

SUPREME COURT OF SAZAD JAMMU & KASHMIR

[Appellate Jurisdiction]

PRESENT:

Raja Saeed Akram Khan, C.J.

Kh. Muhammad Naseem, J.

Raza Ali Khan, J.

Muhammad Younas Tahir, J.

**CIVIL APPEALS NO. 26, 04, 16, 45, 31,
32, 27, 28, 29 AND 49 OF 2023**

(Against the orders dated 18.01.2023, 22.12.2022, 18.01.2023, 03.01.2023,
27.01.2023, 26.01.2023, 25.01.2023, 28.01.2023, 09.01.2023, 25.01.2023
passed by the Election Commission of AJ&K)

Gul Pathan

(In C.A No.26/2023)

Azhar Iqbal

(In C.A. No.04/2023)

Syed Saeed Mehmood Shah

(In C.A. No.16/2023)

Muhammad Zaman

(In C.A No.45/2023)

M. Jameel Ahmed

(In C.A. No.31/2023)

Raja Abdul Sattar Khan

(In C.A. No.32/2023)

Mehmood Hussain

(In C.A. No.27/2023)

Manzar Hussain

(In C.A. No.28/2023)

Muhammad Awais

(In C.A. No.29/2023)

Zeeshan Iqbal

(In C.A. No.49/2023)

.... Appellant(s)

VERSUS

Election Commission & others

(In all the appeals)

.... Respondent(s)

For the appellants: Syed Zulqarnain Raza Naqvi, ASC
(In C.A. No.26, 45 & 28 of 2023)

Mr. Waheed Bashir Awan, ASC
(In C.A. No.04/2023)

Kh. Junaid Pandit, ASC
(In C.A. No.16 and 29 of 2023)

Raja Ayaz Ahmed, ASC
(In C.A. No.31/2023)

Raja Sajjad Ahmed Khan, ASC
(In C.A. No.32 and 27 of 2023)

Sardar Pervaiz Akhtar, ASC
(In C.A. No.49/2023)

For the Election
Commission:

Mr. Tahir Aziz Khan, ASC

For the private
respondents:

Mr. Haroon Riaz Mughal, ASC
(In C.A. No.26/2023)

Mr. Manzoor Hussain Raja, ASC
(In C.A. No.04 /2023)

Mr. Mushtaq Ahmed Janjua, ASC
(In C.A. No.16 & 29 of 2023)

Mr. Mujahid Hussain Naqvi
(In C.A. No.27/2023)

Mr. Shehzad Shafi Awan, ASC
(In C.A. No.31/2023)

Raja Ayaz Ahmed, ASC
(In C.A. No.49/2023)

Date of hearing: 15.02.2023

JUDGMENT

Raja Saeed Akram Khan, C.J.- This matter has arisen out of the elections to the Local Bodies in Azad Jammu and Kashmir held in the year, 2022. The appellants in all the titled appeals had contested the elections and declared returned candidates, however, the rival contestants i.e., private respondents, challenged their candidature by filing separate

applications before the Election Commission of Azad Jammu and Kashmir **(Commission)** on the ground that they had produced the fake, bogus and fabricated matriculation certificates and that some of them had not attained the age of twenty-five years on the first day of January as required under law. The Commission through the impugned orders declared the polls of disputed Union Councils as void, disqualified the appellants for four years and also directed for registration of criminal case against them. Consequent upon the orders of the Commission, the Secretary Election Commission issued the notifications whereby the earlier notifications declaring the appellants as returned candidates, were recalled. The orders of the Commission have been assailed before us through the titled appeals filed under section 9 of the Azad Jammu and Kashmir Elections Act, 2020 **(Elections Act)**.

2. The brief facts of the case are as follows:-

- (i) *C.A. No.64/2023: Gul Pathan, appellant, was declared returned candidate against the seat of District Councillor for Union Council Bratla, Tehsil Charhoi, District Kotli. Raja Muhammad Riaz Khan, private respondent, challenged his candidature by filing an application before the Commission on the ground that he has annexed fake matriculation certificate along with his nomination papers. The Commission wrote a letter to the Board of Secondary Education,*

Karachi for verification of the impugned certificate, on 12.12.2022. As per the letter of concerned Board dated 14.12.2022, the certificate of the appellant was found bogus. Through the impugned order dated 18.01.2023, the Commission, declared the elections of Union Council Bratla, to the extent of District Councillor, void; disqualified the appellant for next four years and also directed the SSP concerned for lodging a criminal case against him. Consequently, through notification dated 19.01.2023, the earlier notification whereby the appellant was declared successful candidate, was cancelled.

