

SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench-I:

Mr. Justice Umar Ata Bandial, CJ
Mr. Justice Syed Mansoor Ali Shah
Mrs. Justice Ayesha A. Malik

Civil Appeal No.142 of 2019

*(Against the order (notification) dated 18.01.2019,
of the Election Commission of Pakistan)*

Civil Petition No.1369 of 2019

*(Against the order of the Islamabad High Court,
dated 15.02.2019, passed in W.P. No.312/2019)*

Zulfiqar Ali Bhatti

..... **Appellant**

Versus

Election Commission of Pakistan and others

..... **Respondents**

For the appellant: Mr. Shahzad Shaukat, ASC.

For respondent No.1:
(Election Commission) Mr. Muhammad Arshad, DG Law.

For respondent No.6:
(Amir Sultan Cheema) Mian Abdul Rauf, ASC.
Mr. Mubeen-ud-Din Qazi, ASC.

Date of hearing: 02.11.2022

JUDGMENT

Syed Mansoor Ali Shah, J.- The question before us, in the present case, is whether the Election Commission of Pakistan has the power to order a re-poll in one or more polling stations or in the whole constituency, under Article 218(3) of the Constitution of the Islamic Republic of Pakistan 1973 read with Section 8(c) or Section 9(1) of the Elections Act 2017, on the ground of tampering made with the election record (polling bags, ballot papers, etc.) after the consolidation of the final result of the poll by the Returning Officer under Section 95 and the publication of the name of the returned candidate in the official gazette under Section 98 of the Elections Act 2017.

2. The background facts of the case in which the said question has arisen for our consideration are that Mr. Zulfiqar Ali Bhatti ("**appellant**") and Mr. Amir Sultan Cheema ("**respondent**"), along with several other candidates, contested the general election of 2018 for the membership of the National Assembly of Pakistan from the constituency

of NA 91 Sargodha-IV. In the poll held on 25-07-2018, the appellant secured 1,10,654 votes and the respondent 1,10,567 votes. The respondent made an application, on 27.07.2018, to the Returning Officer for recounting the votes, under Section 95(5) of the Elections Act 2017 (**"Elections Act"**). The Returning Officer dismissed the application on 29.07.2018 and consolidated the final result of the poll on that day. On 30.07.2018, the respondent filed a petition before the Election Commission of Pakistan (**"Election Commission"**) for setting aside the order of the Returning Officer and accepting his application for recounting the votes. The Election Commission, by its order dated 31.07.2018, disposed of the respondent's petition while directing him to approach the appropriate forum (Election Tribunal) through an election petition, for the redressal of his grievance. The respondent, however, challenged the orders of the Returning Officer and the Election Commission in the Lahore High Court through a writ petition. The High Court allowed the writ petition on 03.08.2018, set aside the order of the Returning Officer and directed the Returning Officer to undertake the recount of the votes in the polling stations to be indicated by the respondent. The appellant challenged the order of the High Court in this Court through a petition for leave to appeal. This Court, vide its order dated 10.08.2018, granted the leave, suspended the operation of the impugned order and directed the Election Commission to issue the notification of the appellant as a returned candidate, which was issued on the same day. Given the issuance of the said notification, the respondent filed the election petition before the Election Tribunal, on 19.09.2018. However, during the pendency of the election petition, this Court disposed of the appeal of the appellant vide a consent order dated 10.10.2018, directing the Returning Officer to recount the votes of the whole constituency and submit a report of the recount to the Election Commission.

3. In the course of the proceedings of the recount, the Returning Officer found that the election record (seals of gunny bags and polling bags, and stamps on ballot papers) of 20 polling stations had been tampered with, after the consolidation of the final result of the poll. He, therefore, declined to consolidate the result of the recount and reported the matter to the Election Commission vide his report dated 30.11.2018. He also advised the respondent to approach the Election Tribunal where his election petition was then *sub judice*. On the report of the Returning

Officer, the Election Commission constituted a Technical Inquiry Committee on 10.12.2018, to carry out the requisite "Fact Finding Inquiry". The Inquiry Committee, in its report dated 09.01.2019, endorsed the fact reported by the Returning Officer regarding tampering with the election record. On the basis of the report of the Inquiry Committee, the Election Commission made an order on 14.01.2019, which was notified on 18.01.2019 ("**impugned order**"), under Article 218(3) of the Constitution of the Islamic Republic of Pakistan 1973 ("**Constitution**") read with Section 8(c) of the Elections Act,¹ to hold a re-poll in the 20 polling stations of which record had been tampered with.

