

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Justice Qazi Faez Isa, CJ
Justice Muhammad Ali Mazhar
Justice Musarrat Hilali

Civil Petition No. 42 of 2024

*(On appeal against the judgment dated 10.01.2024
passed by Peshawar High Court, Peshawar, in Writ
Petition No. 6173-P/2023)*

*The Election Commission of Pakistan through
its Secretary and others.* ... *Petitioners*

Versus

*Pakistan Tehreek-e-Insaf through its
authorized person and others.* ... *Respondents*

For the Petitioners: Mr. Makhdoom Ali Khan, Sr. ASC
Mr. Sikandar Bashir Mohmand, ASC
Mr. Saad Mumtaz Hashmi, ASC
Mr. Muhammad Arshad, DG (Law) ECP
Mr. Masood Sherwani, DG (P/F) ECP
Mr. Khurram Shehzad, Addl. DG (L) ECP

For the Federation: Ch. Aamir Rehman,
Additional Attorney-General for Pakistan

For Respondents No. 1, 2 & 4: Mr. Hamid Khan, Sr. ASC
Mr. Ali Zafar, ASC
Mr. Gohar Ali Khan, ASC
Mr. Ajmal Ghaffar Toor, ASC
Mr. Niazullah Khan Niazi, ASC
Mr. M. Sharif Janjua, AOR
Assisted by Mr. Abdullah Malik, AHC

Respondents No. 3, 5 to 8,
9, 13, 14, 15, 19-22: Not represented.

For Respondent No. 10: Mr. Ahmad Hassan Shah, ASC
assisted by Badar Chaudhry, Advocate
a/w Mr. Akbar S. Babar

Respondent No. 11: Ms. Noureene Farooq Khan

Respondent No. 12: Mr. Mehmood Ahmed Khan

Respondent No. 16: Mr. M. Muzammil Khan Sandhu

Respondent No. 17: Mr. Yousaf Ali

Respondent No. 18: Mr. Bilal Azhar Rana

Dates of Hearing: 12 and 13 January 2024.

JUDGMENT

Qazi Faez Isa, CJ. This case is about intra-party elections. It would be apt to start by quoting one of the founders of a political party, a learned senior counsel who represents some of those before us.

‘Intra-party elections should be held at every level to promote democratic culture within the party. Such elections should be held with secret ballot and the political parties should not be fiefdoms of their leaders. By introducing electoral process within the political parties the democratic culture will be promoted. There will be greater opportunity for the parties to grow and develop leadership within their own ranks. The existing ruling elite has deliberately avoided holding of internal elections of their political parties and is running them arbitrarily at the will and whims of their leaders.’¹

Background and Representation

2. The petition before us challenges the short order dated 10 January 2024, followed by the twenty-six page judgment of the Peshawar High Court passed in Writ Petition 6173-P/2023.² The said petition had challenged the order dated 22 December 2023 passed by the Election Commission of Pakistan (**‘ECP’**). The order dated 22 December 2023 titled – *‘Hearing in Connection with the intra party elections of Pakistan Tehreek-e-Insaf’*³ was unanimously passed by the Commissioner and all four Members of the ECP. The order decided the complaints received from fourteen complainants, arrayed herein as respondents No. 9 to 22 (**‘the complainants’**), and the objections of the ‘Political Finance Wing’ of the ECP with regard to the intra-party elections of the Pakistan-Tehreek-e-Insaf (**‘PTI’**).

3. Through a short order announced by us in Court on 13 January 2024 (**‘the Short Order’**)⁴ this petition for leave to appeal was converted into an appeal and allowed. The learned Mr. Makhdoom Ali Khan represented the ECP, learned Mr. Ahmad Hassan Shah represented

¹ Mr. Hamid Khan, Senior Advocate Supreme Court, quoted by the Supreme Court in *Workers’ Party Pakistan v Federation of Pakistan*, PLD 2012 Supreme Court 681, p.743, para-64.

² Writ Petition No. 6173-P of 2023.

³ In Case No.F.5(1)/2023-O/0-DD-Law and Case No. F.3(10)/2022-Confid (Vol-III).

⁴ Pages 35 to 38 hereto.

respondent No. 10 and supported ECP's submissions and learned senior counsel Mr. Hamid Khan and learned counsel Mr. Ali Zafar represent respondents No. 1 to 8 (**'the contesting respondents'**). We heard at length all the learned counsel, and the parties who were not represented by counsel, till late in the evening because the date of the general elections is 8 February 2024 and the ECP had already issued the Election Programme which would have been derailed if the decision of this case was delayed. The following are the detailed reasons for the Short Order.

The Elections Act, 2017

4. The Elections Act, 2017 (**'Elections Act'**) is a comprehensive piece of legislation which sets out *'to amend, consolidate and unify laws relating to the conduct of elections and matters connected therewith or ancillary thereto'* as its Preamble stipulates. With a view to having just one law on the subject of elections and matters related thereto the Elections Act repealed a number of laws. Section 241 of the Elections Act repealed the following eight laws:

- (a) the Electoral Rolls Act, 1974 (Act No. XXI of 1974);
- (b) the Delimitation of Constituencies Act, 1974 (Act No. XXXIV of 1974);
- (c) the Senate (Election) Act, 1975 (Act No. LI of 1975);
- (d) the Representation of the People Act, 1976 (Act No. LXXXV of 1976);
- (e) the Election Commission Order, 2002 (Chief Executive's Order No.1 of 2002);
- (f) the Conduct of General Elections Order, 2002 (Chief Executive's Order No.7 of 2002);
- (g) the Political Parties Order, 2002 (Chief Executive's Order No.18 of 2002); and
- (h) the Allocation of Symbols Order, 2002.'

5. The Elections Act recognizes the right of every political party to make its own constitution, provided it complies with the requirements of section 201 of the Elections Act, including the procedure for holding of intra-party elections. Section 201 is reproduced hereunder:

'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;
 - (c) 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.
- (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.'

6. Chapter XI of the Elections Act is titled '*Political Parties*' and its section 208 mandates the holding of '*Elections within a political party*'. Section 208 is reproduced hereunder:

'208. **Elections 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.'

7. The members of a political party infuse life into it. Those elected as office holders via intra-party elections receive the mandate to run the party and determine its affairs. After a political party has held its intra-party elections it is required to provide a certificate '*that the elections were held in accordance with the constitution of the political party and this Act*', that is, the Elections Act. Such certificate can only be issued after the holding of intra-party elections. The relevant provisions of the Elections Act which attend to this are contained in section 209, reproduced hereunder:

209. Certification by the political 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.

8. Chapter XII of the Elections Act is titled '*Allocation of Symbols*'. An election symbol discloses to voters, and in particular to illiterate voters, the person or political party they seek to vote for. The relevant provision requiring consideration for the purpose of this case is section 215 of the Elections Act which is reproduced hereunder:

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

(2) A combination of enlisted political parties shall be entitled to obtain one election symbol for an election only 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 an 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.

9. It may be noted from the abovementioned provisions of the Elections Act that it mandates the holding of intra-party elections and provides for penalties if elections are not held. If a political party is errant and '*fails to*

*conduct intra-party elections as per given time frame in their constitution*⁵ the ECP *'shall impose a fine which may extend to two hundred thousand rupees but shall not be less than one hundred thousand rupees'*.⁶ This provision was inserted into the Elections Act recently.⁷ However, if a political party does not hold elections within the stipulated 'five years'⁸ then the ECP, after issuing show cause notice and providing an opportunity of being heard, *'shall not allocate an election symbol to such political party.'*⁹ This provision has always existed in the Elections Act, it was not inserted later. Both of the following scenarios would constitute a violation of section 209 of the Elections Act: (a) A political party fails to submit a certificate as required by section 209 of the Elections Act; or (b) A political party submits a certificate under section 209 of the Elections Act, which certificate is false because no intra-party elections were held by the party in accordance with the party's constitution and the Elections Act. Either of these scenarios would entitle the ECP to issue a show cause notice to the party under section 215(4) of the Elections Act and, if the violation is not cured, the consequences envisioned in section 215(5) of the Elections Act would follow, that is, the party would not be eligible to obtain an election symbol.

