PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

WP No. 6173-P/2023

Pakistan Tehreek-e-Insaaf (PTI)
Through its authorized person and others.

.....Petitioners.

V/s

Election Commission of Pakistan
Through its Secretary and others.

.....Respondents.

For the Petitioners:	M/s Barrister Ali Zafar, Niazullah Khan Niazi, Sarfaraz Ahmad Cheema, Barrister Gohar Ali, Shah Faisal Utmankhel, Qazi Muhammad Anwar, Ali Zaman, Arshad Ahmad and Ms. Mashal Azam Yousafzai, Advocates.
For Respondent No.1:	M/s Sikandar Bashir Mohmand, Barrister Imran Khan and Hamza Azmat, Mr. Muhsin Kamran Siddiqui, Advocates along with Mr. Khurram Shehzad, Addl: DG Law ECP, Mr. Aziz Bahadar, JPEC and Mr. Musadiq Anwar, DD (Confid).
For Respondents No. 2 & 7:	Syed Aziz Uddin Kakakhel, Advocate.
For Respondent No.8:	M/s Tariq Afridi & Ahmad Farooq Khattak, Advocates.
For Respondent No. 10:	Qazi Jawad Ehsanullah, Advocate.
For Respondent No.12:	M/s Jehanzeb Shinwari & Naveed Akhtar, Advocates.
For Respondent No.13:	Mr. Fida Bahadar, Advocate.
Date of hearing:	09-10.01.2024
Date of Announcement:	10.01.2024

JUDGMENT

SYED ARSHAD ALI, J:- The question before us, in the present case, is whether the Election Commission of Pakistan (**ECP**) has the power and jurisdiction under Article 218 (3),

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Article 219 of the Constitution of Islamic Republic of Pakistan, 1973 (**Constitution**) read with sections 208 and 215 (5) of the Election Act, 2017 (**Act**) to question, adjudicate and probe the Intra Party Election of Pakistan Tehreek-e-Insaaf (PTI) which was conducted by the PTI on the directions of ECP on 2nd December, 2023.

2. The instant petition filed by the PTI and 07 others (office bearers) challenges the order dated 22.12.2023 passed by ECP whereby the petitioner No.1 was declared ineligible to obtain the election symbol for which it had applied.

3. M/s Barrister Ali Zafar & Barrister Gohar Ali, while opening their arguments, have stated that the effect of the impugned order is virtually the dissolution of a political party and denying to it the penumbral rights which action of the respondent offends the fundamental rights of the petitioners guaranteed through Article 17 of the Constitution. The learned counsels, while referring to various provisions of Act have argued that the ECP has no jurisdiction to probe the Intra Party Election; dispute and question the validity of election under its limited jurisdiction. The learned counsels, while relying upon the law laid down by the Apex Court in the case of *Mrs. Benazir Bhutto (PLD 1989 SC 66),* have argued that the citizens of Pakistan enjoy the rights not only of forming a political party but also the constitution ensure the functioning of a political party which, inter alia, includes a right to obtain a symbol to facilitate the voters to identify the party candidate. In absence of a common symbol, the voters of political parties would be deprived of their choice to elect a political party. The learned counsels, while referring to the judgment of the Apex Court in the case of *Mrs. Benazir Bhutto (PLD 1988 SC 416)* have contended that any step taken by any government functionary, which has the effect of disenfranchising of a political party in any manner would offend Article 17(2) of the Constitution. The learned counsels have next argued that the ECP does not dispute that the PTI had conducted the Intra

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Party Election but their only objection was that the said election was supervised by incompetent persons (Election Commission), therefore, even under the defective doctrine rule, the said election is to be protected in view of the law laid down by the Apex Court in the case of *Malik Asad (PLD 1989 SC 497) and (PLD 2009 SC 879).* The learned counsels have also maintained that the petitioners' political party has been singled out by not accepting its Intra Party Election whereas no action was taken against other political parties despite having not conducted any Intra Party Election. Therefore, the impugned action of the ECP hit at the core of Article 25 of the Constitution. On factual premises, the learned counsels have maintained that when through an order dated 23.11.2023 the petitioners' political party was asked to conduct Intra Party Election within twenty (20) days, in compliance thereof, they had conducted the Intra Party Election, produced all the required documents establishing the holding of Intra Party Election but the respondent-ECP with malafide has undertaken a process questioning the validity of Intra Party Election conducted by the petitioners' political party; refusing to upload the required certificate under section 209 of the Act on its official website and has passed the impugned order purportedly under Section 215 of the Act which is in complete disregard of the law. The learned counsels have further maintained that ECP is not a Court therefore, has no jurisdiction to undertake any process questioning the validity of Intra Party Election even on the complaint of an alleged aggrieved person.