4. In view of the order of the Election Commission for holding a re-poll in 20 polling stations, the respondent withdrew his election petition on 25.01.2019, while the appellant challenged this order of the Election Commission in the Islamabad High Court through a writ petition filed under Article 199 of the Constitution as well as in this Court through the present appeal filed under Section 9(5) of the Elections Act, by way of abundant caution due to ambiguity in ascertaining the appropriate remedy. The Islamabad High Court dismissed the writ petition of the appellant, vide its order dated 15.02.2019, on the ground that the appellant had availed the alternate statutory remedy of appeal before this Court, and observed that the appellant may re-agitate the matter in writ jurisdiction if his appeal filed in this Court under Section 9(5) of the Elections Act is dismissed on the ground of maintainability. The appellant filed the petition for leave to appeal against that order of the Islamabad High Court also, in this Court. Both the appeal and the petition for leave to appeal of the appellant are being decided by this judgment.

5. It would be pertinent to mention here that in pursuance of the impugned order of the Election Commission, the re-poll in 20 polling stations was held on 02.02.2019 and after consolidating the result of this re-poll in 20 polling stations with the result of the first poll in other polling stations, the respondent was notified as a returned candidate on 19.02.2019. The durability of this superstructure built upon the impugned order is, however, dependent upon the validity of that order.

¹ These provisions have not been mentioned in the order dated 14.01.2018 and the notification dated 18.01.2018. The Election Commission has referred to these provisions in its concise statements (CMA No.1727/2019 and CMA No.2577/2022) filed in the present appeal.

6. We have considered the arguments of the learned counsel for the parties, read the case law cited by them and examined the record of the case.

Scope of the powers of the Election Commission under Article 218(3) of the Constitution and Section 8(c) of the Elections Act

7. As the Election Commission and the respondent have mainly referred to the provisions of Article 218(3) of the Constitution and Section 8(c) of the Elections Act, to establish that the Election Commission had the power to make the impugned order, it would be appropriate to reproduce the provisions thereof here for ease of reference, before embarking the discussion on the question under consideration with reference to these provisions:

Article 218. Election Commission.

(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.

Section 8. Power of Commission to ensure fair election.

Save as otherwise provided, the Commission may—

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

A bare reading of Section 8(c) of the Elections Act shows that it merely reiterates the power that is vested in the Election Commission under Article 218(3) of the Constitution by substituting the words “make such arrangements” with the words “issue such instructions, exercise such powers and make such consequential orders” that are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law. This reiteration of the power of the Election Commission by a sub-constitutional law is of little legal significance, in view of the conferment of that power already by the supreme law of the land – the Constitution. Therefore, we basically need to understand the scope of the constitutional provision.

8. Article 218(3) of the Constitution entrusts the Election Commission with the duty “to organize and conduct the election”, and empowers it, in general terms, “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”.² The power so conferred is restricted to the fulfillment of the

² Workers' Party v. Federation PLD 2012 SC 681. Paras 40 & 41

duty specified, that is, "to organize and conduct the election".³ Therefore, in order to understand the amplitude of this power, we need to find out the meaning of the term "election" as used in Article 218(3) and to ascertain when the duty of the Election Commission to "conduct the election", as entrusted to it under this Article, starts and when it stands completed. Secondly, it also requires determination whether the duty of the Election Commission to conduct the election and the power to make the necessary arrangements therefor can be regulated by a law enacted by the Parliament; if so, what would be the status of the general power of the Election Commission under Article 218(3) of the Constitution *vis-à-vis* such law.