ECP's Conduct

10. The contesting respondents have raised questions about the conduct of the ECP and alleged that it has not acted fairly and in accordance with law. Therefore, we examined how the ECP had proceeded in the matter. The prescribed period had expired without intra-party elections having been held in the PTI. Therefore, the ECP *vide* its letter dated 24 May 2021 had called for the holding of intra-party elections in the PTI, but the ECP's advice was ignored. The ECP then issued a show cause notice on 27 July 2021 with regard to the non-holding of intra-party elections in the PTI. The reply to the show cause notice acknowledged that elections had not been held and a request was made that the time for holding of intra-party elections be extended by a year. It was not contended that the law did not empower the ECP to withhold election symbol or that such a provision was unconstitutional. On 24 August 2021 the ECP granted the extension.

⁵ Elections Act, 2017, section 208(5).

⁶ *Ibid.*

⁷ Inserted *vide* Elections (Second Amendment) Act, 2023, the Gazette of Pakistan, Extraordinary, 7 August 2023.

⁸ Elections Act, 2017, proviso to section 208(1).

⁹ *Ibid.*, section 215(5).

During the time of the issuance of these notices PTI was governing in the Federation and Mr. Imran Ahmad Khan Niazi was the Prime Minister. The PTI was also governing in the provinces of Punjab and Khyber Pakhtunkhwa. Therefore, the allegations of partisanship which were subsequently levelled against the ECP are incomprehensible.

11. Despite issuing notices to hold elections and granting an additional year's time, intra-party elections were still not held in the PTI. Therefore, the ECP through its letter dated 27 March 2022 reminded the PTI that elections must be held, but the command of the law was ignored. The ECP wrote another letter dated 16 April 2022 to the same effect, and then issued final notice on 21 May 2022 directing that intra-party elections be held in the PTI. In response it was stated that intra-party elections had been held on 8 June 2022. The ECP did not accept this assertion, and through its letters dated 22 June 2022, 19 July 2022 and 4 August 2022 noted a number of discrepancies. Correspondence was also exchanged with regard to the purported amendments made to the constitution of the PTI.

12. Eventually the ECP issued a *show cause notice* on 2 August 2023 and directed that intra-party elections be held in the PTI, but elections were still not held. The ECP heard the matter on 13 September 2023 and *vide* order dated 23 November 2023, after finding that intra-party elections in the PTI were not held, ordered that they be held within twenty days.

13. The contesting respondents stated that fresh intra-party elections were held on 2 December 2023. The complainants complained to the ECP that intra-party elections in the PTI had not been held. The ECP also conveyed its own reservations *vide* letter dated 7 December 2023, which were responded to by the letter dated 8 December 2023. The ECP was not satisfied with the reply, and fixed the hearing on 18 December 2023 with regard to the matter of non-holding of intra-party elections in the PTI.

14. The ECP, comprising of its Commissioner and four Members, after hearing the parties, unanimously passed order dated 22 December 2023, which concluded as follows:

'30. So keeping in view, the clear mandate of Elections Act, 2017 read with PTI constitution 2019, and for reasons mentioned hereinabove, it is held that PTI has not complied with our directions rendered therein order dated 23rd November, 2023 and

failed to hold intra-party election in accordance with PTI prevailing Constitution, 2019 and Election Act, 2017, and Election Rules, 2017. Therefore, the certificate dated 4th December, 2023 and Form-65 filed by the alleged Chairman, is hereby regretted and rejected accordingly. The provisions of Section 215 of the Election Act, 2017 are hereby invoked and PTI is hereby declared ineligible to obtain, the Election Symbol, for which they have applied for.'

Was sufficient notice given by the ECP before it decided that the PTI was not eligible to get an election symbol?

15. In the instant case no one sought to deprive the PTI of an election symbol; not the ECP, the Government nor any political party. The ECP not once but repeatedly had called for the holding of intra-party elections in the PTI and had clearly spelt out the consequences if elections were not held. In this regard the ECP issued notices and passed orders, which in chronological order are reproduced hereunder:

ECP's letter dated 24 May 2021

'... a political party is to conduct intra-party elections in accordance with its constitution, a mandatory requirement under the law to sustain/retain the already allotted election symbols. And to contravene with prescribed legal provisions, a political party shall be issued show cause notice(s) by the Election Commission and election symbol whereof shall be withdrawn enabling the party ineligible to obtain an election symbol for the elections to come.'

'2. ... it is advised that intra-party elections of your political party may be conducted timely in a manner provided in party's constitution to avoid being declared ineligible as given in law.'

ECP's show cause notice dated 27 July 2021

'WHEREAS, Section 215(1) of the Act *ibid* provides that a political party enlisted under the Elections Act, 2017 shall be eligible to obtain an election symbol for contesting elections for *Majlis-e-Shoora* (Parliament), Provincial Assemblies or local government on submission of certificates of intra-party elections.

NOW THEREFORE, in terms of Section 215(4) of the Elections Act, 2017, you are required to show cause as to why your party may not be declared ineligible to obtain an election symbol for upcoming Election(s).'

ECP's letter dated 24 August 2021

'... the Hon'ble Election Commission has accepted your request and advised to conduct intra-party elections of the chairman and other office bearers well before **13th June, 2022.**

ECP's letter dated 7 March 2022

'... you are once again reminded that the intra-party elections of the Chairman and other office bearers of your party may be ensured well before 13th June, 2022 and in this regard no further extension will be granted.'

ECP's letter dated 16 April 2022

'... you are once again reminded that the intra-party elections of the Chairman and other office bearers of your party may be ensured well before 13th June, 2022.'

ECP's Final Notice dated 21 May 2022 for conduct of Intra-Party Elections

'... a political party ... which fails to do so [hold intra-party elections] ... election symbol whereof shall be withdrawn.'

ECP's Notice dated 2 August 2023

'Under section 215 of the Act *ibid*, if any political party fails to comply with the provisions of the said section 209, this Commission is empowered to declare the said political party ineligible to obtain an election symbol.'

ECP's Order dated 13 September 2023

'... ineligible to obtain an election symbol for election to Majlis-Shoora (Parliament) etc.'

The Elections Act mentions the issuance of a notice but ECP issued repeated notices and also multiple reminders. Therefore, we have no doubt that the ECP gave more than sufficient time for compliance with the requirement to hold intra-party elections in the PTI.

Litigation with regard to intra-party elections in PTI

16. The ECP had passed an order¹⁰ on 23 November 2023 and took a lenient view by giving another opportunity for the holding of intra-party elections in the PTI. The order concluded as under:

'therefore it is held that respondent party is failed to hold its intra party election within the extended period of one year, till 13-06-2022, but we instead of taking the final step to invoke the provision of section 215(5) of the Election Act, 2017, a lenient view is taken with direction to the respondent party to hold its intra party election strictly in accordance with the prevailing party constitution, within 20 days positively and its result along with all the required documents, including form 65 shall

¹⁰ In Case No. 3(10)/2022-Confid.

be submitted thereafter the election within 7 days before the Commission. In case, the respondent party failed to comply with direction of the Commission and failed to hold its intra party election within the prescribed 20 days which will run from today, the date on which this order is announced, in such eventuality the respondent will suffer the penal consequences of Section 215(5) of Election Act, 2017 accordingly and would be ineligible to obtain an election symbol for election to Majlis-e-Shoora (Parliament) etc.'

17. The above order was challenged before the Lahore High Court by the PTI and Mr. Imran Ahmad Khan Niazi. The High Court's constitutional jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan ('**the Constitution**') was invoked by filing Writ Petition 81171/2023 ('**the 1st case**'). The petitioners alleged that intra-party elections were held in the PTI on 8 June 2022 and that in these elections Mr. Imran Ahmad Khan Niazi was elected as Chairman. The following *prayer* was made in the petition:

- (a) Declare and hold that the Impugned Order 23-11-23 is misconceived, coram non-judice and set it aside, inter alia, on facts and grounds as urged hereinabove;
- (b) Declare, find and hold that intra-party elections dated 10-06-2022 had been validly held in accordance with the party Constitution and law;
- (c) Declare that Amendment to Art.5, Clause.5 had been validly and lawfully made in accordance with law and party Constitution;
- (d) In the meanwhile, this Court may kindly be pleased to suspend the operation of the Impugned Order dt.23-11-2023 and restrain the ECP from passing any further adverse order till final disposal of the titled petition.
- (e) Any other relief as deemed just and appropriate may also be granted in favor of Petitioners;'

Learned Messrs Ali Zafar and Gohar Ali Khan, represented the petitioners.