- (ii) **C.A. No.04/2023:** *Azhar Iqbal, appellant, was declared returned candidate against the seat of District Councillor for Union Council Dhaman Pakhonar Baloch, District Sudhnuti. The private respondent, Ghulam Shabbir, filed an application before the Commission with the claim that the matriculation certificate of the appellant is bogus as the same has allegedly been issued from the Islamic University of Pakistan, whereas, none of the Universities issues such matriculation or intermediate certificate. Through the impugned order dated 22.12.2012, the Commission, on the basis of list of fake Universities uploaded by the HEC on the official website, disqualified the appellant for four years and also directed for initiating criminal proceedings against him. Consequently, through notification dated 23.12.2022, the earlier notification whereby the appellant was declared successful candidate, was cancelled.*
- (iii) **C.A. No.16/2023:** *Syed Saeed Mehmood Shah, appellant, was declared successful candidate against the seat of Councillor, Municipal Corporation, Muzaffarabad, Ward No.8, Domail Syedan, Tehsil and District Muzaffarabad. The private respondent, Syed Rehmat Shah, filed an application before the Commission for verification of the matriculation certificate issued in the name of appellant on the ground that the same is allegedly issued by the Islamic University of Pakistan, whereas, none of the*

Universities issues such matriculation certificate. The Commission through impugned order dated 18.01.2023, observed that according to the list of illegal Universities uploaded on the website of HEC, the aforementioned University is not legal, hence, the appellant was disqualified for four years and criminal proceedings were also ordered to be initiated against him. Consequently, through notification dated 19.01.2023, the earlier notification through which the appellant was declared successful candidate was, cancelled.

- (iv) **C.A. No.45/2023:** *Muhammad Zaman, appellant, was declared successful candidate against the seat of Councillor, Union Council Panag Sharif, Tehsil and District Kotli. On the application filed by the private respondent, Muhammad Sajid Mallik, the Commission wrote a letter to the Board of Secondary Education, Rawalpindi for verification of matriculation certificate of the appellant. The concerned Board vide its letter dated 17.12.2022 conveyed that the disputed certificate is bogus, resultantly, the Commission vide impugned order dated 03.02.2023, disqualified the appellant and also ordered for initiating criminal proceedings against him.*
- (v) **C.A. No.31/2023:** *Muhammad Jameel Ahmed, appellant, was declared returned candidate for Ward No.06 (Mera Bala), Union Council Meran Kalan, Tehsil and District Muzaffarabad. The private respondents filed two separate applications before the Commission with the claim that the appellant was not qualified to contest the elections as he is holding the bogus certificate of matriculation. The Commission wrote a letter to the Board of Intermediate and Secondary Education, Mirpur for verification of the disputed certificate. The concerned Board declared the certificate to be bogus, consequently, the Commission vide impugned order dated 27.01.2023 disqualified the appellant and ordered to initiate criminal proceedings against him.*