9. So far as the first question is concerned, the meaning of the term "election" and of the expression "conduct the election" as used in Articles 218 and 225 of the Constitution has already been expounded by a four-member Bench of this Court in *Javaid Hashmi case*⁴. The words "election" and "conduct the election", as expounded in that case as well as in the other cases approvingly cited therein, have been used in Articles 218 and 225 of the Constitution in a wide sense to connote the entire election process consisting of several steps starting with the issuance of the election programme and culminating with the declaration of the returned candidate, which include filing of the nomination papers, scrutiny of the nomination papers, withdrawal of the candidates, holding the poll, counting of the votes, consolidation of the result and declaration of the returned candidates, etc. In this wide sense, the process of conducting the election starts with the issuance of the election programme and stands completed on the publication of the names of the returned candidates in the official gazette.⁵

10. On the second question about regulating the constitutional duty and power of the Election Commission as to conducting the election, by a law enacted by the Parliament, we could not lay our hands on any judgment of this Court that has specifically taken up and dealt with this question. It, therefore, requires us to make a thorough examination of the operational scheme of the constitutional provisions contained in Part VIII of the Constitution on the subject of "Elections", as we can correctly understand the meaning and scope of a particular

³ Ibid.

⁴ Election Commission v. Javaid Hashmi PLD 1989 SC 396.

⁵ See Sections 5(4), 57 and 98 of the Elections Act.

provision on the subject of "Elections" only when we read this Part of the Constitution as an integrated whole.

11. Part VIII of the Constitution is divided into two Chapters and contains fifteen Articles (213-226). Chapter I, comprised of Articles 213 to 221, mainly contains the provisions on the matters of the constitution of the Election Commission, the appointment of the Chief Election Commissioner and four members of the Election Commission, the term of their office, the procedure for their removal from office, the appointment of the officers and staff of the Commission, and duties of the Election Commission. While the core matters relating to the subject of "Election" that have been provided for in Chapter II (Articles 222 to 226) are the enactment of electoral laws by the Parliament, the time of general election and bye-election, the appointment of the care-taker Cabinet, and the establishment of special tribunals for resolution of election disputes by law enacted by the Parliament.

12. 'Broadly speaking, before an election machinery can be brought into operation, there are three requisites', as said by Justice Fazal Ali, 'which require to be attended to, namely, (1) there should be a set of laws and rules making provisions with respect to all matters relating to, or in connection with, elections, and it should be decided as to how these laws and rules are to be made; (2) there should be an executive charged with the duty of securing the due conduct of elections; and (3) there should be a judicial tribunal to deal with disputes arising out of or in connection with elections.'⁶ On reading the provisions of Part VIII of the Constitution, we can say that, in general, Article 222 of the Constitution deals with the first of these requisites, Articles 218 and 219 with the second, and Article 225 with the third requisite.

13. The most relevant provision of Article 222, in our view, to the question being considered is that of clause (d) thereof, which is reproduced here for ready reference:

222. Electoral laws.

Subject to the Constitution, Majlis-e-Shoora (Parliament) may by law provide for:

- (a)
- (b)
- (c)
- (d) the conduct of elections and election petitions; the decision of doubts and disputes arising in connection with elections;
- (e)
- (f)

⁶ Ponnuswami v. Returning Officer AIR 1952 SC 64.

but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part.

The reading of clause (d) of Article 222 of the Constitution makes it clear that the Parliament can enact a law that regulates the conduct of elections and such law would consequentially also regulate the constitutional duty and power of the Election Commission to conduct the election. The confusion as to the scope of the general power of the Election Commission under Article 218(3) is, however, caused by the latter part of Article 222 which says that "no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part". Although Article 218, as well as Article 219 of the Constitution which list out the functions of the Election Commission, uses the term "duty" for the Election Commission in relation to the conduct of the election, and the word "powers" or "power" has at no other place been expressly used in Part VIII of the Constitution for the Election Commission, we find no difficulty in construing that the "powers" referred to in Article 222 are those "duties" and "functions" the performance of which has specifically been entrusted to the Election Commission under this Part of the Constitution. For, in legal parlance, the words "power", "duty" and "function" are often used interchangeably, and the use of any one of these words is ordinarily understood to include the others, such as the word "function" is said to include "power" and "duty"⁷. The latter part of Article 222, therefore, operates against the taking away or abridging any of the "duties" and "functions" of the Election Commission that has been entrusted to the Election Commission under Part VIII of the Constitution. The Parliament cannot, by enacting a law, confer any of such duties and functions of the Election Commission to any other executive or judicial authority or office,⁸ either entirely or partly. This is what, in our view, is meant by the latter part of Article 222.