18. The 1st case was heard on 8 December 2023 by a learned single Judge before whom the petitioners requested that a larger Bench be constituted to hear the case. Accordingly, the matter was adjourned by ordering that the request for the formation of a larger bench be placed before the Chief Justice '*for appropriate orders*'. The Chief Justice conceded to the petitioners request and constituted a five-member Bench. The petition was heard by the five-member Bench on 15 December 2023 when

notice was issued to the ECP. However, the Court ordered that the learned counsel '*shall address their arguments on the question of maintainability of the instant constitutional petition*'. When we heard the instant case the status of the 1st case was checked and it transpired that it was pending. The question raised by the five-member Bench about the maintainability of the petition was left unaddressed and undetermined.

19. When the 1st case was pending adjudication in the Lahore High Court another petition, Writ Petition 5791/2023 ('**the 2nd case**'), was filed in the Peshawar High Court on 9 December 2023. PTI was arrayed as petitioner No. 1, through its '*authorized person*', but it was not disclosed who the *authorized person* was. The only other petitioners were Messrs Muhammad Zahir Shah and Anwar Taj, who described themselves as '*Vice President, PTI KPK*', however, the matter was not restricted to non-holding of elections in Khyber Pakhtunkhwa. It was alleged in the 2nd case that intra-party elections in the PTI were held on 2 December 2023 and that their validity could not be questioned by the ECP and that the '*objections filed*' should not be entertained. But those who had filed the said *objections* were not arrayed in the petition. On 11 December 2023, without first issuing notice to the ECP, the Peshawar High Court directed the ECP not to pass '*a final order*' and the case was ordered to be fixed on 19 December 2023. The learned Mr. Gohar Ali Khan was the petitioners' counsel; he submitted an application¹¹ on 15 December 2023 to ante date the case and had the order passed on 11 December 2023 varied, to direct the petitioners to '*appear before the Election Commission Pakistan*' but the ECP was restrained from passing '*any adverse order*'. The Peshawar High Court disposed of the 2nd case on 21 December 2023 by passing the following order:

'We deem it appropriate to direct the worthy Election Commission of Pakistan, respondent herein, to decide the matter, so pending before it by 22nd instant positively, strictly in accordance with law.'

20. Against the order of ECP dated 22 December 2023 (operative part whereof is reproduced in paragraph 14 above) Writ Petition 287/2024 ('**the 3rd case**') was also filed in the Lahore High Court, wherein the following reliefs were sought:

'(a) Instant petition may kindly be accepted, hold and declare that the impugned Order of ECP dated 22.12.2023 is

¹¹ CMA No. 2784-P/2023.

without jurisdiction, without lawful authority and illegal and as consequence thereof set it aside forthwith;

- (b) In the meanwhile, suspend the impugned order dated 22.12.2023 forthwith and direct the election commission Pakistan to forthwith "publish the certificate of PTI on website of ECP" as required by S. 209(3) in the interest of justice and to restore its election symbol forthwith;
- (c) Declare that 'Election Symbol' has been illegally and unlawfully been withdrawn which is, inter-alia, violation of fundamental rights of the petitioners including Art. 17 and Art. 25 of the constitution;
- (d) Respondents may kindly be directed to entertain the grievance of the petitioners in the light of the order dated on 26.12.2023 passed by the Honorable Peshawar High Court, in the supreme interest of justice and fair play;
- (e) Declare that the Election Commission has no jurisdiction to decide that whether intra party elections, held on the direction of Election Commission were according to party Constitution or not;
- (f) It is further prayed that election commission may kindly be directed to publish the list of women candidates for PTI's reserve seats in Punjab the interest of justice.
- (g) Ad-interim injunction may also be granted.
- (h) Any other relief as deemed just and appropriate may also granted in favor of the petitioners.'

The 3rd case was dismissed *vide* order dated 3 January 2024 by holding that, *'the relief claimed by the petitioners cannot be granted without declaring the said provisions of the "Act" ultra vires Article 17 of the "Constitution"'*. The learned Judge also noted that the 2nd case was pending in the Peshawar High Court.

21. The decision of the learned single Judge in the 3rd case was challenged by filing an intra court appeal, ICA 2282/2024 (**'the 4th case'**), before the Lahore High Court. A Division Bench subsequently dismissed the appeal *vide* order dated 11 January 2024 and upheld the order of the learned single Judge.

22. Writ Petition 6173-P/2023 (**'the 5th case'**) was also filed to challenge ECP's order dated 22 December 2023 in the Peshawar High Court by eight petitioners; petitioner No. 1 was PTI and the petitioners No. 2 to 7 were individuals who described themselves respectively as Chief Election

Commissioner, Secretary General, Chairman, President PTI Balochistan, President PTI KPK and Vice Presidents PTI, KPK. It was stated in the petition that '*Imran Khan Niazi, the previous Chairman of PTI too decided not to contest the intra-party elections himself*'.¹² 'Barrister Gohar Khan' designated himself as PTI's Chairman but did not disclose how he came to occupy the said office. The following relief was sought in the 5th case:

- (a) Hold and declare that the impugned Order is without jurisdiction, without lawful authority and illegal and as a consequence thereof set it aside forthwith;
- (b) hold and declare that proceedings by ECP to question the validity of the IPEs on the basis of any objections filed by any persons were coram non iudice, illegal and without lawful authority;
- (c) find and declare that 'election symbol' has been illegal and unlawfully been withdrawn which is, inter alia, violation of fundamental rights of the Petitioners including Art.17 and art.25 of the Constitution;
- (d) direct the Election Commission Pakistan to forthwith "publish the certificate of PTI on website of ECP" as required by S209(3)" in the interest of justice and to restore its election symbol forthwith;
- (e) In the meanwhile, suspend the Impugned Order forthwith and direct the ECP subject to final decision of the instant petition to publish the certificate on its website and restore the election symbol of the PTI for the forthcoming General Election.
- (f) Any other relief as deemed just and appropriate may also be granted in favor of the Petitioners;'

23. In the 5th case the requisite certification, which discloses earlier case(s) filed with regard to the same subject matter, only mentioned '*WP 5791/2023*'. However, in paragraph 20 of the petition it was stated that the order of '*ECP dated 23/11/2023 has been challenged in Writ Petition which is pending in the Lahore High Court, Lahore*,' but without disclosing the number of the writ petition pending in the Lahore High Court. Suppressing relevant information and submitting false certification may result in a petition's dismissal.

Can a party file the same case in two courts?

24. A party cannot simultaneously agitate the same matter before two courts. Section 10 of the Code of Civil Procedure, 1908 prohibits this; it

¹² Paragraph 22 of Writ Petition 6173/2023.

stipulates that cases 'in which the matter in issue is also directly and substantially in issue in a previously instituted' case, the court in which the subsequent case is filed shall not proceed therewith. The rule of law and judicial process would be seriously undermined if a party simultaneously agitates the same matter before two different High Courts. This may also result in conflicting decisions as happened in the present case; the Lahore High Court decided (in Writ Petition 287/2024) that unless the applicable provisions of the Elections Act are assailed, and only if they were declared unconstitutional, relief sought could be agitated, however, the Peshawar High Court completely disregarded this aspect of the case. The 1st case (Writ Petition 81171/2023) which was being heard by a five-member Bench was also left pending. The decision of the Supreme Court in the case of *Salahuddin Tirmizi v Election Commission of Pakistan*,¹³ by a five-member Bench, on the point of jurisdiction had held, that:

'... The order passed by the Election Commission of Pakistan which functions at Islamabad in respect of the constituency of Province of N.W.F.P., would be challengeable both before the Islamabad High Court and Peshawar High Court. This concurrent jurisdiction is, however, subject to the rule of propriety according to which a High Court having jurisdiction in a matter if has exercised such jurisdiction, the other High Court which has also jurisdiction in the matter may restrain from exercising its jurisdiction. In view thereof, in the present case, the propriety demanded that subsequent order passed by Election Commission of Pakistan should have been challenged before the Islamabad High Court and the jurisdiction of Peshawar High Court should have not been invoked and said High Court also should not, without determining the question of propriety exercise the jurisdiction.'

