

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE NASIR-UL-MULK, CJ.
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE GULZAR AHMED

CIVIL APPEAL NOS. 727-730,777 & 788 OF 2014

(on appeal from the judgments/Orders of the Lahore High Court, Multan Bench dated 28.02.2014 passed in Writ Petition Nos.11666 of 2013; of the LHC Rawalpindi Bench dated 24.03.2014 passed in W.P.204 of 2014; of the LHC Multan Bench dated 28.02.2014 in W.P.1078 of 2014 and in W.P.11960 of 2013; of the LHC Lahore dated 12.03.2014 passed in W.P. No.30569 of 2013 and of the LHC Bahawalpur Bench dated 19.05.2014 passed in W.P.3666 of 2014, respectively)

AND

CIVIL APPEAL NO. 273-L OF 2014

(on appeal from the judgment/order of the Lahore High Court Lahore dated 30.06.2014 passed in W.P. No.19172 of 2014)

AND

CIVIL PETITION NO. 1244 OF 2014

(on appeal from the judgment/order of the Peshawar High Court Peshawar dated 13.05.2014 passed in W.P. 1086-P of 2014)

AND

CIVIL PETITION NOS.1619-L AND 909 OF 2014

(on appeal from the judgments/orders Lahore High Court Lahore dated 18.08.2014 passed in W.P. No. 22081 of 2014 and of the LHC Rawalpindi Bench dated 24.03.2014 passed in W.P. No.2753 of 2013 respectively)

Muhammad Raza Hayat Hiraj
Sheikh Rashed Ahmed
Makhdoom Javed Hussain Hashmi
Muhammad Riaz Malik
Khawaja Ghulam Rasool Koreja
Malik Muhammad Afzal Khokhar

(in CA 727,729/14)
(in CA 728/14)
(in CA 730/14)
(in CA 777/14)
(in CA 788/14)
(in CA 273-L/14)

...Appellants

Pir Muhammad Aqal Shah
Muhammad Riaz Malik
Sheikh Rasheed Ahmed

(CP 1244/14)
(CP 1619-L/14)
(CP 909/14)

...Petitioners

VERSUS

The Election Commission of Pakistan etc.
Election Tribunal, Rawalpindi & others

(in CA 727,729,730/14)
(in CA 728/14 and
CP 909/14)

Hamid Zaman, etc

(in CA 777/14 and
CP 1619-L/14)

Makhdoom Syed Ahmed Alam Anwar & others
Malik Karamat Ali Khokhar, etc

(in CA 788/14)
(in CA 273-L/14)

Muhammad Nazir Khan & others
Hamid Zaman, etc

(CP 1244/14)
(CP 1619-L/14)
...Respondents

For the Appellants/Petitioners:

(in CAs 727,729/14) Mian Abbas Ahmed, ASC.

(in CA 728/14 &
CP 909/14)

Sardar Abdul Raziq Khan, ASC

(in CA 730/14)

Mr. Muhammad Akram Sheikh, Sr. ASC

(in CA 777/14)

Mr. Asad Javed, ASC.

(in CA 788/14)

Mr. Farooq H. Naek, Senior ASC

(in CA 273-L/14)

Ch. Nazir Ahmed Kamboh, ASC.

(in CP 1244/14)

Mr. Kamran Murtaza, ASC.

(in CP 1619-L/14)

Ch. Aamir Rehman, ASC.

For Respondent-3:

(in CAs 727,729/14) Sardar Muhammad Aslam, ASC

For Respondent-2:

(in CA 728/14 &
CP 909/14)

Mr. M. Ilyas Sheikh, Sr. ASC.

For Respondent-1:

(in CAs 777 & 273-L/14 and
CP 1619-L/14)

Mr. Ahmed Awais, ASC

For Respondent-13:

(in CA 730/14)

Malik Mumtaz Jatt, ASC

For Respondent-1:

(in CP 1244/14)

Qazi Muhammad Anwar, Sr. ASC

On Court Notice:

Kh. Ahmad Hussain, DAG.

Date of Hearing:

25.09.2014

JUDGMENT

NASIR-UL-MULK, CJ.— These connected Civil Appeals/
Civil Petitions arise out of various orders and judgments passed by the
Lahore High Court and Peshawar High Court in Writ Petitions against
interim/interlocutory orders of the Election Tribunals. As common
questions of law were involved, the said appeals/petitions were clubbed

and heard together. Leave to appeal was first granted on 08.05.2014 in Civil Appeal Nos. 727 of 2014 etc in the following terms:

“After hearing the arguments of learned ASCs for the parties in these connected civil petitions, leave to appeal is granted, inter alia, to examine the following contentions:

- i) Whether Article 225 of the Constitution of the Islamic Republic of Pakistan, 1973 ousts the jurisdiction of High Courts under Article 199 of the Constitution with regard to post election disputes?*
- ii) Whether bar contained in Article 225 of the Constitution is absolute?*
- iii) Whether jurisdiction under Article 199 of the Constitution may be exercised against interlocutory orders passed by the Election Tribunal during the process of trial?*
- iv) Whether where it is shown that determination of an Election Tribunal is erroneous on the point of law, arbitrary or result of non-reading of material on record, High Court can exercise its jurisdiction under Article 199 of the Constitution?*
- v) Whether constitution petition under Article 199 of the Constitution before the High Court is competent against an action of the Election Tribunal, found in violation of the law laid down by this Court?”*

2. The appellant in Civil Appeal No.727 of 2014 was a returned candidate for National Assembly from the constituency NA-156 Khanewal-I, against whom an election petition was filed before the Election Tribunal, Multan. The appellant filed an application under Section 63 of Representation of the Peoples Act, 1974 (hereinafter to be referred to as “the Act”) for dismissal of the election petition due to alleged failure of the election petitioner to verify the election petition in accordance with provisions of Section 55 (3) of the Act read with Order VI Rule 15 of CPC. The said application was dismissed as being without merit by Election Tribunal vide order dated 23-09-2013 which was challenged through Writ Petition No. 11666. The Multan Bench of

Lahore High Court, through a consolidated judgment dated 28-02-2014, dismissed the said Constitution Petition.