- (vi) **C.A. No.32/2023:** *In this appeal, the appellant, Raja Abdul Sattar Khan, was declared returned candidate for Union Council Makhyala, Tehsil Dhirkot, District Bagh. On the application filed by the private respondent the Commission wrote a letter to the Board of Secondary Education Karachi for verification of the matriculation certificate issued in the name of appellant, whereupon, the same was found bogus. Meanwhile, the appellant resigned. The Commission through impugned order dated 26.01.2023 declared the appellant disqualified.*
- (vii) **C.A. No.27/2023:** *In this appeal, the appellant, Mehmood Hussain, was declared returned candidate for Local Council Ward No.6, Union Council Kharak, Tehsil and District Mirpur. His candidature was challenged by the private respondent, Zameer Hussain, by filing an application before the Commission on the ground that the appellant has annexed bogus certificate of matriculation with his nomination papers. The Commission wrote a letter to the Board of Intermediate and Secondary Education, Sargodha, whereupon, the certificate issued in the name of the appellant was found bogus. The Commission vide impugned order dated 25.01.2023, disqualified the appellant for four years and ordered for initiation of criminal proceedings against him. Consequently, through notification dated 25.01.2023, the earlier notification whereby the appellant was declared successful candidate, was cancelled.*
- (viii) **C.A. No.28/2023:** *The appellant, Manzar Hussain, was declared returned candidate for Ward No.9, Naghal, Union Council Tahrochi Charhoi, District Kotli. The private respondents filed an application before the Commission for verification of his matriculation certificate. The Commission through order dated 28.01.2023 disqualified the appellant on the ground that the alleged University from which the appellant has got the certificate is not legal as per the website of HEC. Consequently, vide notification dated 31.01.2023 the earlier notification whereby the*

appellant was declared successful candidate, was cancelled.

- (ix) **C.A. No.29/2023:** *In this case, the candidature of the appellant for Ward No.02, Dara Batangi, Union Council Gojra, Tehsil and District Muzaffarabad, was challenged by the private respondent, before the Commission on the ground that the appellant was below the age of 25 years on 01.01.2022. The Commission vide impugned order dated 09.01.2023 disqualified the appellant, consequently, earlier notification whereby he was declared successful candidate, was also recalled.*
- (x) **C.A. No.49/2023:** *In this case also, the candidature of the appellant, Zeeshan Iqbal, was challenged by the private respondent on the ground that he was below the age of 25 years. The Commission vide impugned order dated 25.01.2023, disqualified the appellant and consequently the earlier notification of declaring him successful candidate, was withdrawn.*

3. The learned counsel for the appellants in all the titled appeals remained united in arguing that the Commission unlawfully exercised the powers under section 9 of the Elections Act, while ignoring that the said provision of law is applicable only to the illegalities or violations which have materially affected the result of the poll at any polling station on the polling day and not otherwise. It was further argued that section 125-K of Elections Act imposes a ban on the jurisdiction and powers of the Commission for deciding the matters relating to the elections after announcement of the election results. Furthermore, the powers of

disqualifying a returned candidate are vested in the Election Tribunal, which has been established and under Article 47(2) of the Azad Jammu and Kashmir Interim Constitution, 1974, **(Constitution)** where any Administrative Court or Tribunal is constituted, no other Court has power to entertain any such proceeding which fall within the domain of such Administrative Court or Tribunal. Hence, after establishment of the Election Tribunal, the Commission had no jurisdiction to entertain the applications filed by the private respondents but despite this not only their applications were entertained but the impugned illegal orders were also passed. It was further argued that section 9 of the Elections Act relates to the elections of Legislative Assembly and not to the elections of the Local Bodies, hence, the Commission was not competent to pass the impugned illegal orders. It was further argued that most of the applications filed by the private respondents were addressed to the Chief Election Commissioner, hence, such like applications cannot be entertained being filed without any legal backing. In support of their contentions, they have placed reliance on the cases reported as *Raja Muhammad Nazir Khan & others vs. Election Commissioner & others* [PLD 1984 AJ&K 9] and

Muhammad Rizwan Gill vs. Nadia Aziz & others [PLD 2010 SC 828].

4. Mr. Tahir Aziz Khan, Advocate, the learned counsel representing the Commission submitted that for removal of the ambiguity some amendments have been introduced in the Local Government Act, 1990 according to which the election of local bodies shall be conducted by the Election Commission as provided under Article 50 of the Constitution and Elections Act, 2020, hence, the Commission was empowered to proceed in the matter. In support of his contentions, he placed reliance on the cases reported as *Naseer Ahmed & others vs. Returning Officer & others* [2023 SCMR 179] and *Ali Asjad Malhi vs. Ms. Syeda Nosheen Iftikhar & others* [PLD 2023 SC 1]. However, when he was asked whether he defends the orders passed by the Commission which have been passed without recording of evidence, he very frankly conceded that the orders passed by the Commission are not sustainable in the eye of law and he is no more defending the same.