Article 189 of the Constitution, reproduced hereunder, requires that the law as enunciated and/or interpreted by the Supreme Court has to be abided by all other courts, including the High Courts:

'189. Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.'

Democracy and Article 17

25. Democracy lies at the root of this case. Democracy is also the foundation and the basis upon which Pakistan came into existence.

¹³ *Salahuddin Tirmizi v Election Commission of Pakistan*, PLD 2008 Supreme Court 735, pp.760-761.

Preeminence throughout has been given to democracy in every constitutional document, the first of which was the Objectives Resolution, which was the preamble of every constitution. In the Constitution of the Islamic Republic of Pakistan, promulgated on 12 April 1973 which came into effect on 14 August 1973 (**the Constitution**), the Objectives Resolution is the Preamble to the Constitution. It stipulates the basic democratic principle that, *'the State shall exercise its powers and authority through the chosen representatives of the people'*. The Objective Resolution/Preamble was *'made substantive part of the Constitution'*.¹⁴

26. If intra-party elections are not held in a political party it severs its relationship with its members, and renders a party a mere name without meaning or substance. In the present case we are not delving into the mode and manner in which intra-party elections are held. We have restricted ourselves to inquiring and determining whether intra-party elections were at all held in PTI.

The Complainants

27. Fourteen PTI party members of long standing complained to the ECP that their right, to stand as candidates and to vote, was denied. In the petition filed by the contesting respondents it was stated that *'they are not members of PTI nor contestants of any intra party elections'*.¹⁵ However, the complainants incontrovertibly established their credentials and long association with the PTI. Therefore, the bare denial by the contesting respondents is of little consequence. Having established one's membership and association with a party the burden shifts to those denying it, to show that they are no longer its members, either on account of having joined another political party or because their membership has been suspended or they were expelled from the party, but nothing in this regard was brought on record, despite having repeatedly asked for it. If a person is suspended or expelled as a member of a political party it must be done in accordance with section 205 of the Elections Act, reproduced hereunder:

'205. Suspension or expulsion of a member.-

(1) A member of a political party may be suspended or expelled from the political party's membership in accordance with the procedure provided in the constitution of the political party.

¹⁴ Constitution of the Islamic Republic of Pakistan, Article 2A, the Gazette of Pakistan, Extraordinary, Part I, 12 April 1973.

¹⁵ Writ Petition 6173/2023, para.11.

(2) Before making an order for suspension or expulsion of a member from the political party, such member shall be provided with a reasonable opportunity of being heard and of showing cause against the action proposed.'

In the present case, no evidence of the complainants' suspension or expulsion from PTI was brought on record. On the contrary learned Mr. Ahmed Hassan Shah, representing Mr. Akbar S. Babar (respondent No. 10), referred to a number of documents¹⁶ which showed Mr. Babar to be one of the founding members of the PTI. Reference was also made to a Court order confirming his status as a member of the PTI.

Proof of Intra-Party Elections in the PTI

28. We had repeatedly called upon the learned counsel representing the contesting respondents to refer to anything tangible which may show that even a semblance of intra-party elections were held in the PTI, but to no avail. The filings by the contesting respondents in the Peshawar High Court also do not indicate the holding of elections. And except a few documents which self-served the beneficiaries thereof, nothing was filed in this Court to suggest that intra-party elections were held. The learned counsel representing the ECP and Mr. Babar and the other complainants drew our attention to the following:

- (1) Absence of nomination forms;
- (2) Absence of the nomination forms or the copies of nomination forms submitted by the ninety-one candidates who (according to the contesting respondents) had put themselves forward as candidates;
- (3) Absence of public disclosure or any disclosure of the candidature of the said ninety-one candidates;
- (4) Absence of proof that the said ninety-one candidates alone had put themselves forward as candidates;
- (5) Absence of notice/intimation informing party members about the place from where they may collect nomination forms;
- (6) Absence of proof of payment or receipt of the fifty thousand rupees, which as per the learned counsel representing the contesting candidate, each candidate had to pay;

¹⁶ Brought on record through CMA No. 171/2024.

- (7) Absence of notice/intimation informing candidates how and where payment of the applicable fee of fifty thousand rupees was to be paid/deposited;
- (8) Absence of proof of deposit in PTI's account of four million, five hundred and fifty thousand rupees that should have been paid by the ninety-one candidates, that is, Rs.50,000 x 91 = 4,550,000;
- (9) Absence of public notice with regard to the election schedule; and
- (10) Absence of public notice with regard to the election venue.

29. The Court Associate was asked to access the official website of the PTI in the presence of the learned counsel to check whether the aforesaid information was posted thereon, but the same was not there either. The aforesaid allegations/contentions went unrebutted by the contesting respondents. Instead they referred to a document which stated that intra-party elections in the PTI were to be held in Peshawar, but the venue was not mentioned therein and disclosure was also not made when asked by the ECP. Learned Mr. Ali Zafar and Mr. Gohar Ali Khan informed us that the place for holding elections was changed to Chamkani, a village near Peshawar, but no notice in this regard was issued nor were the PTI members/voters informed about it. It is thus indisputable that intra-party elections in the PTI were not held. And, no opportunity to contest intra-party elections and to vote for candidates was provided to the members of the PTI.

Elected Unopposed

30. We wish to clarify that if an individual comes in *unopposed* it does not mean that he/she was not deemed to have been elected. But if everyone was elected *unopposed*, without any proof of elections having taken place, then it is altogether a different matter. Mr. Umer Ayub Khan describes himself as the Secretary General of PTI, but without there being anything credible on record to show how he had assumed this important position. Mr. Gohar Ali Khan describes himself as the Chairman of PTI, but in his case too there is nothing credible on record to establish how he had claimed to be the Chairman, and supplanted himself with Mr. Imran Ahmed Khan Niazi, who in the 1st case (Writ Petition 61171/2023) had himself stated that he was the Chairman of the PTI. Once it is established that intra-party

elections had not been held, legitimate questions arise how important party offices are being occupied.

Disenfranchisement of the PTI's members

31. We were informed by the learned counsel representing the contesting respondents that there are about eight hundred and fifty thousand members of the PTI. Therefore, if intra-party elections were not held in PTI all of them stood disenfranchised. The Fundamental Right enshrined in Article 17(2) of the Constitution secures the right to form political parties. If members of political parties are not allowed to participate in intra-party elections, their Fundamental Right of putting themselves forward as candidates, contesting elections and voting for the candidates of their choice is violated. To hold otherwise would render Article 17(2) of the Constitution, and the judgment in the case of *Benazir Bhutto v Federation of Pakistan*¹⁷ case, meaningless and ineffective.

32. The aforesaid recorded facts demonstrate the following:

- (a) The ECP repeatedly called upon, and then directed for the holding of intra-party elections in the PTI, but its requests and directions were disregarded.
- (b) Repeated recourse was had to the courts with regard to a factual matter – whether intra-party elections were held in PTI;
- (c) By filing cases in the High Courts, the ECP was prevented from inquiring into the matter of intra-party elections in the PTI and/or from passing an order;
- (d) When the ECP did pass an order directing that intra-party elections be held in the PTI it was not obeyed and resort was again had to the High Courts;
- (e) A five-member Bench of the Lahore High Court was scheduled to consider the maintainability of the petition with regard to the intra-party elections in the PTI but the petitioner left the case unattended and agitated the same matter before another High Court;
- (f) Petitions with regard to intra-party elections in the PTI were first filed in the Lahore High Court and then in the Peshawar High Court; and

¹⁷ PLD 1989 Supreme Court 66.

- (g) During the hearing the self-appointed Chairman of the PTI stated that '*we did not go forum shopping*' but the facts may suggest otherwise.

