mandating secrecy, fairness, justness and/or which are not free from large scale malpractices." (from paragraph 12)

5. In this case before the results were announced and the requisite notification declaring the winners had been issued by the Election Commission it had issued the said notification. The Presiding Officer, who is an official designated by the Election Commission to perform duties in connection with elections, was set upon and the ballot papers

of a polling station were taken from him at gunpoint, which undoubtedly is a very serious matter and one which had affected the sanctity of the elections. The Presiding Officer had himself lodged the FIR. Therefore, to reestablish the sanctity of the ballot and the credibility of the elections the Election Commission ordered a re-poll of the voters registered at the said polling station the ballot papers of which were stolen. The Election Commission exercised its discretion to order re-poll, which was justifiable in the facts and circumstances of the case. The Election Commission is a constitutional body and unless it is shown that the jurisdiction and discretion exercised by it is illegal, *mala fide*, manifestly arbitrary or unjustifiable its working and decisions should not be interfered with. The Election Commission had ordered a re-poll in respect of a polling station because the Presiding Officer was robbed of the ballot papers cast at the polling station. The Election Commission exercised its discretion to order re-poll at such polling station, and the exercise of its discretion cannot be termed illegal, *mala fide*, manifestly arbitrary or unjustifiable. As regards the contention of the learned counsel for the petitioner, that no prior notice was issued to the petitioners before the issuance of the said notification, this was not necessary because admittedly a crime with regard to the theft of ballot papers had been committed which was reported to the police by the Presiding Officer, who was acting as an official of the Election Commission, and a case in this regard was registered. Moreover, the decision of the Election Commission, which is in the form of the said notification, can not be categorized as one adverse to the interest of the petitioners necessitating prior notice to them. The Election Commission acted to ensure that none of the candidates got any undue benefit nor were deprived of the votes

cast in their favour and ordered re-poll in respect of the said polling station which was a corrective measure, and one which was also fair.

6. The petition filed by the petitioners in the High Court could have also been dismissed on the ground that the Election Commission in issuing the said notification had not acted illegally or in a *mala fide* manner. However, the learned Judge examined the merits of the case as well, and also determined that, "*the law does not provide for taking into account the unofficial result prepared by the presiding officer for the purposes of consolidating the final result.*" The learned members of the Division Bench of the High Court had also examined the merits of the case though they could have dismissed the ICA on the ground that it was not maintainable in terms of section 3 of the Law Reforms Ordinance, 1972 as the matter was first considered by the Election Commission and then by the High Court exercising jurisdiction under Article 199 of the Constitution, however, this petition is not being dismissed on this ground because this point was not considered in the impugned judgment in the ICA. The learned members of the Division Bench considered the scope of the referred to unofficial results and held, that "*the votes of said polling station cannot be verified or counted in the event of a challenge by any of the parties.*"

7. The foundation of representative democracy rests on a credible electoral process which in this case had been undermined and the Election Commission proceeded to restore it. In respect of the polling station the record of which was snatched / stolen from the Presiding Officer the Election Commission ordered re-poll, which was an eminently fair decision but nonetheless it was unnecessarily and repeatedly

challenged by the petitioners, resulting in the non-implementation of the order of the Election Commission for about two and a half years.

8. No ground for leave to appeal has been made out, therefore, this petition is dismissed. In case the re-poll, as ordered by the Election Commission, has not already taken place the Election Commission should make arrangements to do so in terms of the order of the learned Judge, that is, "*proceed to fix a poll date for the constituency/polling station in question*". The office is directed to send a copy of this judgment to the Election Commission for information and compliance.

JUDGE

JUDGE

JUDGE

Bench-II
Islamabad:
31.05.2018

Approved for Reporting
(M. Tauseef)