

HIGH COURT OF AZAD JAMMU AND KASHMIR

Writ petition No. 1051/2011
Date of Institution. 29.06.2011
Date of decision. 01.07.2011

Sardar Abdul Qayyum Niazi S/o Sardar Fazal Dad Khan, R/o Dara Sher Khan, contestant candidate from Constituency No. LA-17 Poonch-1 Azad Jammu and Kashmir.

....Petitioner.

VERSUS

1. The Election Commission of Azad Jammu and Kashmir through its Secretary Muzaffarabad.
2. The Chief Election Commissioner Azad Jammu & Kashmir Muzaffarabad.
3. The President of Azad Jammu & Kashmir through its secretary Muzaffarabad.
4. The Chief Secretary of Azad Jammu & Kashmir Muzaffarabad.
5. The Minister for Kashmir Affairs having his office in Council Secretariat Muzaffarabad.
6. The Government of the State of Azad Jammu & Kashmir through its Chief Secretary Muzaffarabad.
7. The District Returning Officer District Poonch Rawalakot.
8. The Returning Officer LA-17 Poonch-1 Azad Jammu & Kashmir camp at Abbaspur.
9. Muhammad Yasin Gulshin S/o Lal Din R/o Abbaspur contesting candidates from constituency No.LA-17 Poonch-1, a candidate of PML(N).
10. Sardar Muhammad Asghar Affindi contesting Independent candidate from constituency No. LA-17 Poonch-1.
11. Sardar Amjad Yousaf Khan, Contesting candidate from Constituency No. LA-17 Poonch-1 a candidate of PPP.

.....Real Respondents.

12. Sardar Muhammad Hayat Khan, Contestant Independent candidate from constituency No.LA-17 Poonch-1.
13. Muhammad Shaffait Fazee, contestant Independent candidate from Constituency No. LA-17 Poonch-1.

...Pro-forma respondents.

WRIT PETITION

Before:- Justice Ghulam Mustafa Mughal, C.J.
Justice Munir Ahmed Chaudhary J.
Justice M. Tabassum Aftab Alvi J.

PRESENT:

M/s Noorullah Qureshi, Sardar Abdul Sammie Khan and Sardar Habib Zia, Advocates, for the petitioner.

Kh. Muhammad Naseem, Advocate, for the Official respondents.

Mr. Mushtaq Ahmed Janjua, Advocate, for respondent No.11.

Mr. Sadaqat Hussain Raja, Advocate, for respondent No.9

ORDER:

(Justice Ghulam Mustafa Mughal, C.J.)

The above captioned petition is directed under Section 44 of the Azad Jammu and Kashmir Interim Constitution Act, 1974, whereby following relief is prayed:-

"It is, therefore, most humbly prayed that an appropriate writ may kindly be issued directing the official respondents to collect the result and polling bags from the concerned polling staff/person and after consolidating the result, the notification in favour of successful candidate may be issued. Any other relief admissible under law may also be granted in the interest of justice."

Precise facts forming the background of the instant petition are that Sardar Abdul Qayyum Niazi, petitioner, herein, and respondents No.9 to 13 were contesting for the seat of Legislative Assembly from constituency

LA-17 Poonch-1. The polling was to be held on 26.06.2011. As per claim of the petitioner, polling started at 8:00 a.m and remained continue till 5:00 p.m on the said date. It is alleged that during the polling hours no mishap took place at any polling station of the said constituency except 3 polling stations namely Duleri, Namjar and Nakar Bala, where the total registered votes are approximately 1500. It is further alleged that polled votes were counted at all the polling stations by the presiding Officers in presence of the agents of the contesting candidates and as per his information he has a lead of 6900 votes. It is claimed that result of 65 polling stations of Tehsil Abbaspur received by respondent No.8 (Returning Officer) who started counting Votes, but at the same moment respondent No.9 along with his thousands supporters entered in the office of respondent No.8 and demanded from him to cancel the result of three union Councils i.e. Sehrah, Battle and Mandhol. The said respondent also demanded that he may be declared as successful candidate. The respondent No.8 apprised respondent No.9 that he has not received polling bags of the polling stations of Tehsil Hajira yet, therefore,