Maintainability of this Case

33. The learned senior counsel Mr. Hamid Khan had questioned the maintainability of this petition and stated that the ECP could not be an aggrieved party which could file a petition. Reliance was placed by learned senior counsel upon the cases of *Wafaqi Mohtasib Secretariat v SNGPL*¹⁸ and *A. Rahim Foods (Pvt.) Limited v K&N Foods (Pvt.) Limited*.¹⁹

34. Learned senior counsel Mr. Makhdoom Ali Khan submitted that the above cited cases had attended to statutory organizations, and thus were not applicable to the ECP, which was a constitutional body. He further contended that if a High Court had wrongly exercised jurisdiction or had passed an order contrary to law then the ECP had every right to assail it before this Court. Reference was also made to the decision in the case of *Salahuddin Tirmizi v Election Commission of Pakistan*,²⁰ a judgment of a five-member Bench of this Court, wherein an earlier decision of the Court was cited and it was held that the, '*High Court in exercise of its jurisdiction under Article 199 of the Constitution was not supposed to substitute its own opinion for the opinion of the Election Commission of Pakistan on the question of facts.*' The *Salahuddin Tirmizi* case also held that '*The scope of judicial review of the High Court under Article 199 of the Constitution in election matter is confined to the extent of an order passed by election authority without lawful authority or it is coram non judice or mala fide and judicial review of the High Court cannot be enlarged to the cases relating to factual inquiry or in cases in which another view of the matter was also possible and if such view would have been taken it would not be illegal or unconstitutional.*'²¹ Reliance was also placed on the case of *Muhammad Hanif Abbasi v Imran Khan Niazi*²² with regard to the collection of information by ECP with regard to the funding of the PTI, which was objected to. This Court overruled the objection and did not limit the powers of the ECP. '*We are not persuaded to read into the law and in the powers of*

¹⁸ PLD 2020 Supreme Court 586.

¹⁹ PLD 2023 Supreme Court 516.

²⁰ PLD 2008 Supreme Court 735.

²¹ *Ibid.*, p. 767, para.30F.

²² PLD 2018 Supreme Court 189.

the ECP any limitation as has been suggested and canvassed by the learned counsel for PTI.' The ECP only had to ensure that 'the information emanates from a credible source, that it is reliable and verifiable and is not a mala fide fabrication meant to harass and prejudice a political party, its leaders or its members'.

35. In the case of *Election Commission of Pakistan v Javaid Hashmi*²³ the ECP had assailed the judgment of the Lahore High Court, passed in a writ petition, and a civil petition for leave to appeal was filed by the ECP in this Court, which was converted into an appeal and allowed with costs. Not only did the ECP file the petition but it also got the relief sought by it.

36. The learned counsel representing the contesting respondents could not controvert the above mentioned cases nor the cases filed by the ECP itself before this Court. No judgment was cited where the ECP was held not able to file a petition/appeal. If the ECP could be sued before the High Court, it would be a denial of justice and manifestly unfair if it could not then assail the decision of the High Court. Therefore, the objection to the maintainability of this petition is without legal substance and is overruled.

Allegations of *mala fide* against the ECP

37. The learned counsel representing the contesting respondents had initially alleged that the actions of the ECP were *mala fide* in law and in fact. But when we asked the learned counsel to show the *mala fide* of fact of the ECP, its Commissioner and Members, the allegation with regard to *mala fide* of fact was withdrawn. Our own independent analysis of the matter did not show anything which may suggest that the ECP acted in a *mala fide* manner. The *mala fide* allegation was further dispelled when it was noted that ECP had also issued similar notices to other political parties. When the ECP first took notice that intra-party elections had not been held in the PTI it was in the Federal Government and in the Provinces of Punjab and Khyber Pakhtunkhwa. If certain provisions of the Elections Act were held not to apply to a particular political party and that intra-party elections were not a legal requirement and/or that there were no consequences for disobeying the law, including such political party becoming disentitled to get its election symbol, this would only be possible if it was first held that such political party was above the law.

²³ PLD 1989 Supreme Court 396.

Constitutional Duties of ECP

38. The ECP is a constitutional body and the oath of office of its Commissioner and Members is prescribed in the Constitution.²⁴ Their term of office and security of tenure is also provided in the Constitution.²⁵ The matter of *Elections* is attended to in Part VIII of the Constitution, which comprises of fourteen Articles from 213 to 226 and sets out the duties and responsibilities of the ECP. Article 219(e) of the Constitution requires that the ECP perform, '*such other functions as may be specified by Act of Majlis-e-Shoora (Parliament)*'. Since Article 219 of the Constitution was referred to by both sides, therefore, it would be appropriate to reproduce both its original text and subsequent changes made thereto, as under:

(1) Original 1973 Text in the Constitution²⁶

'Duties of Commissioner

The Commissioner shall be charged with the duty of-

- (a) preparing electoral rolls for election to the National Assembly and the Provincial Assemblies, and revising such rolls periodically;
- (b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly; and
- (c) appointing Election Tribunals.'

(2) Constitution (Eighteenth Amendment) Act, 2010²⁷

'Duties of Commission

The Commission shall be charged with the duty of-

- (a) preparing electoral rolls for election to the National Assembly and the Provincial Assemblies, and revising such rolls periodically;
- (b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly;
- (c) appointing Election Tribunals;
- (d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and

²⁴ The Constitution of the Islamic Republic of Pakistan, Article 215 and Third Schedule.

²⁵ *Ibid.*, Article 215.

²⁶ The Gazette of Pakistan, Extraordinary, Part I, 12 April 1973.

²⁷ The Gazette of Pakistan, Extraordinary, Part I, 20 April 2010.

(e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament).'

(3) Constitution (Twentieth Amendment) Act, 2012²⁸

Duties of Commission

The Commission shall be charged with the duty of-

(a) preparing electoral rolls for election to the National Assembly and the Provincial Assemblies, and revising such rolls periodically;

(b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly;

(c) appointing Election Tribunals;

(d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and

(e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament):

Provided that till such time as the members of the Commission are first appointed in accordance with the provisions of paragraph (b) of clause (2) of Article 218 pursuant to the Constitution (Eighteenth Amendment) Act, 2010, and enter upon their office, the Commissioner shall remain charged with the duties enumerated in paragraphs (a), (b) and (c) of this Article.'

(4) Constitution (Twenty-Second Amendment) Act, 2016²⁹

'The Commission shall be charged with the duty of-

(a) preparing electoral rolls for election to the National Assembly, Provincial Assemblies and local governments, and revising such rolls periodically to keep them up-to-date;

(b) organizing and conducting election to the Senate or to fill casual vacancies in a House or a Provincial Assembly;

(c) appointing Election Tribunals;

(d) the holding of general elections to the National Assembly, Provincial Assemblies and the local governments; and

(e) such other functions as may be specified by an Act of Majlis-e-Shoora (Parliament):

Provided that till such time as the members of the Commission are first appointed in accordance with the provisions of

²⁸ The Gazette of Pakistan, Extraordinary, Part I, 29 February 2012.

²⁹ The Gazette of Pakistan, Extraordinary, Part I, 10 June 2016.

paragraph (b) of clause (2) of Article 218 pursuant to the Constitution (Eighteenth Amendment) Act, 2010, and enter upon their office, the Commissioner shall remain charged with the duties enumerated in paragraphs (a), (b) and (c) of this Article.'

