IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL, CJ
MR. JUSTICE MUHAMMAD ALI MAZHAR
MS. JUSTICE MUSARRAT HILALI

CIVIL PETITIONS NO.2270 & 2272 OF 2023
(On appeal from the judgment dated 31.05.2023 passed by the High Court of Balochistan, at Quetta in Constitution Petitions No.353 & 352/2023)

Jameel Qadir (In C.P. No.2270/2023)

Muhammad Asif Baloch (In C.P. No.2272/2023)

...Petitioners

VERSUS

Government of Balochistan, Local Government, Rural Development & Agrovilles Department, Quetta through its Secretary and others

...Respondents

For the Petitioners: Mr. Sajeel Shehryar Swati, ASC
Syed Rifaqat Hussain Shah, AOR
(In C.P. No.2270/2023)

Mr. Shah Khawar, ASC
(In C.P. No.2272/2023)

For the private Respondents: Mr. Kamran Murtaza, Sr. ASC
(respondents No.6 in both cases)

For the ECP: Mr. M. Arshad, DG (Law)
Mr. Falak Sher, Consultant
Mr. Said Ghafoor, Deputy Director

Date of Hearing: 27.07.2023

JUDGMENT

MUHAMMAD ALI MAZHAR, J:- These Civil Petitions for leave to appeal are directed against the judgments dated 31.05.2023 passed by the learned High Court of Balochistan at Quetta ("**High Court**") in Constitution Petition Nos. 352 & 353 of 2023, whereby the orders dated 09.02.2023 and 01.03.2023 passed by the Election Commission of Pakistan ("**ECP**") were set aside and the respondent No.6 in C.P.No.2270/2023, namely Inayatullah, and respondent No.6 in C.P.No.2272/2023, namely Abdul Rahim Kurd (collectively the "**private respondents**"), were declared returned candidates with the direction to the ECP to issue notifications for the returned candidates accordingly.

2. The transitory facts of the case are as under:

i) C.P. No.2270/2023 (C.P. No.353/2023 in High Court)

The Petitioner contested the elections for Deputy Chairman, Municipal Corporation, Khuzdar on 09.02.2023. The respondent No.6 (i.e. Inayatullah) was the opponent. During the process of counting the votes, the Returning Officer invalidated 24 ballots out of a total of 59 ballots for the reason that the mark of the voters had not been made in the actual place designated for the marking. Consequently, the petitioner was declared the returned candidate and his notification was issued on 30.03.2023. The respondent No.6 filed an application to the ECP. The ECP *vide* order dated 01.03.2023 dismissed the petition with the observation that the Election Tribunal had been appointed under the law which may be approached. The respondent No.6, instead of approaching the Election Tribunal, filed a Constitution Petition to challenge the order of the ECP before the High Court which was allowed and the respondent No.6 was declared the returned candidate by the High Court.

ii) C.P. No.2272/2023 (C.P. No.352/2023 in High Court)

The petitioner and respondent No. 6 (i.e. Abdul Rahim Kurd) contested the Local Bodies elections for the seat of Chairman, Municipal Corporation, Khuzdar. The elections were held on 09.02.2023 and the petitioner was declared the returned candidate. According to the votes counted, a total of 35 ballot papers were marked in favour of the respondent No.6, of which 21 votes were declared invalid and 14 votes were declared valid. Whereas a total of 24 ballot papers were marked in favour of the petitioner of which 5 were declared invalid ballot papers. Thereafter the respondent No.6 filed an application before the ECP which was dismissed with the observation that the respondent No.6 may approach the Election Tribunal. Feeling aggrieved, the respondent No. 6 filed a constitution petition in the High Court which was allowed and the respondent No.6 was declared the returned candidate by the High Court.