2. Civil Appeal No. 729 of 2014 is related to the above mentioned appeal, where Writ Petition No. 1078 was also dismissed by the High Court vide its order dated 28.02.2014, filed against the orders of the Election Tribunal which had dismissed the application of the petitioner to treat issues of jurisdiction as preliminary in the proceedings of the election petition.

3. In Civil Appeal No. 728 of 2014 the appellant was a returned candidate for National Assembly from the constituency NA-55 Rawalpindi, against whom an election petition was filed before the Election Tribunal, Rawalpindi. The appellant also filed application for rejection of the election petition under Section 63 of Act (for similar reasons as in C.A. 727 of 2014 above), which was dismissed vide order of the Election Tribunal dated 11.11.2013. A subsequent application on the same subject was also dismissed vide Election Tribunal's order dated 21.01.2014, which was challenged before the High Court through Writ Petition No. 204 of 2014. The said Writ Petition was also dismissed through order dated 24.03.2014.

4. The appellant in Civil Appeal No. 730 of 2014 was a returned candidate for National Assembly from the constituency NA-149 Multan-II, against whom an election petition was filed, for the rejection of which an application under Section 63 of the Act was filed (for similar reasons as in C.A. 727 of 2014 above). The dismissal of the said application through order of the election tribunal dated 26.09.2013 was challenged through Writ Petition No. 11960, which was also dismissed on 29.02.2014. Meanwhile, the appellant had resigned from the seat of the National Assembly and by-election has been held and another candidate has been elected. This appeal has become infructuous.

5. The appellant in Civil Appeal No. 777 of 2014 was a returned candidate for National Assembly from the constituency NA-118 Lahore-I, Lahore against whom an election petition was filed before the Election Tribunal, Lahore, which vide its order dated 18.11.2013 directed the thumb impression of the voters to be verified by National Database and Registration Authority (NADRA). The said order was impugned before the Lahore High Court through Writ Petition No. 30569 of 2013, which was dismissed vide order dated 12.03.2014.

6. The appellant in Civil Appeal No. 788 of 2014 was a returned candidate for National Assembly from the constituency NA-192 Rahim Yar Khan, against whom Respondent No. 1 filed Constitution Petition No. 2968, calling into question the fairness of the process adopted for the consolidation of the election results. The said Petition was dismissed by order of the High Court dated 23.05.2013 as Article 225 ousts the jurisdiction of courts in election matters, after which an election petition was filed before the Election Tribunal, Bahawalpur. Election Tribunal vide its Order dated 14.05.2014 ordered the recounting of all the polled ballot papers and appointed a commission for the purpose. The said order was impugned before the Lahore High Court, Bahawalpur Bench by Writ Petition No. 3666 of 2014, which was also dismissed vide order dated 19.05.2014.

7. The appellant in Civil Appeal No. 273-L of 2014 was a returned candidate for National Assembly from the constituency NA-128 Lahore XI, Lahore against whom an election petition was filed before the Election Tribunal, Lahore, which first vide its order dated 26.03.2014 directed the verification of thumb impressions at a particular polling booth by the NADRA and then through its order dated 13.06.2014 directed the inspection of election record of the whole constituency. The said orders were impugned before the Lahore High Court through Writ

Petition No. 19172 of 2014 which was dismissed vide order dated 30.06.2014.

8. The petitioner in Civil Petition No. 1244 of 2014 had challenged the elections for the National Assembly constituency of NA-40 (Tribal Area-V) through an election petition after losing the same. Election Tribunal, Abbottabad, raising concern over the fairness of the elections allowed the application of the petitioner through order dated 27.03.2014 for verification of the votes through finger print/thumb impression method employed by the NADRA. The said order was assailed by the appellant before Peshawar High Court in Writ Petition No. 1086-P of 2014. High Court vide its order dated 13.05.2014 continued the earlier granted stay order for continuation of the status quo, which was assailed before us in the said Civil Petition.

9. The petitioner in Civil Petition No. 1619-L of 2014 was a returned candidate for National Assembly from constituency NA-118 Lahore I, Lahore against whom an election petition was filed before the Election Tribunal, Lahore, which first vide its order dated 11.08.2014 closed the right of evidence of the appellant, after he had proceeded abroad on a conference, delaying the election tribunal proceedings. The said Order was impugned before the High Court vide Writ Petition No. 22801 of 2014 which was dismissed vide Order dated 18.08.2014.

10. The petitioner in Civil Petition No.909 of 2014 had filed Writ Petition No. 2753 of 2013 in the above mentioned Election Matter impugning the order of the Election Tribunal dated 11.11.2013 dismissing the application by the petitioner for dismissal of the election petition as it was defective under the Act (for not getting the election petition verified on oath) and also for allowing the application of the petitioners in the election petition to produce documents under Order

XIII R. 2 of the Code of Civil Procedure. The said Constitution Petition was dismissed 24.03.2014.

11. All the above cases arise from judgment of the Lahore High Court except Civil Petition No.1244 of 2014, wherein the petitioner had impugned interlocutory order passed by the Peshawar High Court in exercise of its powers under Article 199 of the Constitution, suspending the proceedings before the Election Tribunals.