4. Mr. Sikandar Bashir Mohmand, Advocate, the learned counsel representing the respondent-ECP has argued that ECP not only regulate the conduct of general elections, election to senate and local bodies but is also a regulator of political parties and it derive its authority from Articles 218(3) and 219 of the Constitution, besides, the Election Act, 2017 in terms of Article 219 (E) of the Constitution. He has laid much

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emphasis on the various provisions in Chapter-XI of the Act by arguing that it is the requirement of law that each party shall have a written Constitution registered with the ECP which should, inter alia, includes the procedure for conducting Intra Party Election. The ECP has the jurisdiction to satisfy and ensure that the Intra Party Election by a political party has been conducted in accordance with its Constitution enabling the workers/members of each political party due participation in the election process. The learned counsel has also referred to the show cause notices issued to the petitioners' political party reminding its legal obligation to conduct the Intra Party Election. The learned counsel has referred to a similar proceedings which were initiated on behalf of the petitioners' political party before the worthy Lahore High Court through constitutional petition No. 287/2024 which was dismissed. Against the said order by a single bench, the petitioners have filed Intra Court Appeal which has yet to be decided by the worthy Lahore High Court, therefore, under the rule of proprietary the petition should not have been filed before this Court. In support of the said arguments, the learned counsel has relied upon the law laid down by the Apex Court in the case of *Salahuddin Tirmizi (PLD 2008 SC 735).* Regarding the jurisdiction of the ECP to hold an inquiry in the internal affairs of a political party, the learned counsel, while relying upon para-45 of the judgment of the Apex Court in the case of *Muhammad Hanif Abbasi (PLD 2018 SC 189),* has argued that the jurisdiction to collect fact while exercising any power under the Election Act or Rules, the ECP has inherent power to collect evidence in order to form an opinion regarding the validity and procedure adherence of intra party election. To further bolster the said arguments, the learned counsel has also referred to *Suo Moto case No. 07 of 2017 reported as PLD 2019 SC 318.*

5. The learned counsel has also objected the constitutional jurisdiction of this Court on the ground that ECP is a

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constitutional body which is absolutely independent with exclusive jurisdiction while performing its obligations and duties under the Act and any order of the ECP is, thus, not amenable to the judicial review of a constitutional court unless patent illegality is evident from record and in the present case, since the ECP has acted in accordance with the mandate provided by sections 208, 209 and 215 of the Act, therefore, the impugned decision is not subject to judicial review of this Court. In support of his arguments, the learned counsel has placed reliance on the case of *Sheikh Rashid Ahmad (PLD 2010 SC 573) and Miss Naheed Khan (2019 CLC 938).* However, much emphasis was laid by the learned counsel representing the respondent/ECP on the law expounded by the worthy Islamabad High Court in the case of *Dr. Farooq Sattar (PLD 2018 Islamabad 300)* wherein the jurisdiction of ECP to interfere and question the validity of Intra Party Election was approved by the worthy Islamabad High Court keeping in view the law laid down by the Apex Court in the case of Muhammad Hanif Abbasi.

6. M/s Qazi Jawad Ehsanullah, Muhammad Tariq Afridi, Naveed Akhtar & Ahmad Farooq Khattak, Advocates, the learned counsels representing the respondents have mainly attacked on the territorial jurisdiction of this court and argued that the principal office of ECP is located at Islamabad and the impugned order was passed by ECP in Islamabad, therefore, this Court has no jurisdiction to entertain this petition. In support of their arguments, the learned counsels have relied upon the law laid down by the Apex Court in the cases *1979 SCMR 555, PLD 2012 SC 681, PLD 2010 SC 537, 1999 SCMR 1921, PLD 2018 SCM 189 and AIR 1967 SC 898.*

7. In rebuttal, Barrister Ali Zafar, while relying upon the law laid down by the Apex Court in *PLD 1968 SC 387, 2009 CLD 1498, 2012 PTD 1869 and 2017 SCMR 1179,* has argued that since the Intra Party Election was conducted in the Province of Khyber Pakhtunkhwa, the offices bearer of the

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PTI belong to Province of Khyber Pakhtunkhwa, therefore, the impugned order has effects in the Province of Khyber Pakhtunkhwa, therefore, this Court has the territorial jurisdiction in the matter.

Facts of the Case

8. It is averred in the petition that Pakistan Tehreek-e-Insaaf (**"PTI"**) being a political party of Pakistan is registered with the Election Commission of Pakistan (**"ECP"**) and Mr. Imran Khan Niazi has been its Chairman. The symbol of 'Bat' was allocated to PTI since its very inception and was its symbol even in 2002, 2013 & 2018 general elections. It is further averred that as per letter dated 24.08.2021 of ECP, the intra party elections of PTI were held under its constitution (2019) as amended in June, 2022 notifying the office bearers including Chairman, Vice Chairman and Secretary General as well as Provincial Presidents and General Secretaries on 10.06.2022 and forwarded the same to ECP on the same day. The election was widely reported in print electronic media not only in Pakistan but even internationally. The matter of intra party election of PTI was placed before the ECP for hearing on 28.03.2023 and finally the ECP vide order dated 23.11.2023 declared that the petitioner had failed to hold intra party elections in accordance with its constitution and thereby directed the petitioner to hold intra party election in accordance with its constitution within twenty (20) days positively and also resubmit its result along with all required documents including Form-65 within seven days. Accordingly, the intra party election of PTI was held on 02.12.2023 and the party's Chairman submitted Form-65 in accordance with section 209 of the Election Act, 2017 along with all relevant documents to ECP on 04.12.2023. In the meanwhile, respondents No. 2 to 15, who are not members of PTI, filed applications before the ECP for declaring the intra party election of PTI as void. The ECP vide impugned order

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dated 22.12.2023 declared the petitioner ineligible to retain the election symbol 'Bat'; hence, the instant writ petition.