3. The learned counsel for the petitioners argued that the impugned Judgment of the High Court is contrary to law. The order of the ECP could not be challenged through the constitutional jurisdiction of the High Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") due to a statutory bar. It was further contended that according to Section 37 of the Balochistan Local Government Act, 2010 ("**2010 Act**"), election disputes can only be resolved by the Election Tribunal, which provision has been enacted keeping in mind the spirit of Article 225 of the Constitution. The learned counsel referred to the case of Election Commission of Pakistan thr. Secretary v. Javaid Hashmi and others (**PLD 1989 SC 396)** in which it was held that the jurisdiction of the High Court under Article 199 of the Constitution is barred in election matters. He further avowed that the Returning Officer acted completely within his power and without any *mala fide* intention. It was further contended that the learned High Court failed to consider that the questions related to the intent of voters, casting of vote and confusion, if any, are matters pertaining to disputed questions of fact which could only be settled by the Election Tribunal, but the High Court assumed the role of

Appellate Court in the writ jurisdiction instead. He further argued that the placement of marks on the invalidated ballots was not innocuous, but rather followed a particular identifiable pattern and the secrecy of the ballot was sacrosanct, therefore the observation of the High Court that voters have through affidavits appended with the petitions testified as to how they cast their votes is in violation of Article 226 of the Constitution and related provisions of the 2010 Act. It was further contended that the learned High Court deviated from the well-established principle of law that where the law requires doing something in a particular manner, it has to be done in the same manner.

4. The learned counsel for the private respondents argued that the confusion cropped up due to deformity of ballot papers, which were not printed according to Rule 63(3) of the Balochistan Local Government (Election) Rules, 2013 ("**2013 Rules**"), which explicitly postulates that the ballot paper should be printed according to Form-XXIV as appended with the 2013 Rules. The private respondents first approached the Provincial Election Commission, Balochistan against the decision of the Returning Officer, and thereafter approached the ECP, but no action was taken and the complaint was totally ignored with the advice to approach the Election Tribunal, hence the respondents filed their Constitution Petitions in the High Court for the redressal of their grievance and the learned High Court rightly took cognizance and declared the private respondents as returned candidates, with the direction to the ECP to issue notifications accordingly. He further argued that the matter in issue could be resolved by the High Court and there was no need to approach the Election Tribunal.

5. The Director General (Law) for the ECP supported the contention of the learned counsel for the petitioners and argued that after notifying the Election Tribunal for resolving election disputes, the learned High Court could not entertain the grievance of the private respondents under Article 199 of the Constitution; hence the constitution petitions were not maintainable.

6. Heard the arguments. The bone of contention is whether the learned High Court, after the constitution of the Election Tribunal, could decide the election dispute between the two contestants or deem either one the winner in exercise of jurisdiction conferred under Article 199

of the Constitution. According to Section 37 of the 2010 Act, no election under the Act shall be called in question, except by an election petition made by a candidate for the election, whereas Section 38 envisages that for the hearing of an election petition the ECP shall, by notification, appoint an officer to be an Election Tribunal for such areas as may be specified in the notification and, in line with Section 39, every election petition is to be tried in such manner as may be prescribed. The Election Tribunal, after the conclusion of the hearing, may pass an order under Section 41 of the 2010 Act, either (a) dismissing the petition; (b) declaring the election of the returned candidate to be void; (c) declaring the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected; or (d) declaring the election as a whole to be void. While sub-section (2) of Section 41 articulates that the decision of the Election Tribunal on an election petition shall be final and shall not be called into question in any court or before any other authority. If we look at the parallel and corresponding provision, that is Section 139 of the Elections Act 2017, it also provides that no election shall be called into question except by an election petition filed by a candidate for that election and under Section 140, the composition of the Election Tribunal is laid out for election to an Assembly or the Senate, or in the case of election to a local government.

7. It is worthwhile to mention that Chapter XII of the 2013 Rules also relates to election disputes. According to Rule 72, no election shall be called into question, except by an election petition made by a candidate for that election, while Rule 74 relates to the contents of the petition in which the petitioner is required to mention the full particulars of any corrupt or illegal practice, or other illegal acts alleged to have been committed, as well as the relief claimed by the petitioner for (a) the declaration that the election of the returned candidate is void, and that the petitioner or some other person has been duly elected, or (b) that the election as a whole is void. In Rule 78 a detailed procedure is provided which is to be followed by the Election Tribunal appointed to deal with and decide election petitions. It is further envisaged under Rule 80 that the Tribunal shall be deemed to be a Civil Court with all the powers of a Civil Court for the trial of suit under the Code of Civil Procedure, 1908, and the Qanoon-e-Shahadat Order 1984 is also made applicable for the trial of an election petition.