12. The question in essence in all these matters is the maintainability of Constitution Petition under Article 199 of the Constitution against interlocutory orders passed by an Election Tribunal, hearing the election petition. These matters pertain to the General Elections held in 2013. The only impugned judgment before us is that of the Lahore High Court dated 28.02.2014 of a three Member Bench. The matter was first heard by a Division Bench of the High Court and in view of split opinion it was referred to the Chief Justice of the High Court for placing the same before a larger Bench. Accordingly, a three Member Bench was constituted, which held that Writ Petitions against interlocutory order of the Election Tribunal were not maintainable. The Court determined from the entire case law developed on the subject that Section 63 of the Act does not envisage a dismissal of the petition in case of its failure to comply partially with the provisions of Section 55 of the Act. Further, that petition will only be dismissed under Section 63 if it as a whole fails to comply with the provisions of Section 55 of the Act or if the petition is not attested or

verified on oath. The Court referred to Article 222 (d) and (e) of the Constitution and observed that all matters related to the conduct of elections, election petitions and offences in connection with elections shall be provided for by parliament through law. That Article 225 starts with a negative phrase precluding any other forum from taking cognizance of disputes related to the election to the legislature and provides for a special procedure to be adopted for contesting elections and the special procedure has been provided for in the form of the Act. That the Act provides a particular scheme for resolving election disputes and the legislative intent behind choosing such a mechanism was an expeditious resolution of election disputes whereas intervention under Article 199 against interlocutory order could possibly delay the trial of the election petition. It was however, stated that a High Court could possibly interfere with interlocutory orders only in exceptional circumstances where such order is illegal and the aggrieved person becomes remediless against the order which disqualifies and disenfranchises him. In response to the argument based on due process it was held that since the remedy of appeal has been provided under Section 67 of the Act, the said Act does not contravene Article 10-A; that Constitution Petitions before High Court against interlocutory orders will lead to fragmentary decisions and hence, should be avoided.

13. Mr. Ibad-ur-Rehman, J. who was a Member of the Division Bench that gave a split opinion had held that such Constitution Petitions were maintainable. The Honourable Judge distinguished the

case of Ghulam Mustafa Jatoi v. Additional District & Sessions Judge etc.

(**1994 SCMR 1299**) by holding that the High Court could exercise jurisdiction against patently illegal orders by election functionary, whereas Election Tribunal was not an election functionary.

14. The above question also came up before the High Court of Sindh in the case of Ali Gohar Khan Mahar v. Election Commission of Pakistan (**2014 CLC 776**) and the High Court of Balochistan in the case of Dur Muhammad Khan Nasar v. Muhammad Shafiq Tareen (**PLD 2014 Balochistan 152**). Though these judgments have not been impugned before us yet the same were referred by the learned counsel during hearing of these matters. Reasoning given in those judgments is helpful in deciding the issue. In Ali Gohar Khan Mahar's case (*supra*) the judgment was handed down by a Division Bench of the High Court and authored by Mr. Munib Akhtar, J. whereas Dur Muhammad Khan Nasar's case (*ibid*) was authored by Qazi Faez Isa, CJ. (as he then was). Both the Courts came to the same conclusion as the Lahore High Court, that Constitution Petitions against interlocutory order by the Election Tribunals are not maintainable.

15. In order to appreciate the arguments of the learned counsel in their proper perspective, it will be appropriate to reproduce Article 225 of the Constitution as the controversy relates to its interpretation in determining whether the High Court's jurisdiction under Article 199 of the Constitution is ousted in post-election disputes. It reads:

“225. No election to a House or a Provincial Assembly shall be called in question except by an election petition presented to such tribunal and in such manner as may be determined by Act of Majlis-e-Shoora (Parliament).”

16. Mian Abbas Ahmad, ASC, learned counsel appearing for the appellants in Civil Appeal Nos. 727 and 729 of 2014 submitted that the powers contained in Article 225 of the Constitution pertain only to the filing of the election petition and would not cover the manner in which the same is to be decided in accordance with the Act of Parliament. With reference to the facts of his case, it was contended that Election Tribunal was obliged under Section 63 of the Act to dismiss the Election Petition for failure of the election petitioner to verify the same in accordance with the provisions of Section 55(3) of the Act. That this must be disposed of as a preliminary issue and in case a returned candidate succeeds in establishing nonconformity with the provision of Section 55(3) of the Act, the matter be decided at the preliminary stage so that the parties are not unnecessarily burdened with the production and recording of evidence. That this process will be in accord with the spirit of election laws requiring speedy disposal of the election petitions. The learned counsel argued that the High Court must thus issue writ of *mandamus* directing the Election Tribunal to exercise its jurisdiction if the same is unjustifiably declined. In support of his contention the learned counsel relied upon Mian Jamal Shah v. The Member Election Commission etc. (**PLD 1966 SC 1**), Muhammad Baran v. Member (Settlement and Rehabilitation) Board of Revenue (**PLD 1991 SC 691**), Mian Arif Iftikhar v. Election Tribunal, West Pakistan and others (**PLD 1968 Lahore 1387**), Ghulam Mustafa Jatoi v. Additional District & Sessions Judge etc. (*supra*) and Ayatullah Dr. Imran Liaquat Hussain v. Election Commission of Pakistan etc. (**PLD 2005 SC 52**).