5. The learned counsel for the private respondents supported the arguments advanced by Mr. Tahir Aziz Khan, Advocate, and submitted that the

Commission has rightly passed the impugned orders as the appellants have failed to justify their fake certificates. They raised a number of grounds pertaining to the merits of the case, however, in view of the proposed decision, we are not inclined to incorporate the same here.

6. We have heard the learned counsel for the parties and gone through the record. The Commission is a constitutional body established under Article 50 of the Constitution. Under sub-Article (5), it shall be the duty of the Commission to organize and conduct the election for the office of the President, the Assembly, the Council and local government bodies and to make such arrangements as are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law. The dispute in hand relates to elections to the local bodies which are conducted under Local Government Act, 1990 read with Chapter X-A of Elections Act and Local Government Election Rules, 1983. After examining the impugned orders of the Commission on the touchstone of the arguments addressed at bar as well as the relevant provisions of law, the propositions which cropped up before us for resolution are as follows:-

- (i) what is the scope and extent of the powers of Commission under section 9 of the Elections Act;
- (ii) whether after issuance of notification of returned candidates, the Commission was empowered to entertain the applications of private respondents and determine the pre-election qualification or disqualification of a candidate under section 9 of the Elections Act, in exclusion of the powers of the Election Tribunal;
- (iii) whether section 9 of the Elections Act is applicable to the elections of the Local Bodies; and
- (iv) whether the Commission was duty bound to adopt proper procedure provided under law before deciding the applications filed by the private respondents.

All the aforesaid legal propositions revolve around section 9 of the Elections Act, which is reproduced as follows:-

“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 inquiry 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.— 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 and may declare, polling at one or more polling stations or election in the whole constituency, void.

- (2) *Notwithstanding the powers conferred on it by sub-section (1), the Commission may order filing of complaint under this Act before a court of competent jurisdiction against persons who entered into the agreement referred to in sub-section (1).*
- (3) *Notwithstanding the publication of the name of a Returned Candidate, 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 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 provisions of section (supra) deals with the powers of the Commission to declare a poll void. It postulates that if the Commission is satisfied that by reason of grave illegalities or such violations of the provisions of Elections Act or Rules as have materially affected the result of the poll at one or more polling stations or in the whole constituency, it shall make a declaration accordingly. It is important to examine the

criteria for grant of relief by the Commission under section 9 of Elections Act. The primary question which Commission has to answer is whether 'grave illegalities or violations have materially affected the result of the election in one or more polling stations or the whole constituency'. The illegalities or violations materially affecting the result of the election may be the breakdown of law and order situation at the polling stations, putting undue pressure on a voter or group of voters so that they will vote a particular way or not at all, threatening the voters, attacks on polling places, coercion, corrupt practices by the polling officers, restraining the women from voting etc. If the Commission is satisfied that these grave illegalities or violations have been committed it is empowered under section 9 to declare a poll void but these powers are restricted only to illegalities committed on the day of polling and not otherwise. In the instant case, the candidature of the appellants was challenged on the grounds of disqualification on account of presenting fake matriculation certificates and not fulfilling the required age limit. Obviously, these grounds do not fall within the definition of 'illegalities or violations materially affecting the result of elections.' If it is presumed so, even then

the same have not been committed on the day of polling. In fact, the powers of the Commission to direct fresh poll at a polling station comes to an end as soon as results of election are declared by the authority empowered to do so and once the names of returned candidates are published officially, the Commission becomes *functus officio* and the only remedy available to the aggrieved persons is to file election petitions as provided under section 81 of the Elections Act. In *Syed Fakhar Imam vs. Chief Election Commissioner of Pakistan* [PLD 2008 SC 730], the petitioner filed an application before the Election Commission of Pakistan alleging grave illegalities and irregularities committed by the returned candidate during the process of election and prayed that the election may be declared as void. The said application was dismissed by the Commission. This order was assailed by the petitioner before High Court in writ petition which was disposed of with the observation that he may approach a competent Election Tribunal by filing an election petition wherein all these questions will be gone into and decided in accordance with law. The petitioner made this order impugned before Supreme Court and the Hon'ble Court held as under: -