8. The private respondents approached the ECP with the prayer to declare them returned candidates, but the bottom line or end result of the orders passed by the ECP on the applications of the private respondents in both petitions which were impugned before the learned High Court was that the Election Tribunal has already been appointed, having powers to adjudicate upon the matter after framing of issues and recording of evidence, and if an election petition is filed the Election Tribunal may pass appropriate orders. The applications were dismissed by the ECP with the observation that if the private respondents so desire, they may approach the Election Tribunal to ventilate their grievances.

9. The learned High Court, before adverting to the question of jurisdiction, not only entertained the petitions but also declared the private respondents as returned candidates with directions to the ECP to notify them. The impugned judgment of the High Court manifests various fact finding appraisals and, while discussing the ballot paper, the learned High Court observed that the ballot paper was not printed in the prescribed manner and also made an attempt to decipher the intention of voters and relied upon the annexed affidavits of the respective voters which were not made subject to cross examination of the other side. The High Court further held that the Presiding Officer declared the votes invalid, which was neither the fault of the candidate, nor of the voter, but due to the mistake committed by the officials of the ECP.

10. The term '*jurisdiction*' in the legal parlance means the command conferred to the Courts by law and Constitution to adjudicate matters between the parties. The jurisdiction of every Court is delineated and established to adhere to and pass legal orders. Transgressing or overriding the boundary of its jurisdiction and authority annuls and invalidates the judgments and orders. In order to deal with the different species of litigation, some Courts and Tribunals are vested with exclusive jurisdiction for taking cognizance of matters which other Courts cannot take under the rigidity or stringency of exclusive jurisdiction to deal with and decide the *lis*. No Court has the right to decide any lawsuit which is beyond the purview of its jurisdiction and want of jurisdiction conveys an action beyond the domain earmarked to any particular Court or Tribunal which cannot be cured, even by consent or acquiescence of parties. It is the prime duty of the Court to decide the question of jurisdiction first in case of doubts raised

regarding jurisdiction, and in any such situation it is the responsibility of the Court to endeavor to resolve the issue of jurisdiction at an early stage of the proceedings. For instance, it is an inherent sense of duty of the Court under Section 3 of the Limitation Act, 1908 to examine the plaint to make sure that the suit is not time barred even though the question of limitation is not set up as a defence. The rationale behind this intrinsic mechanism of assessment at an early stage is to submerge and lay to rest a time barred case without proceeding further. In a similar method, in case of any doubt, the Court is duty-bound to decide the question of jurisdiction before commencing a full-fledged trial and, if the case is found to be beyond the jurisdiction of that Court, the parties may be directed to seek the appropriate remedy before the appropriate Court or forum, rather than proceeding the whole case and then deciding the issue of jurisdiction; and if the Appellate Court holds that the Court had no jurisdiction in the matter then the parties will have to start from scratch. In the case of M.S. Ahlawat v. State of Haryana & another, (AIR 2000 SC 168), the Court held that to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience. The jurisdiction cannot be conferred by consent, nor can it be fettered unless there is a choice between more than one place in terms of jurisdiction. If the order or judgment is suffering from the vice of *coram non judice* it may be quashed and set aside by the Court when a special statute gives a right and also provides a forum for the adjudication of rights.