17. Mr. Farooq H. Naek, Sr. ASC, appearing for the appellant in Civil Appeal No.778 of 2014 submitted that for the purposes of determining the bar under Article 225 of the Constitution the same can be split into two parts; the first relating to the calling into question of an election and the second relating to the manner in which the Tribunal is to decide the election petition. It was contended that the Constitutional bar relates to only first part in that the election can only be questioned by way of an election petition before the Election Tribunal. That once the petition is filed, the bar is no longer attracted and the same is to be processed and decided in accordance with the Act of Parliament, namely, the Act. The learned counsel further contended that Article 225 of the Constitution relates to the remedy available to the losing candidate and thus the bar cannot be applied to the returned candidate, leaving him without remedy against an adverse interlocutory order passed by the Election Tribunal. It was contended that Section 67 of the Act does not provide adequate remedy for challenging an interlocutory order. Learned counsel for the petitioner, in this context, relied upon the cases of Mehboob Ali Malik v. The Province of West Pakistan and another (**PLD 1963 (W.P.) Lahore 575**) and Khan Asfanyar Wali and others v. Federation of Pakistan (**PLD 2001 SC 607 at 877 paragraph 178**).

18. Referring to Ghulam Mustafa Jatoi v. Additional District & Sessions Judge/Returning Officer (supra), Syed Nayyar Hussain Bukhari v. District Returning Officer, Na-49, Islamabad (**PLD 2008 SC 487**) and Muhammad Hussain Babar v. Election Commission Of Pakistan, Through Secretary (**PLD 2008 SC 495**) the learned counsel submitted that although the case law relates to orders passed while the election was in progress and not to the post-election period, however, the principle laid down therein do not completely oust jurisdiction of the

High Court under Article 199 of the Constitution where an interlocutory order is patently illegal, without jurisdiction and *coram non judice*. It was contended that the principles laid down shall also be applicable to interlocutory order passed by the Election Tribunal. In this context reliance was placed on *Hari Vishnu Kamath v. Ahmad Ishaque and others* [**AIR 1955 SC 233** (Paragraph No. 6)].

19. Ch. Aamir Rehman, ASC, appearing for the petitioner in Civil Petition No. 1619-L of 2014, referred to the case of *Dr. Sher Afghan Khan Niazi v. Ali S. Habib and others* (**2011 SCMR 1813**) to submit that the High Court can exercise its jurisdiction in exceptional circumstances.

20. Qazi Muhammad Anwar, Sr. ASC, representing Respondent-1 in Civil Petition No.1244 of 2014, submitted that the High Court's intervention was justified when the Election Tribunal allowed the application of the election petitioner for verification of the thumb impression on the ballot papers after the arguments in the case had been addressed and judgment had been reserved. The learned counsel cited in support of his contention the cases of *Muhammad Asim Kurd alias Gailoo v. Nawabzada Mir Lashkari Khan Raisani* (**1999 SCMR 689**) and *Muhammad Saeed v. Election Petitions Tribunal, WP and others* (**PLD 1957 SC 91 at 112**). He contended that in exceptional circumstances the High Court is empowered to exercise its Constitutional jurisdiction against an interlocutory order of the Election Tribunal.

21. Sardar Muhammad Aslam, ASC, representing Respondent No.3 in Civil Appeal Nos. 727 and 729 of 2014, opposed the above contentions and submitted that the interlocutory order passed by the Election Tribunal ultimately merges into the final judgment and thus the same can be assailed in appeal under Section 67 of the Act. He

placed reliance upon Malik Muhammad Usman Achakzai v. Election Tribunal, Balochistan Quetta (PLD 2010 SC 943), Muhammad Asim Kurd alias Gailoo v. Nawabzada Mir Lashkari Khan Raisani (1998 SCMR 1597), Shella B. Charles v. Election Tribunal and others (1997 SCMR 941), Upadhaya Hargovind Devshker v. Dhirendrasinh Virbhadrasinghji Solanki (AIR 1988 SC 915) and Mohinder Singh Gill and another v. The Chief Election Commissioner (AIR 1978 SC 851).

22. The same arguments were reiterated by Mr. Ahmed Awais, ASC, representing Respondent-1 in Civil Appeal Nos. 777 & 273-L of 2014 and Civil Petition No. 1619-L of 2014 and made further reference to the case of Election Commission of Pakistan v. Javaid Hashmi and others (PLD 1989 SC 396) and Ghulam Mustafa Jatoi v. Additional District & Sessions Judge etc. (supra).

23. Mr. Kamran Murtaza, ASC, appearing for the petitioner in Civil Petition No.1244 of 2014, contended that allowing the interlocutory orders of the Tribunal to be challenged before the High Court would cause delay in the disposal of the election petition as it had happened in his case, where the Election Tribunal's order of allowing the application to get the thumb impression on the ballot-papers verified had been suspended by the order of the High Court since March, 2014.

24. Mr. M. Ilyas Sheikh, Sr. ASC, representing Respondent-2 in Civil Appeal No. 728 of 2014 and Civil Petition No.909 of 2014, reiterated the above arguments and in support thereof cited Hari Vishnu Kamath v. Ahmad Ishaque and others (supra) and K. Venkatachalam v. A. Swamickan and another (AIR 1999 SC 1723).

25. Khawaja Ahmad Hussain, learned Deputy Attorney General for Pakistan, submitted that the High Court's jurisdiction should not be entirely ousted and a narrow window be left for intervention by it. He

submitted that the principle laid down for intervention in Ghulam Mustafa Jatoi's case (*supra*) should be applied to the orders passed during the post-election period.

26. Since the learned counsel during their submissions have made reference to Sections 55(3), 63 and 67 of the Act, these need to be reproduced:

“55 (3). Every election petition and every schedule or annex to that petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings.”