14. So far as the general power of the Election Commission under Article 218(3) is concerned, the expression "and in accordance with law" used in that very Article clearly suggests that it is to be exercised to ensure that the election is conducted in accordance with the law enacted by the Parliament, and not in suppression thereof. The Election Commission, thus, cannot exercise its general power in a

⁷ *Nazar Hussain v. State* PLD 2010 SC 1021; *Gadoon Textile v. WAPDA* 1997 SCMR 641 per Fazal Karim J.; *Al-Jehad Trust v. Federation* PLD 1997 SC 84 per Ajmal Mian J.

⁸ *Province of Sindh v. M.Q.M.* PLD 2014 SC 531; *Election Commission v. Province of Punjab* PLD 2014 SC 668.

manner that would make the conduct of election otherwise than in accordance with the law enacted by the Parliament, that is, in violation or breach of such law. Therefore, a law enacted by the Parliament that regulates the conduct of elections and consequentially the constitutional duty and power of the Election Commission to conduct the election, is not hit by the provisions of the latter part of Article 222 of the Constitution; as the requirement for the Election Commission to conduct the election "in accordance with law" while performing its constitutional duty has been prescribed by the Constitution itself, not by a law enacted by the Parliament.

15. However, where the law enacted by the Parliament does not cover an unforeseen matter or issue that may arise during the election process, the Election Commission is to exercise its general power under Article 218(3) of the Constitution, in the same manner as all other discretionary powers are exercised, that is, fairly, reasonably and judiciously in accordance with the principles of equity, justice and good conscience. While exercising its general power in such a situation, the Election Commission must remember the fundamental principle that the general, plenary and inherent powers are exercised to supplement, not supplant or supersede, the law. Such powers cannot be exercised to defeat the express provisions of law but are invoked only when there is no specific provision of law on the matter or issue that needs to be dealt with.⁹

16. Accepting the contention that the Election Commission has such general and inherent power under Article 218(3) of the Constitution which is absolute or superior to the law enacted by the Parliament, would be tantamount to going against the constitutional mandate of the rule of law ensured under Article 4 of the Constitution. Article 4 of the Constitution declares it firmly that to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan. Given this constitutional mandate, in the matter of elections, the right of the citizens to vote¹⁰ and contest elections¹¹ cannot be entirely left to be dealt with at the discretion of the Election Commission

⁹ M/s Conforce v. Syed Ali PLD 1977 SC 599; Roazi Khan v. Nasir 1997 SCMR 1849; Muhammad Sadiq v. Bashiran PLD 2000 SC 820.

¹⁰ Province of Sindh v. M.Q.M. PLD 2014 SC 531 - Right to vote was held to be guaranteed by Article 17(2) of the Constitution.

¹¹ Javed Jabbar v. Federation PLD 2003 SC 955 - Right to contest elections was held to be guaranteed by Article 17(2) of the Constitution.

under its general and inherent power by construing such power to be above the law enacted by the Parliament.

17. Article 4 of the Constitution is the bedrock of the rule of law, and an antithesis to the rule of men, in our country. It is a restraint on the executive and judicial organs of the State to abide by the rule of law.¹² No person, authority, tribunal or court exercising executive or judicial powers can take any action against any person in contravention of the law. This principle equally applies to this Court in exercising its general and inherent power under Article 187(1) of the Constitution. Under this Article, the Court can issue any direction, order or decree to do complete justice between the parties in any case or matter pending before it, but cannot pass an order in contravention of any of the fundamental rights or any constitutional provision or any relevant statutory law.¹³

18. Thus, we can safely conclude on the question of the status of the general power of the Election Commission under Article 218(3) of the Constitution *vis-à-vis* a law enacted by the Parliament, that this power operates in the area uncovered by such law.¹⁴ Alike is the scope and applicability of the powers of the Election Commission under Section 8(c) of the Elections Act, which is also evident from the opening words of Section 8, "Save as otherwise provided". These words indicate that if something otherwise is provided in the Elections Act, then this Section will not apply.¹⁵ Further, the amplitude of the power of the Election Commission under this Section, like its general power under Article 218(3), is extended to the performance of its executive duty to "conduct the election" and thus it can be exercised only at any stage of the election process,¹⁶ not after the completion thereof.

19. In other words, we can say, the general power under Article 218(3) of the Constitution and Section 8(c) of the Elections Act can be exercised by the Election Commission within two parameters: (i) during the election process, which starts with the issuance of the election programme and culminates with the publication of the name of the

¹² Federation v. Nawaz Sharif PLD 2009 SC 644.