Impugned Order dated 22.12.2023

9. The crux of finding of ECP in the impugned judgment are that no record was placed before the ECP that any competent authority has ever appointed Federal Election Commission in accordance with the provision of Article IX of PTI Constitution of 2019. A single Federal Election Commission is not the requirement of constitution of PTI and such a solitary office bearer could not exercise any power to hold PTI Intra Party Election till the Commission as a whole is appointed by a competent authority provided under the constitution. According to the record, Secretary General of PTI was Mr. Asad Umar whereas the Election Commission was appointed by Mr. Umar Ayub purportedly acting as Secretary General of PTI, who was never validly appointed as the Secretary General of PTI.

10. The petitioners have questioned the impugned order on legal as well as factual premise. However, we are mindful of our jurisdictional contours that the factual finding of ECP regarding the conduct of election cannot be substituted by this Court. Therefore, if it is found that the ECP had the jurisdiction in the matter then in such circumstances this Court has no mandate to interfere in the said findings. **Air Marshal (Retd) Muhammad Asghar Khan v. General (Retd) Mirza Aslam Baig, former Chief of Army Staff and others (PLD 2013 SC 1), Dr. M.A Haseeb Khan and others vs. Sikandar Shaheen and 9 others (PLD 1980 SC 139), Ghulam Muhammad and another vs. Mst. Noor Bibi and 5 others (1980 SCMR 933), Muhammad Younis Khan and 12 others vs. Government of N.W.F.P. through Secretary, Forest and Agriculture, Peshawar and others (1993 SCMR 618), Shah Wali and others vs. Ferozuddin and others (200 SCMR 718) & Collector of Customs and others vs. Messrs Fatima Enterprises Ltd and others**

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(2012 SCMR 416). Therefore, we will confine ourselves to the adjudication of the following two questions arising out of respective contention of the parties.

i. *Territorial jurisdiction of this Court and maintainability of the petition to question the order of a constitutional body.*

ii. *Whether the ECP has any jurisdiction to question, probe and adjudicate the Intra Party Election of PTI.*

Jurisdiction of this Court and maintainability of this petition.

11. The law is by now settled that the Election Commission is a constitutional and independent body having mandate to conduct free and fair election and it derives its authority from the constitution itself, therefore, if any order is passed by the ECP within the four-corner of law i.e. Constitution and the Election Act then the Constitutional Court would be very slow in interfering the working of Election Commission unless it is established that the jurisdiction exercised by the ECP is manifestly illegal, arbitrary or malafide. **Malik Ameer Haider Sanga vs. Mrs. Sumera Malik and others (2018 SCMR 1166).**

12. Moving on to the territorial jurisdiction of this Court. In order to elaborately answer this issue, we would like to refer to the jurisprudence regarding the territorial jurisdiction developed by superior courts of Pakistan through various judgments.

Asghar Hussain vs. the Election Commission of Pakistan (PLD 1968 SC 387). In this case, the High Court of East Pakistan was moved for quashment of an order of Tribunal/Election Commission relating to a dispute to a Provincial Constituency of a East Pakistan. The High Court of East Pakistan had dismissed the petition on the ground of lack of territorial jurisdiction. The Apex Court allowed the appeal against the judgment of the High Court of East Pakistan where it was held *"the decision given by the High Court of East*

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Pakistan that it has no jurisdiction to issue a writ or a direction to the election Commission of Pakistan is thus unreasonable in law from every point of view. The election Commission is "a person" or "authority" which exercises in the Province of East Pakistan functions in connection with their affairs of the Centre namely, election to the office of President, National Assembly and the Provincial Assemblies and for holding a Referendum as provided for in the Constitution. In that, the Commission is subject to the jurisdiction of High Court under Article 98 (2) (a) (i) notwithstanding that its main office and secretariat are located in the Province of West Pakistan".

The Federal Government vs. Ayan Ali and others (2017 SCMR 1179). In the present case, the issue related to the jurisdiction of Sindh High Court to have entertained a constitutional petition filed by Ms. Ayan Ali against a notification issued by the Federal Government on the recommendation of Government of Punjab. In the said case, Ayan Ali at one point of time had approached the Lahore High Court wherein directions were issued to the Federal Government to decide the said representation and subsequently when she had to depart from Karachi; through a notification her name was placed in ECL. The Apex Court in the said judgment while rejecting the arguments of the Federal Government relating to the territorial jurisdiction of Sindh High Court and while relying upon the *LPG's case* has held *"as regard the question of territorial jurisdiction, it hardly need emphasis that the impugned notification/memorandum has been issued by the Federal Government which functions all over the country and since the respondent No.1 resides in the Karachi and has a right and choice to proceed abroad through Jinnah International Airport Karachi and in fact at least twice earlier she had proceeded to go abroad through Jinnah International Airport Karachi, though she was stopped owing to the earlier notification/memorandum and therefore,*

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the embargo placed on her leaving the country has in fact taken place at Karachi, which prevention in all likelihood was to be repeated at Karachi in pursuance of the third notification/memorandum and thus giving rise to a cause of action against a third notification/memorandum at Karachi because of its taking effect there. It is now well settled that the Federal Government, though may have exclusive residence or location at Islamabad would still be deemed function all over the country".