“63. Dismissal of petition during trial.— The Tribunal shall dismiss an election petition, if—

- (a) The provisions of section 54 or section 55 have not been complied with; or
- (b) If the petitioner fails to make the further deposit required under subsection (4) of section 62.”

“67. Decision of the Tribunal.—(1) The Tribunal, may upon the conclusion of the trial of an election petition, make an order.-

- (a) Dismissing the petition;
- (b) Declaring the election of the returned candidate to be void;
- (c) Declaring the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected; or
- (d) Declaring the election as a whole to be void.

(IA) The Election Tribunal shall proceed with the trial of the election petition on day to day basis and no adjournment shall be granted to any party for more than seven days and that too on payment of costs as the Tribunal may determine and the decision thereof shall be taken within four months from its receipt:

Provided that where a petition is not decided within four months, further adjournment sought by any party shall be granted only on payment of special cost of ten thousand rupees per adjournment and adjournment shall not be granted for more than three days:

Provided further that if the Tribunal itself adjourns it shall record reasons for such adjournment:

Provided also that where delay in the proceedings is occasioned by any act or omission of a returned candidate or any other person acting on his behalf, the Tribunal itself, or on application of the aggrieved party, shall after issuance the show cause notice to the returned candidate, within fifteen days from the date of show cause notice, may order that the returned candidate has ceased to perform the functions of his office either till the conclusion of the proceedings or for such period as the Tribunal may direct.

(2) Save as provided in sub-section (3), the decision of a Tribunal on an election petition shall be final.

(3) Any person aggrieved by a decision of the Tribunal may, within thirty days of the announcement of the decision, appeal to the Supreme Court, which shall be decided within thirty days and the decision of the Supreme Court on such appeal shall final.

Explanation.—*In this sub-section, “decision of the Tribunal” shall not be deemed to include an order made by the Commission in the exercise of its powers under Section 103AA.”*

27. As earlier observed, three High Courts, Lahore, Sindh and Balochistain have declared that interlocutory orders passed by the Election Tribunal are not liable to be challenged before the High Court in its Constitutional jurisdiction. Though the judgment of the Lahore High Court is impugned in these appeals yet the decision therein would also decide the fate of the judgments delivered by the other two High Courts. Reference thus inevitably is to be made to the reasons and analysis of the case law by all the three Courts in deciding the question before us. There is no dispute that the case law developed so far is on the High Courts' jurisdiction to interfere at intermediary stage during election process before its conclusion. The question of High Courts' power to intervene in interlocutory orders passed by Election Tribunals during pendency of election petitions has squarely come before this Court for the first time. Having said that, the underlying principle laid

down in the judgments cited at the bar and discussed in the three judgments of the High Courts are relevant and provide a base on which to proceed with the resolution of the controversy in the appeals.

28. It is not necessary to mention the entire case law developed broadly on the subject. Reference is made to only those judgments that have close relevance to the issue before us. Though there are judgments of this Court prior to 1989 dealing one way or the other with the question of intervention in interim orders passed during the election process, the two landmark judgments which have been repeatedly discussed and reiterated are Javaid Hashmi's case (supra) and Ghulam Mustafa Jatoi's case (supra), both of which deal with orders passed during the election. Javaid Hashmi was a candidate in the by-election of the National Assembly from Punjab. On the eve of the polling day the Election Commission of Pakistan had issued orders whereby the Returning Officer brought about changes in large number of the polling staff from that earlier approved. Apprehending unfair play Javaid Hashmi challenged the order of the Election Commission. The Lahore High Court intervened in its Constitutional jurisdiction and ordered the Election Commission of Pakistan to reverse the change and restore the original list. The order of the High Court was challenged by the Election Commission of Pakistan before this Court. The petition was heard by a four Member Bench, which by a majority (Dr. Nasim Hassan Shah, J. dissenting) set aside the judgment of the High Court on the ground that the Writ Petition filed by Javaid Hashmi was not maintainable. The word "*election*" in Article 225 of the Constitution was given a wide meaning and was broadly construed. Mr. Justice Muhammad Haleem, CJ (as he then was) authored the majority judgment and after referring to the Indian judgment in Election Commission of India v. Shivaji (AIR 1988 SC 61) held:

“the word ‘election’ has been appropriately used in the Article with reference to the entire process consisting of several steps taken for its completion which have a bearing on the result of the process.”

Proceeding further with the ouster clause, the Court held that:

“In enacting Article 225 in the Constitution the purpose of Legislature is obvious that it did not contemplate two attacks on matters connected with the election proceedings; one while the election process is on and has not reached the stage of its completion by recourse to an extraordinary remedy provided by Article 199, and another when the election has reached the stage of completion by means of an election petition. It is also of utmost consideration that in the case of two attacks on a matter connected with the election proceedings there is likelihood of there being two inconsistent decisions; one given by the High Court and the other by the Election Tribunal which is also an independent Tribunal and this could not be the intention of the Legislature. Again the words ‘except by an election petition’ in Article 225 of the Constitution do not refer to the period when it can be called in question but point to the manner and the mode in which it can be called in question. It is, therefore, that the constitutional provision is expressed in the negative form to give exclusive jurisdiction to the Tribunals appointed by the Election Commissioner and thus to exclude or oust the jurisdiction of all Courts in regard to election matters and to prescribe only one mode of challenge. The purpose is not far to seek as in all democratic Constitutions such as is ours the Legislatures have an important role to play, and, therefore, it is of utmost importance that the election should be held as scheduled without being unduly delayed or prolonged by challenging matters at an intermediate stage.”