¹³ Dossani Travels v. Travels Shop PLD 2014 SC 1; Prem Chand v. Excise Commissioner AIR 1963 SC 996.

¹⁴ We are fortified in our view by the opinion of Justice Krishna Iyer expressed in Mohinder Singh v. Chief Election Commissioner AIR 1978 SC 851 while construing Article 324(1) of the Indian Constitution, which contains provisions similar, in substance, to that of Article 218(3) of our Constitution as to the entrustment of duty of conducting the elections to the Election Commission. His view was later-on reiterated and followed in A.C. Jose v. Sivan Pillai AIR 1984 SC 921, Kanhiya Lal v. R.K. Trivedi AIR 1986 SC 111 and Special Reference No.1 of 2002 AIR 2003 SC 87.

¹⁵ Bartha Ram v. Lala Mehar 1995 SCMR 684.

¹⁶ Ibid.

returned candidates in the official gazette, and (ii) when there is no express provision in the law enacted by the Parliament to deal with the matter or issue that arises during the performance of constitutional duty of conducting the elections honestly, justly, fairly and in accordance with law.¹⁷

Applicability of Article 218(3) of the Constitution and Section 8(c) of the Elections Act to the present case

20. In the present case, the Election Commission passed the impugned order after the consolidation of the final result of the poll by the Returning Officer under Section 95 and the publication of the name of the appellant as a returned candidate in the official gazette under Section 98 of the Elections Act, when the election process has been completed. But as the notification of the appellant as a returned candidate had been issued under the interim order of this Court, the same could not have concluded the election process to create a bar on the exercise of its general power by the Election Commission under Article 218(3) of the Constitution read with Section 8(c) of the Elections Act. The objection that the Election Commission exercised its power in the present case after the completion of the election process is, therefore, not sustainable.

21. The second limitation on the exercise of its general power by the Election Commission under Article 218(3) of the Constitution read with Section 8(c) of the Elections Act is, however, found attracted. The matter of directing a re-poll or a fresh poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act. There are three provisions in the Elections Act that deal with this matter in relation to the duty and power of the Election Commission to "conduct the election", which are Sections 9, 88 and 121 of the Elections Act.¹⁸ As the matter of directing a re-poll by the Election Commission in the process of conducting the election has expressly been dealt with in the Elections Act, the Election Commission was not justified to invoke and exercise its general power under Article 218(3) read with Section 8(c) of the Elections Act in the present matter.

¹⁷ See Muhammad Salman v. Naveed Anjum 2021 SCMR 1675 (Majority opinion) paras 25 and 42, wherein it was held that in view of the express provisions of Articles 63 and 63A in the Constitution as to the power of the Election Commission on the matter of disqualification as well as in view of the legal framework provided in the Elections Act on this matter, the general or inherent power of the Election Commission under Article 218(3) of the Constitution cannot be exercised on the matter of qualification or disqualification of a returned candidate.

¹⁸ We are not concerned with the powers of the Election Tribunal in this regard and have therefore not referred to them here.

22. However, we are cognizant of the well-settled legal position that the mentioning of a wrong or inapplicable provision of law or non-mentioning of the applicable provision of law while exercising a jurisdiction or a power which is otherwise vested in a court, tribunal or authority, does not by itself have fatal consequences.¹⁹ Therefore, we proceed to examine whether the impugned order could have been passed by the Election Commission under Section 9 or 88 of the Elections Act and can be sustained under any of these provisions of the law.²⁰

Scope of Section 88 of the Elections Act and its applicability to the present case

23. We shall discuss the scope and applicability of Section 9 later. First, we consider the provisions of Section 88, which are reproduced here for ease of reference:

88. Stopping of the poll.—(1) The Presiding Officer shall stop the poll and inform the Returning Officer that he has done so if—

(a) the poll at the polling station is, at any time, so interrupted or obstructed for reasons beyond the control of the Presiding Officer that it cannot be resumed during the polling hours fixed under section 70; and

(b) any ballot box used at the polling station is unlawfully taken out of the custody of the Presiding Officer, or is accidentally or intentionally destroyed, or is lost or is damaged or tampered with to such an extent that the result of the poll at the polling station cannot be ascertained.