Messrs Al-Iblagh Limited , Lahore vs. The Copyright Board Karachi and others (1985 SCMR 758). Regarding the territorial jurisdiction in the matter, it was observed that:

> *"The Central Government has set up a Copyright Board for the whole of Pakistan and it performs functions in relation to the affairs of the Federation in all the Provinces. Hence, any order passed by it or proceedings taken by it in relation to any person in any of the four Provinces of Pakistan would give the High Court of the Province, in whose territory the order would affect such a person, jurisdiction to hear the case.*

It was further observed that:-

> *"We agree and are of the opinion that both the Lahore High Court as well as the Sindh High Court had concurrent jurisdiction in the matter and both the Courts could have entertained a Writ Petition against the impugned orders in the circumstances of this case. We, therefore, hold that the Lahore High Court has illegally refused to exercise jurisdiction in this case. The case will, therefore, go back to the Lahore High Court for the decision of the Writ Petition filed by the appellant before it for decision on merits, in accordance with law".*

LPG Association of Pakistan through Chairman vs. Federal of Pakistan through Secretary Ministry of Petroleum and Natural Resources, Islamabad and others (2009 CLD 1498). In this case, the territorial jurisdiction of Lahore High Court was questioned on the ground that all the respondents (except a proforma respondents) functioned at Islamabad; impugned notice was issued by the Commission from Islamabad. The Lahore High Court while rejecting the

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said objection has laid the following principles on the point of territorial jurisdiction/concurrent jurisdiction of High Courts.

> *6. From the judgments cited at the Bar on both the sides, the portions whereof have been extensively reproduced, the following ratio is deducible:-*
>
> *(A) The Federal Government or any body politic or a corporation or a statutory authority having exclusive residence or location at Islamabad with no office at any other place in any of the Provinces, shall still be deemed to function all over the country.*
>
> *(B) If such government, body or authority passes any order or initiates an action at Islamabad, but it affects the "aggrieved party" at the place other than the Federal capital, such party shall have a cause of action to agitate about his grievance within the territorial jurisdiction of the High Court in which said order/action has affected him.*
>
> *(C) This shall be moreso in the cases where a party is aggrieved or a legislative instrument (including any rules, etc) on the ground of it being ultra vires, because the cause to sue against that law shall accrue to a person at the place where his rights have been affected. For example, if a law is challenged on the ground that it is confiscatory in nature, violative of the fundamental rights to property; profession, association etc, and any curb has been placed upon such a right by a law enforced at Islamabad, besides there, it can also be challenged within the jurisdiction of the High Court, where the right is likely to be affected:*
> *In this context, illustrations can be given, that if some duty/tax has been imposed upon the withdrawal of the amounts by the account holders from their bank account and the aggrieved party is maintaining the account at Lahore, though the Act/law has been passed at Islamabad, yet his right being affected where he maintains the account (Lahore), he also can competently initiate a writ petition in Lahore besides Islamabad; this shall also be true for the violation of any right to profession, if being conducted by a person at Lahore, obviously in the situation, he shall have a right to seek the enforcement of his right in any of the two High Courts.*
>
> *(D) On account of the above, both the Islamabad and Lahore High Courts shall have the concurrent jurisdiction in certain matters and it shall not be legally sound or valid to hold that as the Federal Government etc. resides in Islamabad, and operates from there; the assailed order/action has also emanated from Islamabad, therefore, it is only the Capital High Court which shall possess the jurisdiction. The dominant purpose in such a situation shall be irrelevant, rather on account of the rule of choice, the plaintiff/petitioner shall have the right to choose the forum of his convenience".*

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13. The survey of the aforesaid cases-law led us to conclude that if any authority which is established either under the Constitution or any Federal Law which performs function in connection with the affairs of Federation or such other constitutional functions which has any nexus with any Province, no matter where the Principal Secretariat of the Authority is situated, if it passes any order or undertake any proceedings in relation to any person or group of person who are residing in a Province or the cause of action has emanated from the province leading to the decision by the Constitutional forum or other authority like ECP, then the High Court of the Province in whose territory the order would affect the person would be competent to exercise jurisdiction in the matter. In the present case, admittedly, the impugned election had taken place in the province of Khyber Pakhtunkhwa and the Election Commission of Pakistan for that purpose resides in the Province of Khyber Pakhtunkhwa, therefore, in our humble view this Court as well as the Islamabad High Court have concurrent jurisdiction in the matter.

14. Moving on further to the arguments of Mr. Sikandar Bashir Mohmand, Advocate the learned counsel representing the Election Commission wherein he has raised an objection that a similar petition baring No. 287/2024 titled ***"Chaudhry Muhammad Aftab Dillo and another vs. Election Commission of Pakistan"*** was filed before the Lahore High Court which was dismissed by the Lahore High Court on 03.01.2024 therefore, the second petition on the same cause of action before this Court is not maintainable. It was further maintained that the judgment of Lahore High Court has been challenged through an Intra Court Appeal which is still pending before the Lahore High Court which shall be heard by a Larger Bench constituted in this regard. In this regard, in order to keep the record straight, prior to the impugned decision by the Election Commission of Pakistan a constitutional petition bearing No.5791-P/2023 was filed