[emphasis is ours]

29. Strict application of the rule in Javaid Hashmi's case (*supra*) posed difficulty in a subsequent case which came before this Court in Ghulam Mustafa Jatoi's case (*supra*). The said petitioner was a candidate in the General Elections, 1993 for National Assembly seat. His nomination papers were accepted by the Returning Officer whose decision was maintained by the Election Tribunal. The Returning Officer subsequently on his own motion without notice to the petitioner disqualified him from contesting the election. He challenged this order in Constitution Petition before the High Court. Relying upon Javaid Hashmi's case (*supra*) the High Court dismissed his petition whereafter he brought the matter to this Court. It was heard by a five Member Bench. While upholding the principle laid down in Javaid Hashmi's case (*supra*) an exception was created by holding that generally the High Court cannot interfere in its constitutional jurisdiction in election process in view of Article 225 of the Constitution, however, it was "*subject to an exception that where no legal remedy is available to an aggrieved party during the process of election or after its completion against an order of the election functionary which is patently illegal, without jurisdiction and the effect of which is to disenfranchise a candidate, he can press into service the constitutional jurisdiction of the High Court*". The Court therefore allowed the appellant to contest the election as he had no remedy available against the order of the Returning Officer which had disenfranchised him and thus barred him from contesting the election. The Court also found as a fact that the order of the Returning Officer was patently illegal.

30. The principle laid down in Javaid Hashmi's case (*supra*) and the exception to it in Ghulam Mustafa Jatoi's case (*supra*) have been reaffirmed thereafter in a number of cases, though there have been

some variations in the decisions of this Court in the application of the principle laid down. There are two other judgments of this Court which would provide some guidance about the jurisdiction of the High Court under Article 199 of the Constitution in matters relating to interlocutory orders of the Election Tribunal. The facts of these cases are not material for the present purpose. First is the case of Aftab Shahban Mirani and others v. Muhammad Ibrahim and others (PLD 2008 SC 779) regarding exercise of powers by the Election Commission of Pakistan under Section 103-AA of the Act ordering repolling at certain polling stations. While discussing the scope of interference by the High Court in its jurisdiction under Article 199 of the Constitution, a five Member Bench held that such interference is limited only to the extent of matters which do not fall exclusively within the ambit of the jurisdiction of the Election Tribunals or Election Commission of Pakistan or in respect of the orders which are *coram non iudice*, without jurisdiction or *mala fide*. The other judgment has recently been delivered in the case of Federation of Pakistan v. Muhammad Nawaz Sharif (PLD 2009 SC 644) also by a five Member Bench. After reiterating the principle laid down in cases of Javaid Hashmi' (supra) and Ghulam Mustafa Jatoi (supra) the Court held that:

"47. After the judgment of Javed Hashmi's case (ibid), this Court had provided a limited window in writ jurisdiction under Article 199 of the Constitution to challenge an order passed by a functionary of the Election Commission during currency of the election process or after the said process is over, provided the said order is patently illegal, the law does not provide remedy either before or after the election process and if the order relates to disqualification of a candidate, the alleged disqualification is floating on surface requiring no further probe." [emphasis is ours]

31. Mr. Munib Akhtar, J. in his judgment in the case Ali Gohar Khan Mahar v. Election Commission of Pakistan (*supra*) had very ably analyzed the combined effect of the three leading cases, namely Javaid Hashmi (*supra*), Ghulam Mustafa Jatoi (*supra*) and Muhammad Nawaz Sharif (*ibid*) in Paragraph No.25 of the judgment in the context of the jurisdiction of the High Court, after the completion of the process of election, by noting that:

"25. Having considered the decisions of the Supreme Court as above, in our respectful view, the controlling authorities for present purposes are Javaid Hashmi, Ghulam Mustafa Jatoi and Muhammad Nawaz Sharif. As noted, the last two decisions were of 5-Member Benches. In both, the general rule laid down in Javaid Hashmi was affirmed. In our respectful view, that general rule must be regarded as applicable to all disputes relating to or arising out of the election process or after that process has been completed. What has been stated in Ghulam Mustafa Jatoi ought to be regarded as an exception to the general rule, and what is stated in Muhammad Nawaz Sharif ought to be regarded as a restatement of the exception. It will be recalled (see para 13 above) that in Javaid Hashmi the Supreme Court expressly observed that the High Court could not in the exercise of its jurisdiction under Article 199 "question the correctness of the decision of the Election Tribunal on any ground whatsoever upon an election petition filed to question the validity of the election" (see Javaid Hashmi at pg. 423). Quite obviously, "the decision" being referred to includes an interlocutory order of the Election Tribunal. The general rule thus clearly encompasses the matter before us, which is challenge to two interlocutory orders of the Tribunal. The only question therefore is whether, and if so to what extent, the matter comes within the scope of

*the exception? We have carefully considered the point. As restated in Muhammad Nawaz Sharif, for the exception to apply the order must be "patently illegal" and there should be no remedy available in law "either before or after the election process". Now, in respect of an election petition presented under section 52, there is a remedy available by way of a direct appeal to the Supreme Court under section 67(3). In *Javaid Hashmi*, the majority dilated at some length upon this aspect and, in our respectful view the existence of this statutory right of appeal is central to the reasoning that led the Court to lay down the general rule. The general rule is comprehensive. The exception on the other hand has been stated in narrow terms. The threshold is high: mere illegality will not do; the impugned order must be "patently" illegal. In our respectful view, if an interlocutory order of an Election Tribunal trying an election petition presented under section 52 is patently illegal, that will almost certainly furnish a ground for an appeal to the Supreme Court under section 67(3). In other words, in the present context, there will hardly ever be a situation where the remedy by way of statutory appeal will not be available and applicable. Put differently, one of the key elements for the exception to apply will not be found to exist. There will be a remedy available under law. That this remedy is not immediately available, but must await the "final" decision of the Election Tribunal is not determinative. In our respectful view, the manner in which the exception has been formulated, especially as restated in *Muhammad Nawaz Sharif*, precludes any such conclusion. It necessarily follows that a petition under Article 199 will not be maintainable against an interlocutory order of an Election Tribunal trying an election petition, even if such order is patently illegal. The aggrieved party will have its remedy by way of the statutory appeal under section 67, and must seek that remedy at the appropriate stage."[emphasis is ours]*