without receiving the result of that area the compilation and declaration of result of the whole constituency is impossible. Respondent No.9 instead of waiting, threatened respondent No.8 of dire consequences and to burn the record as well as Court room. It is stated that respondent No.9 who was already equipped with the destructive material sprinkled the petrol and burnt 65 polling bags, Court building, vehicles and other judicial record. Respondent No.8 saved his life by hiding himself in a bathroom and called the local SHO to rescue him. It is alleged that two F.I.Rs i.e. 28/11 and 27/11 were registered on 26.06.2011 with respect to the same incident by respondent No.8 and SDM Abbaspur. Respondent No.9 also disturbed smooth polling at polling stations Duleri, Namjar and Nakar Bala where polling could not took place at all. It is stated that total polling stations of constituency of LA-17 Poonch-1 are 157 and the result of 65 polling stations of Tehsil Abbaspur were received by respondent No.8 whereas the result of 89 polling stations belonging to Tehsil Hajira reached late when the office of respondent No.8 was burning. It is alleged that the said polling bags were retained by the presiding

Officers and are still in their custody as the respondent No.8 refused to take their custody at that time. It is claimed that result was compiled of all the polling stations except Duleri, Namjar and Nakar Bala. The result was signed by the presiding Officers and the copies thereof were handed over to the agents of the candidates. It is alleged that an application was also moved by the petitioner to the learned Chief Election Commissioner that polling bags of 89 polling stations may be ordered to be recovered but the application has been rejected by the learned Chief Election Commissioner vide his order dated 27.06.2011. It is further alleged that the order of the learned Chief Election Commissioner is arbitrary, illegal and ultra vires of Section 24-A of the Azad Jammu & Kashmir Legislative Assembly (Elections) Ordinance, 1970.

The learned Chief Election Commissioner has filed comments wherein it is stated that the result of 89 polling stations has not been received in the office of the concerned returning officer or by any other competent authority, therefore, whereabouts of 89 bags are still unknown whereas the result of 65 polling stations could not be compiled for

the reasons listed in the report of the returning Officer because allegedly respondent NO.9 occupied the office of the returning officer with his supporters and burnt the same by sprinkling petrol.

Respondent NO.11 has also filed comments.

Today, an application has also been filed by the petitioner whereby he has placed on the record/result issued by the Presiding Officers of different polling stations for consideration.

Mr. Noorullah Qureshi, the learned Advocate for the petitioner inter alia, argued that voting at 89 polling stations of Tehsil Hajira was completed during the polling hours and the results were compiled by the concerned Presiding Officers hence, it was the duty of the learned Chief Election Commissioner to direct these officers to hand over the polling bags received by them to the Returning Officer. He argued that it was also the duty of the learned Chief Election Commissioner to direct the Returning Officer to compile and announce the result of these polling stations. He submitted that cancellation of the election of constituency LA-17 Poonch-1 as a whole is

illegal, arbitrary, ab-initio-void and colourable exercise of powers because in given situation re-election was only to be ordered to the extent of 65 polling stations. Referring to section 24-A of the Azad Jammu & Kashmir Legislative Assembly (Elections) Ordinance, 1970, the learned Advocate maintained that order passed by the learned Chief Election Commissioner is not covered by the said provision hence, is liable to be quashed.

Sardar Abdul Sami Khan & Sardar Muhammad Habib Zia, the learned Advocates for the petitioners have owned the arguments of Mr. Noorullah Qureshi, the learned Advocate for the petitioner.

Mr. Mushtaq Ahmed Janjua, the learned Advocate for respondent No.11 controverted the arguments advanced on behalf of the petitioner and submitted that both, petitioner herein and respondent No.9 are responsible for bogus polling in order to achieve the result of their choice. He argued that they have taken away polling boxes from the polling stations. Even as per his knowledge polling bags of 89 polling stations are also in their custody. He further submitted that FIRs lodged by the Returning Officer and other persons including the

petitioner indicate the disturbance at polling stations on behalf of the petitioner and respondent No.9. He submitted that the order passed by the learned Chief Election Commissioner is well reasoned and has been passed competently and such like orders which have been passed with jurisdictional competence cannot be set-aside though they are erroneous. He argued that petitioner being minister was taking a part in campaign by using official vehicle in violation of the directions of the learned Chief Election Commissioner. He submitted that said vehicle was admittedly burnt. As he has suppressed the material facts and filed this petition with unclean hands, hence, the same is liable to be dismissed on this sole ground. The learned Advocate contended that polling result of 89 polling stations was not produced before Returning Officer, therefore, the question of preparation of the results does not arise and only solution of the matter in the peculiar circumstances of this case was cancellation of the result as whole and order of the re-election. He relied upon PLD 1986 Karachi 179 and 1985 SCMR 310.