“8. *It is well settled principle of law that after the publication of the name of the respondent as a returned candidate in the official gazette the only remedy available to the petitioner was to file an Election petition as provided under section 52 of the Act of 1976 before the Election Tribunal appointed under section 57 of the Act of 1976.*”

In *Bartha Ram vs. Lal Mehar Lal Bheer* [1995 SCMR 684] Bartha Ram (Petitioner), Lala Mehar Lal Bheel (Respondent No.1) and eleven others contested election for the reserved seat of Hindus and Scheduled Castes, of the Provincial Assembly Punjab. The respondent No.1 was declared returned candidate. After the publication of the notification of returned candidate, the petitioner challenged the election of respondent No.1 before the ECP under section 103-AA¹ of Representation of the People Act, 1976 on the ground of wrong counting of the votes. On this the ECP issued notice to the Respondent No.1. Before the ECP could proceed further, the respondent No.1 filed a writ Petition in the Lahore High Court, questioning the authority/jurisdiction of the ECP to entertain the petition. After hearing the parties, the High Court declared that after the publication of Notification on 18-10-1993, the ECP had become *coram non judice* to seize the matter and the only remedy available to the losing candidate was to have recourse to

¹ *This section corresponds to section 9 of the Elections Act, 2020.*

the Election Tribunal constituted under the Act. Feeling aggrieved thereby, Bartha Ram filed a petition for leave to appeal and the Hon'ble Supreme Court held as under:-

“8. As regards section 103-AA, the reading of this section will also show that this section would apply when by reasons of grave illegalities or violation of the provisions of the Act or the rules the poll in any constituency is sought to be declared void. In the petition pending before the Election Commission, the allegations of grave illegalities and violation of the provisions of the Act or rules have not been levelled by the appellant. So, the petition of the appellant before the Election Commission for recounting of the votes on account of the mistake in the counting of the votes does not fall within the ambit of section 103-AA of the Act. We feel that since the case of the appellant before the Commission is not covered by subsection (1) of section 103-AA, subsection (2) of section 103-AA which authorises the Commission to exercise powers conferred on it by subsection (1) of section 103-AA before expiry of sixty days is also not attracted and the correct legal position is that after the publication of the name of the respondent as a returned candidate in the official Gazette on 18-10-1993, the only remedy available to the appellant was to file an Election Petition as provided under section 52 of the Act before the Election Tribunal appointed under section 57 of the Act.....”

(underlining is ours)

The High Court of Azad Jammu and Kashmir in the case reported as *Muhammad Nazir Khan vs. Election Commission* [PLD 1984 J&K 9] considered the aforesaid legal proposition and held that the Commission's power to direct fresh polls at a polling station comes to an end, the moment the results of the election are declared by

the authority empowered to do so. It is suffice to reproduce here the relevant part of the judgment as follows:-

“... There are yet other provisions contained in rule 56 of the Local Government Election Rules which go a long way to support the legal position that the Election Commissioner's power to direct fresh polls at a polling station under rule 30 (2) comes to an end, the moment the results of election of the Wards of a Local Council in which such polling station is included are declared by the authority empowered to do so. The relevant provisions of the above Rules are reproduced below:-

"56. (1) No election shall be called in question except by an election petition presented in accordance with these rules.

(2) An election petition shall be presented within thirty days next after the declaration of result under rule 44."

The combined effect of the provisions of the Rules reproduced above is that after the declaration of result of election of membership to a Local Council by the Returning Officer under rule 44 of the Local Government Election Rules, the only remedy available to the persons aggrieved by such result is that he can challenge the same by way of presenting election petition against it before the Election Tribunal appointed by the Government under rule 59 (9) of the said Rules within thirty days from the date of its declaration. In other word, a candidate declared to have been elected as Member of the Local Council by the Returning Officer of the Ward concerned cannot be unseated by the order of any Court or Authority except that of the Election Tribunal made in the election petition filed by a contesting candidate or electoral aggrieved by his such election as Member of the Local Council. Thus, we fail to see how the Election Commissioner can pass any order directing fresh poll at one or more polling stations provided for any Ward of Local Council whose results have already been declared by the Returning Officer concerned because any such order shall have the effect of disturbing and upsetting the result of election which

power fails exclusively within the province of the authority of the Election Tribunal as indicated above. Moreover, the fact that the period of limitation for presenting election petition to the Election Tribunal starts from the date of the declaration of the result of the election by the Returning Officer is clearly indicative of the legal position that on the declaration of the result by the Returning Officer of the concerned ward of the Local Council, the Election Commissioner ceases to enjoy any power of making order under rule 30(2) of the Local Government Election Rules.”