32. An argument was raised on behalf of the appellants that appeal under Section 67(3) of the Act was not an efficacious remedy against an interlocutory order, particularly when a Tribunal upon an application of the returned candidate declines to dismiss the election petition under Section 63 of the Act. That thus the only remedy in such circumstances would be to invoke the jurisdiction of the High Court under Article 199 of the Constitution. True that Section 67(3) of the Act does not provide remedy against interlocutory order as an appeal to the Supreme Court lies against the decision of the Tribunal upon conclusion of the trial. This was so held in Mian Zahid Sarfraz v. Raja Nadir Pervaiz Khan and others (**1987 SCMR 1107**) There are two stages at which an election petition is liable to be dismissed; either at the conclusion of the trial under Section 67(1)(a) of the Act or under Section 63 of the Act when the election petitioner fails to comply with the provisions of Section 54, 55 or fails to make further deposit under Sub-Section (4) of Section 62 of the Act. The latter powers are exercisable by the Election Tribunal at the preliminary stage of the trial. Appeal against dismissal of an election petition under Section 63 of the Act is maintainable under Section 67(3) of the Act. [see Sardarzada Zafar Abbas and others v. Syed Hassan Murtaza (**PLD 2005 SC 600**)]. However, when the Tribunal declines to dismiss the election petition on a preliminary objection raised by the returned candidate the question whether such refusal is appealable came up before this Court in Muhammad Iftikhar Mohmand v. Javed Muhammad and others (**1998 SCMR 328**), where it was held “we are of the view that as the main election petition is still pending before the learned Tribunal and an appeal is provided against the final decision of the Tribunal before this Court, the

petitioner in the event of the final decision going against him, will be entitled to raise all the pleas available to him, in the appeal before this Court including the preliminary objection as to the maintainability of the petition which has been overruled by the learned Tribunal by the impugned judgment.” The same principle was earlier applied in a matter pertaining to the jurisdiction of the High Court under Article 199 of the Constitution. In Shella B. Charles v. Election Tribunal and another (*supra*) where one of the parties to the election petition moved the High Court against an interlocutory order of the Tribunal ordering recount of ballot-papers, the High Court declined to issue writ and dismissed the petition in *limine* and held:

“12. As observed above, the order dated 09.08.1994 is interlocutory one and with jurisdiction and the learned Election Tribunal has yet to pass final orders in the election petitions. The final order which includes any interlocutory order like the impugned order dated 09.08.1994, is subject to incidence of appeal under Section 67 of the Representation of the People Act, 1976 before the Hon’ble Supreme Court. Therefore, on this ground alone, we think that the writ petitions are not maintainable against the impugned order dated 09.08.1994. As such, both the writ petitions are dismissed in limine. Since the main petition has been dismissed the Criminal Miscellaneous Applications also stand dismissed.”

This Court while declining to stay the proceedings before the Election Tribunal observed *“The Election Laws provide hierarchy for impugning the election and orders passed by the Election Tribunal. If the above orders of the Election Tribunal are illegal, the same can be challenged by the petitioner if eventually the election petition is decided against her but the proceedings of an election petition cannot be stayed at this stage.”*

The petition was eventually dismissed on 27.07.1998 as having become infructuous.

33. The Courts have always been mindful of the need for election process to be completed expeditiously and without hindrance, including the trial of election petitions arising out of the election. In the case of Javaid Hashmi (*supra*) while giving a wide meaning to the term 'election' the Court also noted that the intervention by the Courts in interlocutory order during the process of election would unduly delay the completion of the election. The same consideration weighed with the Court in Muhammad Asim Kurd alias Gailoo v. Nawabzada Mir Lashkari Khan Raisani (*supra*) where, in holding that no appeal under Section 67(3) of the Act lies against the interlocutory order of the Tribunal reference was made to Sub-Section (1A) of Section 67 of the Act and it was pointed out that *"this interpretation is also in consonance with the above newly-added subsection (1-A) quoted hereinabove, which provides that the trial of the Election Petition shall proceed day to day and the decision thereof shall be taken by the Tribunal within four months from the date of its receipt from the Commissioner"*. Though, the Court was examining the case under its appellate jurisdiction under Section 67 of the Act, it is based on the underlying principle that the Court must not intervene in the proceedings of the Tribunal till their termination.