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before this Court whereby the petitioner had asked for the similar relief. The said petition was disposed of by this Court vide judgment dated 31.12.2023 whereby directions were issued to the Election Commission of Pakistan to decide the pending matter by 22nd December, 2023 positively. When the Election Commission of Pakistan had passed the impugned order on 22.12.2023, the said order was challenged before this Court through the instant constitutional petition on 26.12.2023. Similarly, two other persons Umar Aftab Dillo and others had filed a petition bearing No. 287/2024 challenging the same order before the Lahore High Court. The main ground which prevailed before the Lahore High Court for dismissing the petition was that since PTI had already filed a similar petition before this Court, therefore it was a matter of proprietary that the case should be decided by this Court. The learned counsel in this regard has referred to the judgment of *Salahuddin Tirmizi (PLD 2008 SC 735)* and has argued that once the matter is raised before one High Court having concurrent jurisdiction then subsequently in the same series of cause of action as a matter of proprietary the same High Court should be approached. However, with profound respect the law laid down by the Apex court in the case *Salahuddin Tirmizi case* is not applicable in the present case because the first constitutional petition was filed before this Court bearing No. 5791-P/2023 wherein direction was issued to the ECP for passing a final order and when the final order was passed it was challenged before this Court by the present petitioner on 26.12.2023 whereas the same order was also challenged before the Lahore High Court by different persons subsequent to the filing of this petition. The Lahore High Court has not decided the case on merit rather dismissed the same in limine owing to the pendency of petition before this Court. Hence, neither the principle of resjudicata is attracted nor under the doctrine of proprietary this petition is not maintainable.

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In view of the aforesaid discussion, the objection to the maintainability of the petition and territorial jurisdiction of this Court is overruled.

Scope of the power of ECP under Article 218(3), 219 (E) of the Constitution and Section 215(5) of the Election Act, 2017

15. Before embarking upon the jurisdiction of ECP in the matter, we deem it appropriate to reproduce the relevant provisions of Constitution as well as Election Act, 2017 for ease of reference.

Constitution of Islamic Republic of Pakistan, 1973

218. (1)……
(2)……
(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.
219…….
(e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament).

Election Act, 2017

201. Constitution of political parties. – (1) A political party shall formulate its constitution, by whatever name called, which shall include—
(a) the aims and objectives of the political party;
(b) organizational structure of the political party at the Federal, Provincial and local levels, whichever is applicable;
© membership fee to be paid by the members where applicable;
(d) designation and tenure of the office-bearers of the political party;
(e) criteria for receipt and collection of funds for the political party; and
(f) procedure for—
(i) election of office-bearers;
(ii) powers and functions of office-bearers including financial decision-making;
(iii) selection or nomination of party candidates for election to public offices and legislative bodies;
(iv) resolution of disputes between members and political party, including issues relating to suspension and expulsion of members; and
(v) method and manner of amendments in the constitution of the political party.

(2) Every political party shall provide a printed copy of its constitution to the Commission.

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(3) Any change in the constitution of a political party shall be communicated to the Commission within fifteen days of incorporation of the change and the Commission shall maintain updated record of the constitutions of all the political parties.

208. Election within a political party. *– (1) The office-bearers of a political party at the Federal, Provincial and local levels, wherever applicable shall be elected periodically in accordance with the constitution of the political party.*

Provided that a period, not exceeding five years, shall intervene between any two elections.

(2) A member of a political party shall subject to the provisions of the constitution of the political party be provided with an equal opportunity of contesting election for any political party office.

(3) All members of the political party at the Federal, Provincial and local levels shall constitute the electoral-college for election of the party general council at the respective levels.

(4) The political party shall publish the updated list of its central office-bearers and Executive Committee members by whatever name called, on its website and send the list, and any subsequent change in it, to the Commission.

(5) Where a political party fails to conduct intra party elections as per given time frame in their constitution, a show cause notice shall be issued to such political party and if the party fails to comply with, then the Commission shall impose fine which may extend to two hundred thousand rupees but shall not be less than one hundred thousand rupees.

209. Certification by the pol8itical party. *(1) A political party shall within seven days from completion of the intra party elections, submit a certificate signed by an office-bearer authorized by the Party Head, to the Commission to the effect that the elections were held in accordance with the constitution of the political party and this Act to elect the office-bearers at the Federal, Provincial and local levels, wherever applicable.*

(2) The certificate under sub-section (1) shall contain the following information—

(a) the date of the last intra party elections;

(b) the names, designations and addresses of office-bearers elected at the Federal, Provincial and local levels, wherever applicable;

(c) the election results; and

(d) copy of the political party's notifications declaring the results of the election.

(3) The Commission shall, within seven days from the receipt of the certificate of a political party under sub-section (1), publish the certificate on its website.

215. Eligibility of party to obtain election symbol. *–(1) Notwithstanding anything contained in any other law, a political party enlisted under this Act shall be eligible to obtain an election symbol for contesting elections for Majlis-e-Shoora (Parliament), Provincial Assemblies or*

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local government on submission of certificates and statements referred to in section 202, 206, 209 and 210.

(2) A combination of enlisted political parties shall be entitled to obtain one election symbol for an election onl if each party constituting such combination submits the certificates and statements referred to in sections 202, 206, 209 and 210.

(3) An election symbol already allocated to a political party shall not be allocated to any other political party or combination of political parties.

(4) Where a political party or combination of political parties, severally or collectively fails to comply with the provision of section 209 or section 210, the Commission shall issue to such political party or parties a notice to show cause as to why it or they may not be declared ineligible to obtain election symbol.