(2) Where a poll has been stopped under sub-section (1), the Returning Officer shall immediately report the circumstances to the Commission and the Commission shall direct a fresh poll at that polling station unless it is satisfied that the result of the election has been determined by the polling that has already taken place at that polling station, along with the result of the polling at other polling stations in the same constituency.

(3)

(4)

(Emphasis added)

A reading of Section 88 shows that the tampering with the ballot box referred to therein relates to the polling day, not thereafter. Secondly, the power of the Election Commission to direct a fresh poll at the relevant polling station is not to be exercised if the Election Commission is satisfied that the result of the election has been determined by the polling that has already taken place at that polling station (before stopping the poll by the Presiding Officer), along with the result of the polling at other polling stations in the same constituency.

¹⁹ Naseer Ahmed v. Returning Officer 2022 SCP 313 (citation on the official website of this Court); OIas Khan v. NAB PLD 2018 SC 40; Saadat Khan v. State 2018 SCMR 387; Commissioner of Income Tax v. Abdul Ghani PLD 2007 SC 308.

²⁰ Section 121 of the Elections Act relates to power of the Election Commission as to directing a fresh poll in the conducting of election to the Senate, which is not relevant for present matter.

24. In the present case, as per the report of the Returning Officer as well as the report of the Inquiry Committee constituted by the Election Commission, the tampering with the election record had taken place not on the polling day, rather it was made after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act. The impugned order passed by the Election Commission can, therefore, not sustain within the scope of the provisions of Section 88 of the Elections Act.

Scope of Section 9 of the Elections Act and its applicability to the present case

25. The scope of Section 9 of the Elections Act as well as that of its predecessor provision, that is, Section 103AA of the Representation of People Act 1976, has been a subject of detailed discussion by this Court in several cases. We would, therefore, refer to its scope here succinctly. Before doing that, we think, it would be appropriate to cite the relevant part of Section 9 here, for ease of reference:

9. Power of the Commission to declare a poll void.—(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 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.

Explanation.....

(2)

(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.

(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.

(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.

The opening expression used in Section 9(1), "Notwithstanding anything contained in this Act", shows that the jurisdiction of the Election Commission under this Section has an overriding effect against any other provision of the Elections Act. Thus, the Election Commission is competent to exercise its jurisdiction under this Section, notwithstanding

the availability of the remedy of the election petition under Section 139 read with Section 142 and the jurisdiction of the Election Tribunal to grant the same relief under Section 154(1)(b)(i) of the Elections Act. To the extent of the grounds specified in Section 9(1) upon which the Election Commission can exercise its power to order a re-poll, the jurisdiction of the Election Commission and the Election Tribunal is, therefore, concurrent.²¹ The Election Commission can exercise its jurisdiction under Section 9(1) of the Elections Act, to order a re-poll if:

- i. There have been grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder;
- ii. Such illegalities or violations are evident from facts apparent on the face of the record; and
- iii. Such illegalities or violations have materially affected the result of the poll at one or more polling stations or in the whole constituency.

Although the ground of grave illegalities or violations of the provisions of the Elections Act or the Rules made thereunder in the election process is common for the exercise of their respective jurisdictions by the Election Commission and the Election Tribunal, the difference lies in the nature of proof of those illegalities and violations, and in the scope of enquiry.

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 Elections 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 Elections Act does not require a full-fledged trial and recording of *pro and contra* evidence of the contesting parties,²² which can only be undertaken by the Election Tribunal.²³

27. We are aware of the power of the Election Commission, under Section 9(1) of the Elections 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

²¹ Aftab Mirani v. Muhammad Ibrahim PLD 2008 SC 779.

²² Salahuddin Tirmizi v. Election Commission PLD 2008 SC 735.

²³ The similar view of a Full Bench of the Election Commission, comprising of Justices Naimuddin, Riaz Ahmad and Bashir Jehangiri, expressed in Khurshid Kasuri v. Returning Officer 1994 CLC 296 on the provisions of Section 103AA of the ROPA 1976 (predecessor provisions of Section 9 of the Elections Act) is approved.

Commission the facts apparent on the face of the record must *prima facie* indicate the commission of some grave illegality or violation of the Elections Act or the Rules made thereunder, during the election process.²⁴ 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 Elections 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),²⁵ 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 Elections 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 Elections 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 Elections Act or the Rules made thereunder,²⁶ 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 Elections 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

²⁴ Ibid.