Kh. M Naseem, the learned Advocate for the learned Chief Election Commissioner while

relying upon the report of the Returning Officer sent to the Chief Election Commissioner submitted that it is an admitted fact that results of 65 polling stations were received in the office of the Returning Officer and the same were destroyed by respondent No.9 within 25 minutes after its receipt. He contended that it is also an admitted fact that the moment polling started the Returning Officer received various complaints of snatching ballot boxes and thereafter, polling bags from the Presiding Officers. The result of 89 polling stations has not been received by the Returning Officer and it is not known with whom those polling bags are lying. The learned Advocate contended that the report of the Returning Officer coupled with registration of F.I.Rs was sufficient to justify the order passed by the learned Chief Election Commissioner and the same cannot be interfered with in writ jurisdiction that too, on the request of a person who himself is involved in disturbing the polling. The learned Advocate further contended that material placed before the Court today with the application has not been considered by the learned Chief Election Commissioner therefore, the same

cannot be considered for the first time by this Court in writ jurisdiction.

Mr. Sadaqat Hussain Raja, the learned Advocate for respondent No.9 contended that whole democratic system is based on sanctity and secrecy of ballots, which has been destroyed in this election hence, fair and free re-election was the only solution and the order under challenge has rightly been passed. The learned Advocate further contended that if polling bags of 89 polling stations are recovered even then there is no guarantee that those bags were remained in safe hands. The learned Advocate submitted that in the circumstances of this case it is essential that order passed by the learned Chief Election Commissioner be maintained and the Electoral rolls of the area be given a chance to elect their representative through a fair and transparent election.

We have heard the learned Advocates for the parties and gone through the record of the case appended with their respective pleadings.

After hearing the learned Advocates for the parties and perusing their pleading as well as record appended therewith, we are of

the view that following points need resolution in the instant case:-

1. As to whether the order of the learned Chief Election Commissioner is ultra vires, of section 24-A of the Azad Jammu & Kashmir Legislative Assembly (Elections) ordinance, 1970.
2. As to whether the order under challenge is otherwise justified on the basis of the material placed before the Chief Election Commissioner.
3. As to whether, the respondents can be directed to recover the polling bags of 89 polling stations and compile the result on the basis of the statements of the Presiding Officers appended thereto.

So far as the first point referred above that the learned Chief Election Commissioner has no jurisdictional competence to issue the order under challenge under section 24-A of the Azad Jammu & Kashmir Legislative Assembly (Elections) Ordinance, 1970 (hereinafter to be referred as ordinance) is concerned, i.e. devoid of any force. In order to comprehend the point, it appears necessary to reproduce section 24-A of the ordinance, which is as under:-

24-A. Fresh poll in the case of destruction, etc. of ballot boxes.-

If at any election-

- (a) any ballot box used at a polling station is unlawfully taken out of the custody of the Presiding Officer or is accidentally or intentionally destroyed or lost or is damaged or tampered with, to such an extent that the result of the poll at the polling station cannot be ascertained; or
 - (b) any error or irregularity which is likely to vitiate the poll is committed at a polling station the Returning Officer shall forthwith report the matter to the Commissioner.
- (2) The Commissioner may, on its own motion or on receipt of a report under sub-section (1), and for reasons to be recorded, either---
- (a) declare the poll at that polling station to be void, appoint a day and fix the hours for taking a fresh poll at that polling station and notify the day so appointed and the hours so fixed in such manner as may deem fit; or
 - (b) If satisfied that the result of a fresh poll at that polling station will not, in any way, effect the result of the election or that the error or irregularity is not material, issued such directions to the Returning Officer as he may deem proper for the further conduct and completion of the election.
- (3) The provisions of this Ordinance and the rules and orders made thereunder shall apply to every fresh poll taken under sub-section (2)."