39. Article 219(e) of the Constitution envisages, and the Elections Act legislates by placing, additional responsibilities on the ECP. In the case of *Workers' Party Pakistan v Federation of Pakistan*³⁰ this Court held that, '*By conferring such responsibility on the Election Commission, the Constitution ensures that all activities both prior, on and subsequent to Election Day, that are carried out in anticipation thereof, adhere to standards of justness and fairness, are honest, in accordance with law and free from corrupt practices.*' The law under consideration in the *Workers' Party Pakistan's* case was ROPA, the predecessor of the Elections Act. This Court had held that:

'The Parliament has framed different laws to effectuate the above constitutional provision and to regulate elections to the National and Provincial Assemblies. ROPA reiterates and further vests the Election Commission with the responsibilities and powers to, *inter alia*, regulate and check intra-party affairs and actions taken by candidates and parties in anticipation of and on Election Day, resolve all election disputes, declare the election void and to award punishments for violating relevant election laws. In appreciation of the arduousness of its task, section 5(2) of ROPA further empowers the Election Commission to "*require any person or authority to perform such functions or render such assistance for the purposes of this Act as...it may direct*". The Election Commission may, under section 103(c) of ROPA also "*issue such instructions and exercise such powers, and make such consequential orders, as may in its opinion, be necessary for ensuring that an election is conducted honestly, justly and fairly, and in accordance with the provisions of this Act and the rules*". Article 220 of the Constitution also directs the Federal and Provincial machinery to assist the Election Commission in fulfilling its constitutional responsibilities. The law, therefore, entrusts the Election Commission with exclusive, broad and extensive powers to attend to all issues related directly and ancillary to the election process.'

ECP acted in accordance with law

40. It is clear from the record that ECP did not act contrary to the law and did not act arbitrarily. The ECP persistently and repeatedly called for the holding of intra-party elections in the PTI. Initially the pretext of the prevalence of the Covid-19 virus was used for not having held elections, and a year's extension was sought from the ECP. The ECP extended the

³⁰ PLD 2012 Supreme Court 681.

period which too expired but still intra-party elections were not held. The ECP gave repeated opportunities for intra-party elections to be held but to no avail, as a result of which the ECP issued a show cause notice but this too was not taken seriously. ECP then passed an order and directed that intra-party elections be held in the PTI, in response to which, and for no justifiable reason, the direction was challenged before the Lahore High Court. And, when a favourable result could not be obtained the Peshawar High Court was approached. Those at the helm of affairs of the PTI disregarded the law, the directions of the ECP calling upon them to comply with the law and repeatedly filed petitions/appeal first before one High Court then before another High Court.

Article 17 of the Constitution and the Elections Act

41. The main thrust of the submissions of the learned Mr. Ali Zafar was to rely upon Article 17(2) of the Constitution to contend that the right to form a political party is guaranteed and that over the years this Court has robustly interpreted Article 17(2) to ensure that a political party can contest elections under a unified symbol and that any unreasonable restriction should be considered to be void. Reliance was placed by him upon the case of *Benazir Bhutto v Federation of Pakistan*,³¹ a judgment by a twelve-member Bench of this Court.

42. The learned counsel also disparaged the Elections Act and contended that its provisions, requiring the holding of intra-party elections and imposing the penalty of taking away the symbol of the party, contravened Article 17 of the Constitution and as such was not sustainable in view of the judgment in the *Benazir Bhutto* case. However, this was done without appreciating that the Elections Act was promulgated by a democratically elected Parliament and also that it was not hurriedly enacted. The draft of the law was sent to the Standing Committee of the National Assembly, then debated on the floor of the National Assembly for four days where-after it was sent to the Senate and thoroughly examined in the Senate's Standing Committee. A Senator³² of the PTI had suggested that instead of providing for the holding of intra-party elections every five years, such elections be

³¹ PLD 1989 Supreme Court 66.

³² Mr. Muhammad Azam Khan Swati.

held every three years, as was provided in the constitution of the PTI, but this suggestion was not approved.³³

43. It is significant that in none of the said five cases, nor before us, the constitutionality of any provision of the Elections Act was challenged. The laws of Pakistan enacted by Parliament must be abided by, including by Judges of the superior courts, whose oath of office also requires adherence therewith. Unless a law, or any provision thereof, is challenged and is found to contravene the Constitution and declared unconstitutional, it must be given effect to. The Elections Act became law on 2 October 2017 and during the last six years no successful challenge has been thrown to it or with regard to any of its provisions.

Removal from Article 17 the provision requiring intra-party elections

44. Article 17 of the Fundamental Rights Chapter³⁴ is titled *Freedom of association*, and it guarantees to every citizen the right to form political parties. The learned counsel representing the contesting respondents attached great significance to the fact that the Constitution (Eighteenth Amendment) Act of 2010 had removed clause (4) requiring intra-party elections from Article 17 of the Constitution. Therefore, it would be appropriate to set down the original text of Article 17 and the changes made thereto:

(1) Original 1973 Text in the Constitution

'(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of morality or public order.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party. Every political party shall account for the source of its funds in accordance with law.'

(2) After the Constitution (First Amendment) Act, 1974³⁵

'(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of morality or public order.

³³ Report of the Standing Committee on Law and Justice, 'The Elections Bill, 2017', Report No.50, Annex C, Clause 208, page.198.

³⁴ Constitution of the Islamic Republic of Pakistan, Part II, Chapter 1.

³⁵ The Gazette of Pakistan, Extraordinary, Part II, 8 May 1974, also in PLD 1974 Central Statutes 252.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law.'

(3) After the Constitution (Fourth Amendment) Act, 1975³⁶

'(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law.'

(4) After the Legal Framework Order, 2002³⁷

'(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of morality or public order.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan or public order and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan or public order, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final:

Provided that no political party shall promote sectarian, ethnic, regional hatred or animosity, or be titled or constituted as a militant group or section.

³⁶ The Gazette of Pakistan, Extraordinary, Part I, 25 November 1975.

³⁷ The Gazette of Pakistan, Extraordinary, Part I, 21 August 2002.

(3) Every political party shall account for the source of its funds in accordance with law.

(4) Every political party shall, subject to law, hold intra-party elections to elect its office-bearers and party leaders.'

(5) After the Constitution (Eighteenth Amendment) Act, 2010³⁸

'(1) Every citizen shall have the right to form associations or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan, public order or morality.

(2) Every citizen, not being in the service of Pakistan, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of Pakistan and such law shall provide that where the Federal Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of Pakistan, the Federal Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) Every political party shall account for the source of its funds in accordance with law.'

45. The submission that, because clause (4) of Article 17 was removed by the Constitution (Eighteenth Amendment) Act, 2010 intra-party elections is no longer a requirement, is fallacious. This spurious contention, if accepted, may lead to devastating consequences. The same amendment to the Constitution had also removed the proviso to clause (2) of Article 17, which also proscribed advocating '*hatred or animosity*', therefore, if the same obtuse reasoning is applied then a political party can now advocate hatred and animosity. Let us further assume that there was a provision in the Constitution requiring that election symbols be provided to political parties and a constitutional amendment did away with this requirement but incorporated it in legislation. The change would not mean that a political party was no longer entitled to an election symbol. Article 17 of the Constitution also does not specifically mention the holding of elections. On the basis of the same flawed reasoning it could be contended that there was no requirement to hold elections in the country. However, there can be no doubt that elections must always be held and it is the Fundamental Right of every citizen, who fulfills the stipulated criteria, to be able to contest elections and to vote.

³⁸ The Gazette of Pakistan, Extraordinary, Part I, 20 April 2010.

The Benazir Bhutto Case

46. The learned counsel on both sides relied upon the *Benazir Bhutto* case in support of their respective contentions. Therefore, it would be appropriate to consider the background and facts of the *Benazir Bhutto* case and examine what was decided therein. Ms. Benazir Bhutto was the co-chairperson of the Pakistan Peoples Party and had filed a constitution petition in this Court under Article 184(3) of the Constitution challenging the provisions of section 21(1)(b) of the Representation of the People Act, 1976 ('ROPA') to the extent that it had been changed by providing that election symbols shall be separately given to each candidate and not to political parties. The petitioner also sought a direction that the respondents be directed to hold general elections on party basis. It was correctly contended that the said changes to the law were in conflict with Article 17 of the Constitution.

47. The said section 21 of ROPA had been amended through Ordinances No. II and VIII of 1985, promulgated by General Muhammad Zia-ul-Haq, which amendments had disabled political parties from obtaining a common election symbol for their candidates, which meant that general elections would be on non-party basis.