34. Besides the decision in Shella B. Charles's case (*supra*) Muhammad Nawaz Sharif's case (*supra*) provides further guidelines. That case emanated from a decision passed during the election process. However, while this Court reiterated and applied the principle consistently followed after Javaid Hashmi's case regarding the scope of the powers of the High Court to exercise Constitutional jurisdiction during the process of election it extended, though obiter, the principle to *"after the said process (election) is over"*, provided the order impugned

was patently illegal and the aggrieved party would be left without remedy. Though, the Court had referred to election functionaries the same would equally be applied to Election Tribunals. The rule in Ghulam Mustafa Jatoi's case is inapplicable in entirety to the post election litigation in that the condition that the candidate is disenfranchised would no longer be relevant. Thus in order for High Court to intervene in its Constitutional jurisdiction in an interlocutory order of the Election Tribunal the order must not only be patently illegal but if not struck down will leave the aggrieved party without remedy. As mentioned above, appeal under Section 67 of the Act against an interlocutory order is not maintainable but the same is liable to be challenged after conclusion of the trial if the ultimate decision goes against the party aggrieved of the order. He is thus not left without remedy. The legal position that emerges from the combined reading of the case law is that an interlocutory order passed by the Tribunal cannot be questioned in Constitutional jurisdiction until the same is patently illegal and the same for some reason cannot even be challenged in appeal under Section 67 of the Act filed against final disposal of the election petition. If the outcome of an election petition goes against a party which is also aggrieved of an interlocutory order passed during the proceedings, besides impugning the main judgment, he is entitled to assail the very legality of the order, apart from the consequences that flow from it. Undoubtedly, as pointed out by Justice Munib Akhtar, J. in the passage reproduced above, if the two conditions, namely, 'patent illegality of the order' and 'absence of remedy against it' are read together there will hardly be an interlocutory order that would be amenable to challenge under Constitutional jurisdiction of the High

Court. The learned Deputy Attorney General for Pakistan, however, came out with an extreme example of a situation where the Court will have to intervene where the Election Tribunal passes an order adjourning the case *sine die* without legal justification resulting in rendering the election petition infructuous.

35. An argument was raised at the bar that Article 225 of the Constitution can be divided into pre and post election phases, and that after presentation of an election petition to Election Tribunal, the bar under Article 225 of the Constitution no longer remains applicable so that a party aggrieved of an interlocutory order of the Election Tribunal can in appropriate case file a Constitution Petition against it. In this regard Article 225 of the Constitution can be divided into two parts; one that "*no election to the House of a Provincial Assembly shall be called in question except by an election petition presented to such tribunal*"; and second "*in such manner as may be determined by Act of Majlis-e-Shoora (Parliament).*" There are two key phrases in each of the two parts of Article 225 (as underlined). The ordinary English meaning of the phrase "*called in question*" as used in first part is to raise litigative challenge to the validity of something. The other phrase "*in such manner*" used in second part relates to the manner and process through which such a litigative challenge has to be properly presented and pursued under a process provided in an Act. The challenge to the election continues till the termination of the proceedings. Taking a clue from the wide definition given to the word "*election*" used in Article 225 of the Constitution in Javid Hashmi's case, so as to include the entire process till conclusion of the election, the word "*election petition*" used

in the same Article is to be similarly construed so as to include the entire process of adjudication of an election petition. Article 225 of the Constitution does not provide that only election petition be filed initially before the Tribunal and from there onwards any order passed will become amenable to challenge in other jurisdictions. The argument being addressed in essence lays that after presentation of initial petition the concerned Tribunal loses exclusivity of jurisdiction for further proceedings and Constitutional jurisdiction of the High Court can be invoked to challenge further proceedings in the Tribunal. The exclusion of jurisdiction of other Courts to try election matters extends to the entire length of the proceedings in an election petition before the Tribunal.

36. It follows from the above discussion that the interlocutory orders passed by the Election Tribunal impugned before the High Court were not liable to be set aside in its Constitutional jurisdiction as the petitioners before the Court had a remedy available to them by way of appeal under Section 67 of the Act after disposal of the election petitions. The impugned judgment of the Lahore High Court dated 28.02.2014, therefore, is maintained and similar opinion of the High Court of Sind in Ali Gohar Khan Mahar's case (supra) and of the High Court of Balochistan in Dur Muhammad Khan Nasar's case (supra) is affirmed. Appeal Nos. 727 to 730, 777, 788 and 273-L of 2014 are consequently dismissed. Civil Petition Nos.1619-L and 909 of 2014 are also dismissed and leave declined. As regards Civil Petition No.1244 of 2014, arising from an interim order of the High Court where the writ petition is still pending, the same is converted into appeal and allowed. The impugned interim order of the Peshawar High Court dated

13.05.2014 is set aside and the High Court may dispose of the Writ Petition in the light of the principle laid down herein.

Chief Justice

Judge

Judge

ANNOUNCED IN OPEN COURT AT
ISLAMABAD.

On 17th December, 2014.

Mudassar[☆]

Chief Justice

“Not approved for reporting.”

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE NASIR-UL-MULK, CJ.
MR. JUSTICE AMIR HANI MUSLIM
MR. JUSTICE IJAZ AHMED CHAUDHRY

CIVIL PETITION NO. 2025 OF 2014

(on appeal from the judgment/order Lahore High Court Lahore dated 22.09.2014 passed in W.P. No.25335 of 2014)

Ch. Muhammad Arif Hussain ...Petitioners

VERSUS

Fayyaz Ahmed Khan Ghouri & others ...Respondents

For the Petitioners: Malik Noor Muhammad Awan, ASC.
Mr. Mehr Khan Malik, AOR.

For Respondent-1 Mr. A.H. Masood, AOR/ASC.

For Respondent-3: Mr. M. Afzal Khan, ASC.

Date of Hearing: 28.10.2014.

JUDGMENT

NASIR-UL-MULK, CJ.— This petition was heard separately and the judgment was reserved on 28.10.2014. However, as the identical question of law is involved, for reasons mentioned in the judgment passed in Civil Appeal No. 727-730 of 2014 etc. this petition is dismissed and leave declined.

Chief Justice

Judge

Judge

ANNOUNCED IN OPEN COURT AT ISLAMABAD.

On 17th December, 2014.

Mudassar/★

Chief Justice

“Not approved for reporting.”