7. Now, this is the best place to resolve the proposition whether the Commission under the same provision of law i.e., section 9 of the Elections Act has the jurisdiction to examine the pre-election qualification or disqualification of a candidate after issuing notification of a candidate as returned candidate in the official gazette and can declare the elections void on this ground too. In our opinion, after issuance of notification of a returned candidate, the determination of question of qualification and disqualification of a candidate does not fall within the domain of the Commission. We are fortified in our opinion from the judgment of the Supreme Court of Pakistan in the case reported as *Muhammad Salman vs. Naveed Aslam & others* [2021 SCMR 1675], wherein it has been held that:-

“41. It would therefore seem that there is no direct authority, at any rate as would be binding on us, in which the question under discussion was considered or decided directly. The question, nonetheless, remains: did Parliament confer a jurisdiction in terms

of section 103AA (and/or section 9) on the Commission to consider the qualification or disqualification, under Articles 62 and/or 63, of a candidate for election or a member of the legislature? In our view, the answer must be in the negative. We begin with an obvious point: neither of the sections expressly or explicitly conferred (or confers) any such jurisdiction. If at all it exists, it has therefore to be read into the provisions, and discovered collaterally or by implication. **Now, the question of whether a candidate is qualified or disqualified goes to his status, i.e., ability to contest the election. Both the sections however are primarily (though not exclusively) directed towards what happens on the polling day, i.e., towards the process of the actual conduct of the election itself. Obviously, this remains unaffected by the status (qualified/disqualified) of the candidates.** Section 9(1) even otherwise makes this clear, in two ways. Firstly, by adding the test of materiality: the "result of the poll" should have been affected. Even if (and secondly) the test applies only to second condition (a point on which we form no definite opinion), the last part of the subsection, which allows only for a recasting of votes to be ordered, makes it clear that the slate of candidates remains the same. Although section 103AA was worded in a more open-ended manner, empowering the Commission to decide whether the poll in the constituency (or, by way of judicial gloss, any one or more polling stations) ought to be declared void, the purpose behind the section was still the same. **It remained essentially focused on the day of the election itself. The facts and circumstances in which almost all the reported cases came to be decided also testify, and point, to this conclusion.**

42. It is also to be remembered that in the entire process leading up to the day of the election, the question of whether the candidate was qualified or disqualified has already been scrutinized. This scrutiny, of the nomination papers, is done by the Returning Officers. However, they are not the only ones allowed by law to scrutinize the nomination papers. They are also open to objections by others. Under the 1976 Act this right was of a somewhat restricted nature: see section 14(1). Under section 62 of the 2017 Act the right has been extended to any

voter of the constituency. There is a right of appeal to an appellate forum comprising of High Court judges. Under the 1976 Act this right of appeal was restricted to candidates only, whereas the 2017 Act has expanded it to include the objector as well. After this appellate forum there can be (though not of course as of right) constitutional petitions under Article 199 and even petitions to this Court under Article 185(3). **In other words, the question of qualification/disqualification is thoroughly tested by a dedicated procedure before the day of the election. And of course, after the election a losing candidate can always file a petition before the election tribunal and again bring the question into issue.**

Underlining is ours

It has become quite obvious and clear that the matter of qualification and disqualification of a returned candidate falls exclusively within the domain of Election Tribunal. Even otherwise, under Article 47(2) of the Constitution where any Administrative Court or Tribunal is established, no other Court has powers to entertain any proceedings in respect of the matters to which the jurisdiction of such Administrative Court or Tribunal extends. It is an admitted position that the Election Tribunal has been established, hence, after its establishment the jurisdiction of any other Court including the Commission is ousted under the Constitution which is the supreme law of the land.