48. Section 21 of ROPA, as originally enacted by the elected representatives of the people, and the subsequent amendments made to it by an individual, are reproduced hereunder:

(1) Section 21 in the Representation of People Act, 1976:

Contested elections and allocation of symbols.- (1) If there are more contesting candidates than one in respect of any constituency, the Returning Officer shall-

- (a) allocate, subject to any direction of the Commission, one of the prescribed symbols to each contesting candidate; and in so doing shall, so far as possible, have regard for any preference indicated by the candidate at the time of filing his nomination papers;
- (b) publish in such manner as the Commission may direct the names of contesting candidates arranged in the Urdu alphabetical order with English transliteration thereof below the name of each contesting candidate, specifying against each the symbol allocated to him; and
- (c) give public notice of the poll.

(2) The Returning Officer shall arrange to exhibit prominently at each polling station the name and symbols of each contesting candidate.

(3) A contesting candidate may, within three days of the publication of the list of contesting candidates alongwith the symbols file an appeal to the Commission against the decision regarding the allocation of a symbol to him by the Returning Officer; and the decision of the Commission on such an appeal shall be final.

(4) The Commission shall not entertain any appeal filed after the expiry of the period of three days referred to in subsection (3).

(2) Section 21 as substituted by the Representation of People (Amendment) Ordinance, 1985 (Ordinance No. II of 1985):

(1) If there are more contesting candidates than one in respect of a constituency, the Returning Officer shall-

- (a) prepare a list of contesting candidates in which their names shall be arranged in the alphabetical order of the Urdu language;
- (b) allocate one of the prescribed symbols seriatim to each of the contesting candidates according to their names arranged in alphabetical order; and
- (c) give public notice of the poll.

(3) Section 21 as substituted by the Representation of People (Fourth Amendment) Ordinance, 1985 (Ordinance No. VIII of 1985):

(1) If there are more contesting candidates than one in respect of a constituency, the Returning Officer shall-

- (a) prepare a list of contesting candidates in which their names shall be arranged in the alphabetical order of the Urdu language;
- (b) allocate one of the prescribed symbols to each contesting candidate by drawing of lots; and
- (c) give public notice of the poll.'

49. Through the amendments made in section 21, by Ordinances No. II and VIII of 1985, General Muhammad Zia-ul-Haq had sought to delegitimize political parties and render them ineffective and meaningless. It was no one's case that the Elections Act or any of its provisions were enacted for a similar purpose or to achieve the same result.

50. The case before us is completely different, both on facts and on the law, from the *Benazir Bhutto* case. First of all the law under consideration is the Elections Act which was promulgated by a democratically elected Parliament; in contrast the offending amendments made to ROPA were made by an individual. Second, the Elections Act recognizes the importance of political parties and requires that general elections be held on party basis. Third, the Elections Act seeks to strengthen political parties and mandates that intra-party elections must be held in every political party. Fourth, to ensure that political parties are and remain democratic their members must be given an equal opportunity to aspire to its political offices. Fifth, if a political party does not periodically hold intra-party elections the consequences for not holding them are mentioned therein, which is the party not being eligible to get its election symbol. We are in complete agreement with the judgment in the *Benazir Bhutto* case. And, by relying upon the same reasoning, as employed therein, the significance of intra-party elections is also established.

Who made the PTI ineligible to get its election symbol?

51. As a consequence of not holding intra-party elections in PTI it became ineligible to be allocated an election symbol. The sole responsibility for which lies on those running the affairs of the PTI, who did not want democracy in the party. They unilaterally and arbitrarily took over a political party in utter disregard of the eight hundred and fifty thousand stated members of the PTI. Because of their actions and by negating the very fundamentals of democracy, that is, not holding elections, the party suffered and was rendered ineligible to receive its election symbol. A political party must never be deprived of its election symbol for some minor violation, but forsaking intra-party elections is a major violation of the law, and of the Constitution. Those in charge of the PTI were adamant not to hold intra-party elections and their intransigence alone deprived the PTI of its symbol. If intra-party elections had been held, all benefits mentioned in the Elections Act would accrue, including the party getting its symbols.

Importance of intra-party elections

52. The significance of intra-party elections, referred as primary elections (primaries), has been continuously articulated for more than a century in the United States:

The Supreme Court of Nebraska held that:

'[Primaries are] a means to an end. It is a part of the election machinery by which is determined who shall be permitted to have their names appear on the official election ballot as candidates for public office. To say that the voters are free to exercise the elective franchise at a general election for nominees, in the choice of which unwarranted restrictions and hindrances were interposed, would be a hollow mockery. The right to freely choose candidates for public office is as valuable as the right to vote for them after they are chosen. Both these rights are safeguarded by the constitutional guaranty of freedom in the exercise of the elective franchise.'³⁹

53. The Supreme Courts of a number of other States of the United States have elaborated further on the importance of primaries (intra-party elections).

'If there be fraud in the primary election, which is the very root from which the whole system of regulation springs, it is vain to regulate the conduct of general elections, for the fraud by which the nominee at the primary election is chosen enters into and is an ineradicable constituent in the result. However, fair the general election may be, if at that election men have no choice but to vote for candidates who have been nominated by fraudulent practices at primaries, or else to desert their party, which would be in most instances but to throw away their votes without achieving any good result, the effect of the election must be the consummation of a fraud and the defeat of the will of the people, for "of thorns men do not gather figs, nor of a bramble bush gather they grapes"'.⁴⁰

A similar principle echoed in the Supreme Court of Pennsylvania:

'The importance of the relation of the primary to the general elections must be apparent. Primary elections and nominating conventions have now become a part of one great political system, and are welded and united into it so firmly as to be difficult of separation. The law is as much an election law when it strikes at the fraud in the primary election as when it arrests the fraudulent ballot just as it is ready to be dropped into the box at the general election.'⁴¹

³⁹ *State v. Drexel*, 74 Neb. 776, 105 N. W. 174 (1905).

⁴⁰ *Commonwealth v. Willcox*, 111 Va. 849 at 860, 69 S. E. 1027 at 1031 (1911).

⁴¹ *Leonard v. Commonwealth*, 112 Pa. 607, 4 Atl. 220.

54. In the United Kingdom, to our understanding, there is no specific law mandating intra-party elections but it could not be contemplated that a political party would not hold such elections. In 2022 Mr. Boris Johnson of the Conservative Party resigned from his position as Prime Minister, but did not appoint his own successor. His successor Ms. Elizabeth Truss defeated Mr. Rishi Sunak in the Conservative Party leadership election on 5 September 2022. However, she too resigned and Mr. Rishi Sunak was elected unopposed. We agree that the *right to freely choose candidates for party office is as valuable right as the right to vote for them after they are chosen*.⁴²

The Impugned Judgment

55. The impugned judgment '*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*'.⁴³ Nonetheless, the learned Judges proceeded to *interfere*, and then contradicted themselves by holding that the ECP's order dated 22 December 2023 was '*illegal, without any lawful authority and of no legal effect*'. The basis of the impugned judgment, according to the learned Judges, is that the law only mandates that the *certificate* (mentioned in section 209 of the Elections Act) with regard to the holding of intra-party elections has be produced, and section 215(5) only envisages the issuance of a notice and of providing a hearing. With respect, the learned Judges disregarded section 209(1), which stipulates that '*a political party shall within seven days from completion of the **intra-party elections** submit a certificate ...*' [emphasis is added]. Section 209 is premised on the holding of intra-party elections. We can also not bring ourselves to agree with the learned Judges that, '*section 209 only deals with the submissions of document and in no manner authorizes the ECP to question or adjudicate upon the validity of Intra Party Election*.' The provision of a piece of paper - the *certificate* - that intra-party elections were held, even when they are not held, would be fraudulent.

56. The matter before the High Court was not with regard to the provision of a piece of paper, that is, the *certificate*, but whether elections had been held in PTI. If, intra-party elections were not held, the provision of

⁴² *Commonwealth v. Willcox*, 111 Va. 849 at 860, 69 S. E. 1027 at 1031 (1911).

⁴³ Para. 10 of the Impugned Judgment passed in Writ Petition No. 6173-P/2023.

a self-serving *certificate*, stating that elections were held, would be of no consequence, and would also be fraudulent.