11. The expression '*coram non judice*' means an act done by a court which has no jurisdiction [Ref: Secrest v. Galloway Co., 30 N.W. 2d 793, 797, 239 Iowa 168]. When the suit is brought in a court without jurisdiction it is said to be *coram non judice* and any judgment is null and void [Ref: Wharton's Law Lexicon, 1976 reprint, p 260; K. J. Aiyer's Judicial Dictionary, A Complete Law Lexicon, Thirteenth Edition, Thoroughly Revised by P.M. Bakshi]. When a court of general jurisdiction undertakes to grant a judgment in an action where it has not acquired jurisdiction of parties by voluntary appearance or service of process, the judgment is void and may be disregarded and it is '*coram non judice*' [Ref: City of Monroe v. Niven, 20 S.E. 2d 311, 312, 221 N.C. 362, Words and Phrases, Permanent Edition, Volume 9A].

12. Here we have also noted that the learned High Court neither determined the question of jurisdiction, nor rendered any findings as to why the aggrieved person was not bound by law to avail the remedy

provided before the Election Tribunal under Section 37 of the 2010 Act which also gives rise to the doctrine of '*per incuriam',* which is a Latin term meaning 'through lack of care'. The decision of a Court becomes *per incuriam* when it is rendered in ignorance of a statute or a rule having the force of statute [Ref: Rupert Cross & J.W. Harris, Precedent in English Law 149 (4th ed. 1991); Black's Law Dictionary (Ninth Edition)]. According to C.C.K. Allen in '*Law in the Making*' (Page No. 246), '*per incuriam*' means '*per ignorantiam*', that is, ignorance of a statute or of a rule having statutory effect which would have affected the decision if the Court had been aware of it. In the case of Huddersfield Police Authority v. Watson ((1947) 2 All E.R.193) it was held that where a case or statute had not been brought to the Court's attention and the Court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam* (Also see: Morelle Ltd. v Wakeling ([1955] 2 QB 379) & Young v. Bristol Aeroplane Co. Ltd. (1944 KB 718 at 729 = (1944) 2 All E.R. 293 at 300)).

13. The writ jurisdiction of the High Court cannot be worn out as a solitary way out or remedy for aerating all sufferings and deprivations. The doctrine of exhaustion of remedies stops a litigant from pursuing a remedy in a new court or jurisdiction until the remedy already provided under the law is exhausted. The underlying principle accentuated in this doctrine is that the litigant should not be encouraged to circumvent or bypass the provisions assimilated in the relevant statute. The extraordinary jurisdiction of the High Court under Article 199 of the Constitution cannot be reduced to an ordinary jurisdiction of the High Court. It is a well settled exposition of law that disputed questions of facts cannot be entertained and adjudicated in the writ jurisdiction. The expression "adequate remedy" signifies an effectual, accessible, advantageous and expeditious remedy.

14. The term *functus officio* literally denotes 'of no further official authority or legal effect' or 'having performed his office', and is used in the context of an officer who is no longer in office or has fulfilled its purpose. This doctrine has an extensive and pervasive application to both the judicial and quasi-judicial authorities and if such doctrine is considered insignificant, it will lead to disorder, therefore, this should be given credence to bring in decisiveness and certitude to legal proceedings. In the instant case, after notifying the returned candidates and appointment of Election Tribunals, the ECP being

sanguine and mindful to the provisions contained under Section 37 of the 2010 Act, directed the parties to approach the Election Tribunal where the election disputes could be resolved by the Election Tribunal after recording evidence as the ECP had otherwise become *functus officio* for entertaining and deciding any election dispute. If the learned High Court was of the view that the issue challenged before it was not an election dispute, then definite findings should have been recorded bearing in mind the bar contained under Section 37 of the 2010 Act and enabling provisions, but no findings were recorded with regard to jurisdiction.

15. *Vide* short order of even date, the aforesaid civil petitions were converted into appeals and allowed in the following terms:

> "For reasons to be recorded later, these petitions are converted into appeals and allowed and the impugned judgment is set aside. The matter is remanded back to the learned High Court for deciding in accordance with law the question of jurisdiction of the High Court in an election dispute after hearing the parties preferably within a period of one month of the receipt of certified copy of this order."

16. Above are the reasons assigned in support of short order.

Chief Justice

Judge

Judge

Islamabad the
27th July, 2023
Khalid
Approved for Reporting.