8. The aforesaid survey leads us to draw an obvious conclusion that the powers of Commission under

section 9 of Elections Act are restricted to the illegalities and violations, committed on the polling day, materially affecting the result of the poll and under sub-section (3) these powers can be exercised before the expiry of sixty days of publication of notification of returned candidates. After issuance of notification of returned candidates, the Commission becomes *functus officio* and loses its power to determine the question of pre-election qualification and disqualification of a candidate which matter exclusively falls within the domain of Election Tribunal. We are, therefore, not hesitant in holding that in the instant case the matter was not related to the illegalities or violations, committed on the polling day, materially affecting the result of poll, hence, the Commission had no jurisdiction or power to declare a poll void and set aside the notifications declaring the appellants returned candidates in the garb of powers vested in it under section 9 of the Elections Act.

9. Although, in view of the aforesaid conclusion it remains mere an academic discussion to resolve the proposition whether section 9 of the Elections Act, is applicable to the elections of local bodies, however, for the sake of clarity we would like to throw light on this proposition as well. As stated hereinabove under Article

50 of the Constitution, the Commission is duty bound to organize and conduct the election for the office of the President, the Assembly, the Council and local Government Bodies. The elections to the Legislative Assembly are conducted under the Elections Act and Rules framed thereunder, whereas, the elections to the local government bodies are conducted under Local Government Act and rules framed thereunder, however, vide Act XIII of 2021 dated 03.06.2021, Chapter X-A has been inserted in the Elections Act which relates to the conduct of elections to the local government. Section 125-A of said Act empowered the Commission i.e., Azad Jammu and Kashmir Election Commission established under Article 50 of the Constitution, to conduct elections to the local governments. The learned counsel for the appellants in their arguments have mainly focussed on section 125-K in support of their contention that this section specifically mentions the provisions of Elections Act which are applicable to local government elections and as Chapter II of Elections Act containing section 9, is not mentioned in this section, hence, this section is not applicable to the local government elections. For the sake of convenience, the said section is reproduced as under:-

“125-K. Application of provisions to local government election.- (1) Subject to this Chapter and the Rules relating to conduct of local government elections, election disputes, election offences and allocation of symbols, the provisions of Chapter VI, Chapter IX, Chapter X of the said Act, as nearly as possible, shall apply to the conduct of local government election.

(2) The qualifications and disqualification of a candidate in a local government election or a Member of a local government shall be decided under the applicable local government law.”

This section postulates that the provisions of Chapter VI, IX and X of the Elections Act, as nearly as possible, shall apply to the conduct of local government election. In our opinion, when the Elections Act coupled with rules is read as a whole, the purpose of insertion of this section becomes quite obvious. The election of local bodies includes the preparation of electoral rolls (section 125-B), delimitation of local government constituencies (125-C), appointment of delimitation committee, delimitation authority and election officials (125-D to 125-F) and appeal against scrutiny order (125-G). From the preparation of electoral rolls to the appeal against scrutiny order, the complete mechanism has been described in Chapter X-A of Elections Act and thereafter comes the stage of polling, declaration of results, resolution of election disputes and imposition of penalties for corrupt practices, regarding which section

125-K of Elections Act is clear that to the extent of these matters the provisions of Chapter VI, IX and X of the Elections Act, as nearly as possible, shall apply. The interpretation made by the learned counsel for the appellants is that as Chapter II of Elections Act (containing section 9) is not mentioned in section 125-K, hence, section 9 will not attract in the matters relating to conduct of local government elections, however, in our opinion if such an interpretation is made it will amount to handicap the Commission. By no stretch of imagination, the general powers of the Commission to ensure free, fair and transparent elections can be snatched in the garb of this section. In our opinion, when section 125-A of Elections Act empowers the Commission to conduct elections to the local governments, it empowers the Commission with all the powers vested in it for holding free, fair and transparent election. Chapter II of the Elections Act vests in the Commission the powers which are necessary to ensure that the election is conducted honestly, justly, fairly and in accordance with law and these powers shall be deemed vested in the Commission regardless of the fact which sort of election is being conducted. It is the settled principle of law that when two interpretations are