57. The impugned judgment had also disregarded the decision of the Lahore High Court in WP 287/2024, and did not await for the decision in the appeal which was preferred against it, that is, ICA 2282/2024. The impugned judgment did not mention WP 81171/2023, filed in the Lahore High Court, which was pending adjudication before a five-member Bench. The learned Judges of the Peshawar High Court also disregarded the principles enunciated in section 10 of the Code of Civil Procedure, 1908 and the decision of the Supreme Court in the *Salahuddin Tirmizi* case.

58. It is also not understandable why the Peshawar High Court in WP 5791/2021 had directed the petitioners therein to '*appear before the Election Commission of Pakistan*' when just twenty days later the same Court held that the ECP could not do anything under the law.

Conclusion

59. The aforesaid are the reasons why the impugned order dated 10 January 2024 and the detailed judgment of the Peshawar High Court passed in Writ Petition No. 6173-P/2023 were set aside and the order dated 22 December 2023 of the Election Commission of Pakistan was upheld.

Chief Justice

Judge

Judge

Islamabad
25.01.2024
(Farrukh/M. Tauseef)

Approved for Reporting

ORDER

Qazi Faez Isa, CJ. The Election Commission of Pakistan ('**ECP**') had issued a notice on 24 May 2021 to Pakistan Tehreek-e-Insaf ('**PTI**') to hold intra party elections, which was followed by a show cause notice stating that section 208 of Elections Act, 2017 ('**the Act**') mandates that intra party elections in PTI must be held and it had been five years since the last one was held, and ECP stipulated the consequences, mentioned in the Act, which would follow if elections were not held. PTI did not dispute that elections had not been held but submitted that because of Covid-19 the time for holding its intra party elections may be extended by one year. Time was granted and PTI was directed to hold intra party elections no later than 13 June 2022 and told that '*no further extension will be granted*'.

2. Intra party elections are stated to have been conducted by PTI on 8 June 2022, however, the ECP *vide* its order dated 13 September 2023 held that PTI had '*failed to hold transparent, just and fair intra party elections*' and that, instead of invoking the provisions of section 215(5) of the Act, '*a lenient view has been taken with direction to the respondent party to hold its intra party elections strictly in accordance with the prevailing party constitution, within twenty days positively*' failing which it '*would be ineligible to obtain an election symbol for elections.*' PTI assailed ECP's order before the Lahore High Court ('**LHC**') in Writ Petition No. 81171/2023, which was initially heard by a Single Judge, but on PTI's request for constitution of a Full Bench it was listed for hearing before a five-member Bench together with WP No. 332/2023. While both these petitions were pending adjudication before the LHC, PTI contended that it had conducted its intra party elections on 2 December 2023, but it did not withdraw WP No. 81171/2023.

3. A number of complaints were received by ECP alleging that intra party elections were not held in PTI and the ECP issued notice to PTI, upon receipt whereof WP No. 5791/2023 was filed before the Peshawar High Court ('**PHC**'), and an ad interim order was obtained against the ECP that it should not pass a final order till the determination of WP No. 5791/2023. Subsequently, WP No. 5791/2023 was disposed of by the PHC by directing the ECP to decide the matter by 22 December 2023. The ECP passed order dated 22 December 2023 in which it held that PTI had not complied with

the directions issued by the ECP, and had failed to hold intra party elections in accordance with PTI's constitution, the Act and the Election Rules, 2017 with the consequence that section 215(5) of the Act would be attracted pursuant to which PTI was '*declared ineligible to obtain the Election Symbol*' which it had applied for.

4. The order of ECP dated 22 December 2023 was assailed before the PHC in WP No. 6173-P/2023, which was allowed *vide* short order dated 10 January 2024, detailed reasons whereof were given subsequently.

5. Two representatives of PTI had filed another writ petition in the LHC bearing No. 287/2024 against the ECP which was disposed of by learned Single Judge *vide* order dated 3 January 2024, holding that the prayer sought therein could only be granted if section 215(5) of the Act was declared *ultra vires* the Constitution but since the same was not challenged the relief sought could not be granted. It was also mentioned that a petition was pending in the PHC. An intra-court appeal was filed against the order of the learned Single Judge, however, a Divisional Bench of the LHC upheld the order of the learned Single Judge.

6. WP No. 81171/2023 and 332/2023 remain pending in LHC. WP No. 6173-P/2023 filed in the PHC did not disclose that WP No. 81171/2023 was pending adjudication before a five-member Bench of the LHC, even though it pertained to the very same matter, that is, the holding of intra party elections in PTI. WP No. 6173-P/2023, filed before the PHC, was not maintainable because the same issue, of intra party elections, had already been assailed by PTI before the LHC. If two and more courts have concurrent jurisdiction, while a petitioner may elect to avail of his remedy before either court, but having chosen a particular court the same dispute cannot then be taken to the other court.

7. ECP has been calling upon PTI to hold its intra party elections since 24 May 2021; at that time the PTI was in the Federal Government and in some provinces. Therefore, it cannot be stated that ECP was victimizing PTI. Nonetheless, we wanted to satisfy ourselves that the ECP had not acted *mala fide* or for ulterior reasons or that PTI was discriminated against. It transpired that ECP had passed orders against thirteen other registered political parties which were far more severe than the order passed against

PTI; one such case, of All Pakistan Muslim League, came before this Court on 12 January 2024 and the order of the ECP, delisting the said political party, was upheld.

8. ECP wanted to ensure that PTI holds intra party elections. The mere production of a certificate stating that such elections were held would not suffice to establish that intra party elections had been held when a challenge was thrown to such an assertion. Nor, in our opinion, should ECP concern itself with minor irregularities in the holding of a political party's elections. However, in the instant case not even prima facie evidence was produced to show that a semblance of elections had been held. Fourteen PTI members, with stated credentials, had complained to ECP that elections had not been held. These complaints were brushed aside in the writ petition by simply asserting that they were not members of PTI and thus not entitled to contest elections, but this bare denial was insufficient, particularly when they had credibly established their long association with PTI. And, if any member of a political party is expelled it must be done in accordance with section 205 of the Act, but no evidence in this regard was forthcoming.

9. Democracy founded Pakistan, a fundamental aspect of which is the ability to put oneself forward as a candidate and to be able to vote, both within a political party and in general elections. Anything less would give rise to authoritarianism which may lead to dictatorship.

10. The ECP is a constitutional body and amongst its duties are those mentioned in the Constitution of the Islamic Republic of Pakistan (**'the Constitution'**), Article 219(e) of which stipulates that ECP must also undertake such functions as prescribed by law, which would include those mentioned in the Act. Section 208 of the Act mandates that political parties must hold intra party elections periodically, and that a period not exceeding five years elapse within two elections. It further stipulates that every member of a political party *'be provided with an equal opportunity of contesting election for any political party office.'* Members of PTI were not provided nomination papers when they went to get them nor were any intra party elections held. Incidentally, the notice issued by the PTI Secretariat stated that the elections were to be held in Peshawar but did not mention

the venue, and then the venue was shifted to Chamkani, which is a village adjacent to Peshawar.

11. Neither before the LHC nor before the PHC any provision of the Act, including section 215(5), was challenged. The observation of the learned Judges that the provision of the law was *absurd* was uncalled for, particularly when no provision thereof was declared to be unconstitutional. Surprisingly, no declaration was sought, nor given, that intra party elections were held in PTI, let alone that the same were held in accordance with the law. If it had been established that elections had been held then ECP would have to justify if any legal benefit to such a political party was being withheld, but if intra party elections were not held the benefits accruing pursuant to the holding of elections could not be claimed.

12. We also do not agree with the learned Judges that the ECP did not have '*any jurisdiction to question or adjudicate the Intra Party Elections of a political party.*' If such an interpretation is accepted it would render all provisions in the Act requiring the holding of intra party elections illusory and of no consequence and be redundant.

13. Therefore, for the aforesaid and detailed reasons to follow, this petition is converted into an appeal and allowed by setting aside the impugned order and judgment of the PHC, passed in WP No. 6173-P/2023; resultantly, the order of the ECP dated 22 December 2023 is upheld.

sd/-
Chief Justice

sd/-
Judge

sd/-
Judge

Islamabad
13.01.2024
(Farrukh)

Approved for Reporting