The above reproduced provision of law postulates that unlawful taking of ballot boxes used at the polling stations or destruction of

the same intentionally which include the tempering, due to which the result of the poll at the polling stations cannot be ascertained, the learned Chief Election Commissioner is competent to pass any suitable order. The Chief Election Commissioner under clause (B) reproduced above is also empowered to declare the polling illegal on the commission of any error or irregularity, which is likely to vitiate the poll. Under sub-section (2) the Commissioner enjoy vast powers for conducting elections justly, honestly and fairly. This power of the Chief Election Commissioner is not subject to any condition and can be exercised on its own motion. If any eventuality covered by section 24-A is noticed by the learned Chief Election Commissioner, then he cannot wait for receipt of a report or search for any applicant for taking proper action. The Chief Election Commissioner is even duty bound under section 92 of the ordinance to exercise all the powers given by the ordinance and rules made thereunder for conducting the just, fair and transparent elections. For achieving the above object the learned Chief Election Commissioner is also empowered to take consequential steps which in his opinion are necessary for ensuring

the transparency in the election. It is an admitted fact between the parties that the polling bags of 65 polling stations furnished to the Returning Officer were received but the same were destroyed before compilation of the result allegedly by the voters/supporters of respondent No.9. The matter is also judicially noticeable that the Courtroom of Civil Judge Abbaspur who was performing as Returning Officer was put on fire. The other admitted fact is that polling bags of the 89 polling stations pertaining to Tehsil Hajira have not been received in the office of the Returning Officer. It has rightly been contended by Kh. M. Naseem that polling bags have not been received by the Returning Officer or District Returning Officer or any other public functionary working under the orders of the learned Chief Election Commissioner and still the whereabouts of these polling bags are not traceable, therefore, it cannot be said that polling on 89 stations of Tehsil Hajira was conducted in accordance with the provision of the ordinance and rules made there under and in accordance with the instructions issued by the Chief Election Commissioner. The order of the Chief Election Commissioner therefore, in our

considered opinion is justified and covered under section 24-A of the ordinance.

We have also noticed that petitioner has not bothered to plead the necessary and material facts which was his duty, thus, the Court cannot be asked to decide the controversy in vacuum. The petitioner has not given the detail of the polling stations and votes obtained by him. Even the chits issued to the election agents have not been mentioned and appended with the petition. Though today, an application along with some results has been placed on the file but these documents have not been considered by the learned Chief Election Commissioner, therefore, we are unable to consider them for the first time at this stage. Law to this extent is well settled that if a document has not been placed before a tribunal exercising special jurisdiction, the same cannot be considered by this Court in writ jurisdiction because the writ jurisdiction is not akin to appellate jurisdiction conferred on a Civil Court.

There are additional reasons for justifying the order of the Chief Election Commissioner. The learned Chief Election Commissioner has passed the order under

challenge on the bases of the report of the Returning Officer of LA-17 Poonch-1. which was addressed to District Returning Officer, Rawalakot and the same was sent by the District Returning Officer to the learned Chief Election Commissioner. This report has not been challenged, therefore, where the basic order remains unchallenged, the final order passed thereupon cannot be quashed.

So far the point No.2 is concerned we are satisfied that order of the Chief Election Commissioner is even otherwise justified on the basis of the material relied upon by both the parties. The parties have registered cases against each other. The Returning Officer as well as the local SDM has also registered cases for the disturbance and causing damage to the public property against the petitioner as well as respondent No.9, therefore, it cannot be said that atmosphere at the polling stations of Tehsil Hajira was peaceful. A specific procedure is provided in the ordinance after closing the poll at polling stations. After the counting of the polled votes at a polling station as is required by sub section 2 and 3 of section 35 of the ordinance, the Presiding Officer of Polling Station has to prepare a

statement of the counted votes as is required by sub section 9 and 10 of the said section and thereafter he has to submit his statement together with the polling material to the Returning Officer who has to consolidate the result under section 36. Where serious violation of law or statutory rules is established or interference by group of miscreants or supporters of loosing candidate on one or two polling stations is alleged then cancellation of election of the whole constituency is not permitted but where from the available record the result is not determinable then the cancellation of result of the election of the whole constituency is justified. We are of the view that same position is in the case in hand. We are also observed with concern that the concerned Presiding Officers of 89 polling stations have not deposited the result with the Returning Officer or District Returning Officer and has also not reported the matter to the Election Commission through any report, therefore, they have not only violated confidence deposited in them but have also acted in derogation to the scheme of the election laws and rules made thereunder. The Election Commissioner

therefore, has to conduct an inquiry to that extent and recommend for proper action to the authority against these Presiding Officers so that in future the repetition of such practice could be stopped.

In view of above, the order passed by the learned Chief Election Commissioner is maintained and finding no force in this petition the same stands dismissed in limine.

Muzaffarabad,

1st July 2011.

CHIEF JUSTICE JUDGE JUDGE