²⁵ The word “summary” was mentioned in the predecessor provision of Section 9(1), that is Section 103AA of the ROPA 1976.

²⁶ Aftab Mirani v. Muhammad Ibrahim PLD 2008 SC 779.

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.²⁷ 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 Elections 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 Elections Act and cannot be a subject of enquiry by the Election Commission to exercise jurisdiction under this Section.

30. Needless to mention that any fact-finding enquiry or departmental regular enquiry may be got conducted by the Election Commission, in the matter of any illegality or violation committed after the consolidation of the final result to take appropriate administrative or criminal action against the delinquent election officials, but not for an action under Section 9(1) of the Elections Act.

31. In the present case, the bar of exercising the powers by the Election Commission before the expiration of sixty days after publication of the name of the appellant as a returned candidate under Section 98 of the Elections Act, was not attracted as the said publication had been made under an interim order of this Court. However, as the illegality of tampering with the election record had been committed, in the present case, after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act, the Elections Commission could not have invoked and exercised its power under Section 9(1) of the Elections Act; for such illegality had not affected the result of the poll already consolidated by the Returning Officer under Section 95 of the Elections Act. Further, the fact that who, the appellant or the respondent, was responsible for the tampering made with the election record after the consolidation of the final result of the poll, could not have been decided, nor has it been decided, by the Election Commission within the scope of summary enquiry under Section 9(1) of the Elections Act. This fact could only have been decided by the Election Tribunal in a full-fledged trial. Without deciding that fact, ordering a re-poll in 20 polling stations is tantamount to punishing the appellant

²⁷ See *Muhammad Salman v. Naveed Anjum* 2021 SCMR 1675 (Majority opinion) para 41.

without determining his fault, and awarding the suspected culprit, if he were the respondent.²⁸ In such an uncertain situation, the Election Commission should not have vitiated the official acts of the election officials, which were the counting of votes and the consolidation of the final result of the poll, as they had a presumption of regular performance as per Article 129(e) of the *Qanun-e-Shahadat* 1984. The impugned order is, therefore, not sustainable under Section 9(1) of the Elections Act.

Conclusion

32. For all that has been discussed and said above, we conclude that the Election Commission had no power to order a re-poll in the 20 polling stations, under Article 218(3) of the Constitution read with Section 8(c) or Section 9(1) of the Elections Act, on the ground of tampering made with the election record after the consolidation of the final result of the poll by the Returning Officer under Section 95 of the Elections Act. The impugned order of the Election Commission is not sustainable and is liable to be set aside by this Court in the exercise of its appellate jurisdiction under Section 9(5) of the Elections Act. Needless to restate the well-settled principle that if a court, tribunal or authority not having jurisdiction wrongly assumes and exercises such a jurisdiction and makes an order without jurisdiction, an appeal lies from that order in the same manner as an appeal lies from an order with jurisdiction.²⁹ The appeal of the appellant is, therefore, allowed and the impugned order is set aside. Consequentially, the superstructure built upon the impugned order also crumbles and falls down. The re-poll held in pursuance of the impugned order and the subsequent notification of the respondent as a returned candidate are quashed. The respondent shall be de-notified, while the appellant re-notified, as a returned candidate.

33. The Islamabad High Court rightly dismissed the writ petition of the appellant, on the ground of the availability of the adequate statutory remedy of appeal before this Court. The petition for leave to appeal of the appellant filed against the order of the Islamabad High Court is meritless and is therefore dismissed; it was mistakenly

²⁸ *Behram Khan v. Abdul Hameed* PLD 1990 SC 352; *Ejaz Shafi v. Ashraf Shah* 1996 SCMR; *Jam Madad Ali v. Asghar Ali Junejo* 2016 SCMR 251.

²⁹ *Muhammad Ashfaq v. State* PLD 1973 SC 368; *Sabir Shah v. Shad Muhammad* PLD 1995 SC 66 per Fazal Karim J.; *MEPCO v. Muhammad Ashiq* PLD 2006 SC 328. See also *Naseer Ahmed v. Returning Officer* 2022 SCP 313 (citation on the official website of this Court)

mentioned as allowed in the short order, which shall stand corrected accordingly.

Chief Justice

Judge

Islamabad,
02 November 2022.

Judge

Approved for reporting
Sadaqat