(5) If a political party or parties to whom show cause notice has been issued under sub-section (4) fails to comply with the provision of section 209 or section 210, the Commission may after affording it or them an opportunity of being heard, declare it or them ineligible to obtain an election symbol for election to Majlis-e-Shoora (Parliament), Provincial Assembly or a local government, and the Commission shall not allocate an election symbol to such political party or combination of political parties in subsequent elections.

16. Admittedly, ECP is not a Court or a Tribunal (Muhammad Hanif Abbasi's case PLD 2018 SC 189). However, 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". The power so conferred is restricted to the fulfilment of the duly specified, that is, "to organize and conduct the election". 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

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would be the status of the general power of the Election Commission under Article 218(3) of the Constitution vis-à-vis such law. **Zulfiqar Ali Bhatti vs. Election Commission of Pakistan (Civil Appeal No. 142 of 2019 decided on 02.11.2022).**

17. In *Zulfiqar Ali Bhatti's case*, the Apex Court has further explained the general powers of the Election Commission in para-14 of the said judgment, which reads as under:-

> *"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 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".*

18. In order to sum up the aforesaid discussion, it is trite law that the Election Commission of Pakistan despite being a constitutional body has the jurisdiction to exercise its powers either under the Constitution or the Election Act, 2017. Its general power under Article 218(3) of the Constitution cannot be abridged by any legislative instrument/act of parliament, however, its other functions arising out of Election Act must be exercised with the expressed authority of the Election Act. Indeed, it is settled law that a "jurisdictional fact" is a fact which must exist before a Court, Tribunal or an Authority assumes jurisdiction over a particular matter. A jurisdictional fact is one on existence or non-existence of which depends jurisdiction of a court, a tribunal or an authority. It is the fact

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upon which an administrative agency's power to act depends. If the jurisdictional fact does not exist, the court, authority or officer cannot act. If a Court or authority wrongly assumes the existence of such fact, the order can be questioned by a writ of certiorari. The underlying principle is that by erroneously assuming existence of such jurisdictional fact, no authority can confer upon itself jurisdiction which is otherwise does not possess". Existence of "jurisdictional fact" is sine qua non for the exercise of power. If the jurisdictional fact exists, the authority can proceed with the case and take an appropriate decision in accordance with law. Once the authority has jurisdiction in the matter on existence of 'jurisdictional fact' it can decide the 'fact in issue' or 'adjudicatory fact'. A wrong decision on 'fact in issue' or on 'adjudicatory fact' would not make the decision of the authority without jurisdiction in vulnerable provided essential or fundamental fact as to existence of jurisdiction is present". **M/s Srinivasa Rice Mills vs. Employees State Insurance Corporation (Appeal No. 4774/2006.)**

19. Having discussed the general jurisdiction of the ECP and referred to the relevant provision of the Election Act, 2017, we now proceed to the moot question whether the ECP has any jurisdiction to question, probe and adjudicate the Intra Party Election dispute or procedural in proprietary in the election process of a political party. It is envisaged by Section 208 of the Election Act, 2017 that the office bearer of a political party at the Federal, Provincial and local levels, wherever applicable, shall be elected periodically in accordance with the Constitution of Political Party. The said Intra Party Election must be conducted at least within five years and where a political party fails to conduct Intra party election as per given time frame in the Constitution it is liable to pay a fine which may extend to 20000 rupees. The verbiage of section 208 does not authorize the ECP either to supervise the Intra Party Election or entertain any complaint regarding

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any irregularity in the said election. However, it is the command of the Section 209 of the Election Act, 2017 that a political party shall within seven days from completion of Intra Party Election submits a certificate signed by office bearer authorized by the Party Head to the ECP to the effect that the elections were held in accordance with the constitution of political party and the Act. The said certificate should, inter alia, include a date of last Intra Party Election, the names designation addresses of office bearers, the election result and the copy of political party notification declaring the result of the election. On submission of the aforesaid documents it is the statutory duty of Commission to publish the said certificate on its website within seven days. Section 209 of the Election Act, 2017 does not confer any jurisdiction on the ECP to question the Intra Party Election process.

20. Allocation of symbol to a political party is governed under chapter-XII of the Election Act, 2017. A political party who has complied with the provisions of section 202, 206, 209 & 210 becomes eligible for an election symbol for contesting election for Parliament, Provincial Assembly or Local Government. The penal clause i.e subsection (5) of section 215 envisaging for ineligibility to obtain an election symbol can be invoked only when a political party despite a show cause notice has failed to comply with provision of sections 209 or 210 of the Election Act, 2017. Section 209 only deals with the submission of documents and in no manner authorises the ECP to question or adjudicate upon the validity of Intra Party Election. Indeed, it is settled law that a regulatory and penal provision in any law should be construed strictly. Penal statutes tendering to deprive valuable rights of franchise should be strictly construed and in case of doubt, benefit must go to the person against whom, it sought to be invoked. (PLD 1984 Lahore 502) (PLJ 1984 Lahore 575). Disqualifying provisions in an act dealing with Municipal Election are penal provisions and therefore, ought not to be extended beyond