possible, the one which is beneficial to the citizens has to be adopted. The beneficial interpretation in the instant case is that the general powers of the Commission i.e. power to ensure fair and free election, power to declare a poll void, power to punish for contempt, etc. shall remain alive regardless of the fact, whether the election is being conducted to the legislative assembly or local bodies. It also appears that to remove this ambiguity regarding applicability of Elections Act to the election of local bodies an amendment has been incorporated in section 3 of the Local Government Act, 1990 and it has been provided that the election of Local Bodies shall be conducted by the Commission as provided under Article 50 of the Constitution and Elections Act, 2020. This discussion enables us to hold that the powers of the Commission under section 9 of the Elections Act cannot be restricted to the elections of Legislative Assembly only rather these powers will vest in the Commission even in the elections of local bodies.

10. The summary of our discussion is that:-

- (i) the powers of the Commission under section 9 are restricted to the extent of grave illegalities or such violations of the provisions of Elections Act or the Rules, committed on the day of polling, thereby materially affecting the result of poll and these powers can be exercised before the

expiration of sixty days after publication of names of returned candidates;

(iii) the Commission has no power to deal with the matters of pre-election qualification and disqualification of a candidate after publishing the notification of returned candidates; and

(iv) the general powers of Commission to ensure free and fair election, to declare a poll void, to punish for contempt etc., shall be deemed vested in the Commission regardless of the type of the election.

11. In the instant case, the candidature of the returned candidates was challenged on the grounds which do not fall within the definition of illegalities or violations materially affecting the result of the election, hence, the Commission had no power to entertain the applications of private respondents and declare a poll void under section 9 of the Elections Act. During the course of arguments, our attention has also been drawn towards sub-section (4) of section 9 of Elections Act, which states that:-

“(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 regulate its own procedure.”

If for the sake of arguments, it is presumed that the Commission had the powers to test the pre-election qualification or disqualification of a returned

candidate under section 9 of Elections Act, even then under sub-section (4), the Commission while exercising powers conferred on it under sub-section (1) shall be deemed to be an Election Tribunal to which an election petition has been presented. Under section 89 of Elections Act, every election petition shall be tried as nearly as may be in accordance with the procedure for the trial of suits under the Code of Civil Procedure, 1908. Sub-section (2) of section 89 provides that the Qanoon-e-Shahadat, 1984 shall apply for the trial of an election petition. Likewise, under Rule 59 of the Local Government Election Rules, 1983 the provisions of the Evidence Act, 1872 shall apply to the trial of an election petition. After detailed study of the impugned orders passed by the Commission, it appears that the Commission has not adopted the proper course provided under law. It was enjoined upon the Commission to deem the applications filed by the private respondents as election petitions and try the same in accordance with the prevailing law. The record tells us that most of the cases have been decided by the Commission on its own information. For instance, some of the cases have been decided on the basis of information gathered from the website of the HEC, whereas, others have been decided

while directly writing letters to the concerned Boards for verification of the disputed matriculation certificates without providing an opportunity to the appellants to cross such verifications. Such a mode is not recognized under law rather the Commission was duty bound to adopt the procedure provided under law and decide the applications after recording the evidence. From this angle too, the impugned orders of the Commission were not sustainable. We would like to observe here with heavy heart that the Commission has passed stereotype orders in a hasty manner without adhering to the relevant provisions of law and such like orders cannot be endorsed. That's why, we had passed the following short order on 15.02.2023:

“For the reasons to be recorded later on, all the titled appeals are accepted and the impugned judgments of the Election Commission along with the consequent notifications are set aside.”

As we have declared the orders of the Commission to be without jurisdiction, therefore, arguments of the learned counsel for the parties pertaining to the merits of the case are not required to be dealt with.

12. Before parting with, it is in our judicial notice that the elections of Chairman, Vice Chairman, Mayor

and Deputy Mayor are still pending. In the public interest the Commission is directed to expeditiously complete the remaining process of election and submit compliance report in this regard. A copy of this judgment shall be sent to the Secretary Election Commission for compliance.

CHIEF JUSTICE JUDGE JUDGE JUDGE

Mirpur,
23.02.2023

The detailed reasons have been recorded. The office is directed to inform the parties.

CHIEF JUSTICE