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their legitimate limit; but at the same time if there is any doubt, the Court should be careful to see that the intention of the legislature in enacting the section is duly observed. (AIR 1931 Cal 288) (Understanding Statutes by S.M. Zafar page-270). The combined reading of section 208, 209 and 215 does not give any impression that the ECP has any jurisdiction to question or adjudicate the Intra Party Election of a political party. The perusal of the entire Election Act would clearly show that the ECP has no jurisdiction to conduct a rowing inquiry in any matter rather its jurisdiction is summary in nature . In the case of ***Sardar Bahadar Khan Bangulzai (1999 SCMR 1921),*** the Apex Court while dealing with a matter regarding the assumption of jurisdiction by the Chief Election Commission on a reference by Head of the Party has very meticulously observed that the inbuilt organizational structural dispute of a political party cannot be resolved by Election Commission in its limited jurisdiction. The relevant para of the judgment reads as under:-

> *19. We are inclined to hold that if a plea is raised before the Chief Election Commissioner that the person who had made reference on account of alleged defection is not the head of the political party involved, the Chief Election Commissioner is obliged to examine the bona fides of such a plea. If the person who has made the reference as the Head of the political party involved has been acting as such in the past, the Chief Election Commissioner is supposed to proceed on the assumption that he is the Head of the political party involved. However, in case he finds that there is no reliable material before him to conclude that factually the person who has made the reference is the head of the political party involved and that the above question relates to inbuilt organizational structural disputes of the political party involved, in that event he may ask the parties to get the above question resolved through a civil proceeding.*

21. The outcome of the aforesaid discussion is that the impugned action of the ECP denying election symbol to the petitioners has the effect of depriving the petitioners and its members to freely participate in the affairs and governance of Pakistan through political activities as guaranteed through

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Article 17 (2) of the Constitution. Indeed, the Constitution of 1973 has ensured that every citizen in the Pakistan has the right to form or to be a member of political party subject to any reasonable restriction imposed by law in the interest of sovereignty or integrity of Pakistan. What could be the reasonableness of the restriction has been aptly discussed by Mr. A.K Brohi in his famous Book (Fundamental Law of Pakistan) and has formulated the following principles of the law of association:-

> "First: the rights of individuals to associate must be protected from unlawful governmental infringement,
> Second: Government may promote the opportunities of individuals to associate by appropriate means, and may grant appropriate privileges and powers to associations when the public interest will be fostered by doing so,
> Third: Government may when the public interest requires it forbid private persons to interfere with the rights of individuals to associate and may even require private persons to enter into legal relations with associations,
> Fourth: An association must not without ad4equate reason infringe upon the rights of other persons; and government must define the interests entitled to legal protection of these other individual and groups, whether they are members or non-members of the association,
> Fifth: Government may prevent the use of the rights of association to do serious injury to society as a whole or to be organized political institution of the society. (12)".

22. Similarly, the Apex Court in the case of **Arshad Mehmood and others vs. Government of Punjab and others (PLD 2005 SC 193)** has laid down the following standards of ascertainment of reasonable restrictions:-

i. *The limitation imposed upon a person in enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public. Messrs Dwarka Prasad v. State of U.P. (AIR 1954 SC 224), P.P. Enterprises v. Union of India (AIR 1982 SC 1016).*
ii. *The Court would see both to the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. Not only substantive but procedural provisions of statute also enter into the verdict of its reasonableness Kishan Chan v. Commissioner of Police (AIR 1961 SC 705).*
iii. *The principles of natural justice are an element in considering reasonableness of a restriction but the*

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elaborate rules of natural justice may be excluded expressly or by necessary implication where procedural provisions are made in the statute. Haradhan Saha v. State of W.B. (1975 3 SCC 1981.

iv. *Absence of provision for review makes the provisions unreasonable. K.T. Moopil Nair v. State of Kerala (AIR 1961 SC 552).*

v. *Retrospectivity of a law may also be the relevant factor of law, although a retrospectivity of law does not make it automatically unreasonable. Narottamdas v. State of Maddhya Pradesh and others (AIR 1964 SC 1667).*

vi. *Reasonable restriction also includes cases of total prohibition of a particular trade or business which deprive a person of his fundamental right under certain circumstances. Narindra Kumar v. Union of India (AIR 1960 SC 430).*

Therefore, any restriction on the political party through any legislative instrument or executive order can be subject to judicial review by the Constitutional Courts on the touchstone of Article 17 of the Constitution.

In the case of ***"Muhammad Nawaz Sharif v. Federation of Pakistan (PLD 1993 SC 473),*** the Apex Court while dilating upon the right of political parties to participate in election being the fundamental rights of citizens of Pakistan has held:

> *"Indeed, even earlier this Court had observed in Maudoodi's case PLD 1964 SC 673 that forming of associations necessarily implies carrying on the activities of an association for the mere forming of association would be of no avail. (see page 764 of the Report". It was also observed in the same case that the ordinary conception of a political party includes a right within the frame work of the Constitution to exert itself through its following and Organization, and using all avaialb3e channels of mass communication, to progate its view in relation to the whole complex of the administrative machine, including the Legislatures, in respect of matters which appear to it to require attention for the amelioration of conditions generally through the nation, for improvements particularly in administrative procedures and policies as well as in the legislative filed, even to the extent of proposing and pressing for amendment of the Constitution itself (see page 692 of the Report)".*

Similarly, in the case of **Miss Benazir Bhutto v. Federation of Pakistan and another (PLD 1988 SC 416).** It was herein, inter alia, also observed:-

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> *"Reading Article 17(2) of the Constitution as a whole it not only guarantees the right to form or be a member of a political party but also to operate as political party.....Again, the forming of a political party necessarily implies the right of carrying on of all its activities as otherwise the formation itself would be of no consequence. It other words, the functioning is implicit in the formation of the party. (see page 511 of the Report).*

In a subsequent passage (at page 541) this aspect was commented upon as follows:-

> *"It (Article 17(2) provides as basic guarantee to the citizen against usurpation of his will to freely participate in the affairs and governance of Pakistan through political activity relating thereto". (Emphasis supplied).*

Thus, in the scheme of out Constitution, the guarantees "to form a political party" must be deemed to comprise also the right by that political party to form the Government, wherever the said political party possesses the requisite majority in the Assembly. As was explained by the Chief Justice Muhammad Haleem in the same judgment:-

> *"Our Constitution is of the pattern of parliamentary democracy with a Cabinet system based on party system as essentially it is composed of the representatives of a party which is n majority... it is a party system that converts the results of a Parliamentary election into a Government".*

Accordingly, the basic right "to form or be a member of a political party" conferred by Article 17(2) comprises the right of that political party not only to form a political party, contest elections under its banner but also, after successfully contesting the elections, the right to form the Government if its members, elected to that body, are in possession of the requisite majority. The Government of the political party so formed must implement the programme of the political party which the electorate has mandated it to carry into effect. Any unlawful order which results in frustrating this activity, by removing it from office before the completion of its normal tenure would, therefore, constitute an infringement of this Fundamental Right".

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Relationship between symbol and a political party

23. Indian Supreme Court in the case of **Kanhiyalal Omar vs. R.K. Trivedi & Ors, 1986 AIR 111, 1985 SCR Supl. (3) 1** highlighted the importance of symbols for political parties in the following words:

> *"The use of a symbol, be it a donkey or an elephant, does give rise to an unifying effect amongst the people with a common political and economic programme and ultimately helps in the establishment of a Westminster type of democracy which we have adopted with a Cabinet responsible to the elected representatives of the people who constitute the Lower House. The political parties have to be there if the present system of Government should succeed and the chasm dividing the political parties should be so profound that a change of administration would in fact be a revolution disguised under a constitutional procedure. It is no doubt a paradox that while the country as a whole yields to no other in its corporate sense of unity and continuity, the working parts of its political system are so organized on party basis in other words on systematized differences and unresolved conflicts. That is the essence of our system and it facilitates the setting up of a government by the majority".*

24. In our jurisdiction, the Apex Court in the case of ***Mrs Benazir Bhutto vs. Federation of Pakistan (PLD 1989 SC 66)*** has held that allocation of symbol to a political party is its fundamental right. The relevant para of the judgment is reproduced as under:-

> *"The term "election is a comprehensive term and includes all the stages of the election commencing from, the calling of the electorate to vote until the declaration and notification of the final result. Obviously casting of votes for the candidates is the most important stage in the process of elections. Now while Rule-9 of the Rules permits a political party to obtain a common symbol to facilitate the voter to identify his party candidate, section 21 of the Act omits to recognize this right. But this Court has found that elections may be held on party basis in every constituency by virtue of the Fundamental Right conferred on the citizens of this country by Article 17(2) of the Constitution. Thus an inconsistency exists between Section 21 of the Act and the Fundamental Right aforesaid. Section 21, as it now stands, is neither cognizant of the existence of political parties nor accords any*

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recognition to them. Indeed be failure therein to make any provision for allocation of any symbol to a political party, which alone can enable it to effectively participate in the process of elections, renders nugatory the right to form a political party and accomplish its objectives, namely, to organize and fight an election with a view to capturing political power. Accordingly, I agree with my learned brother Shafiur Rahman, J. that Section 21 is vocative of the Fundamental Right contained in Article 17(2) and is void to the extent indicated by him. The petition, accordingly, must succeed.

Conclusion

25. The survey of the case-law stated above and the enabling provision of the Constitution as well as the Act lead us to the conclusion that it is the fundamental right of every citizen of Pakistan not only to form political party but the political party should be provided a conducive atmosphere to contest election for the Parliament, Provincial Assembly, Senate and to form a Government. It has the right to contest election under a common symbol this constitutional right cannot be denied to it on the basis of absurd provision of law. Therefore, the impugned decision of the ECP is backed by no legal provision either under the Act or under the Constitution. Therefore, the same is illegal.

26. Above are the reasons for our short order dated 10.01.2024, which is reproduced as under:-

"For the reasons to be recorded later and subject to amplifications and explanations made therein, the instant petition is allowed in the following manner:

i. *We hold and declare that the impugned order of the Election Commission of Pakistan (ECP), dated 22.12.2023 passed in Case No. F.5 (1)/2023-O/o-DD-Law Case No. F.3(10)/2002-Confd (Vol-III) as illegal, without any lawful authority and of no legal effect.*

ii. *The Election Commission of Pakistan (ECP) is directed to forthwith publish the Certificate filed by the petitioner (PTI) on its Website in terms of section 209 of the Election Act, 2017.*

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iii. *It is further held and declared that Pakistan Tehreek-e-Insaaf (PTI) is entitled to the Election Symbol strictly in terms of Sections 215 and 217 read with any other enabling provision of the Election Act, 2017 and Election Rules, 2017".*

Judge

Judge

Date of hearing & announcement
Of judgment.....09-10.01.2024
Date of preparation & signing
Of judgment.....12.01.2024

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