JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

CASE NO. : W.P. NO.2004-2023

Fawad Ahmed

Vs.

Election Commission of Pakistan through its Chief Election Commissioner & Another

Petitioner by	:	**Mr. Faisal Fareed Chaudhry, Advocate**
Respondents by	:	**Mr. Saad Hassan, Advocate for ECP with Muhammad Arshad, D.G. (Law) and Ms. Saima Tariq Janjua, DD (Law), ECP.**
Date of decision	:	**06.07.2023**

AAMER FAROOQ C.J. The petitioner is a former Member of National Assembly having been elected from NA-67 Jhelum in the General Elections, 2018; he was an active member of a political party namely Pakistan Tehreek-e-Insaaf (PTI) and even held Cabinet posts. Apparently, the petitioner made certain statements, on the basis of which, Election Commission of Pakistan (ECP) issued contempt notice to *inter alia* the petitioner and apparently, on the same statement made by him, FIR was lodged against him (FIR No.69 dated 24.01.2023 under sections 153-A/506/505/124-A PPC registered with Police Station Kohsar, Islamabad); he was also arrested pursuant to the referred FIR, but was bailed out subsequently. ECP also took cognizance on the statements made by the petitioner and the contempt notice was issued to the petitioner on 27.01.2023 under section 10 of the Elections Act, 2017 (the Act). The petitioner entered appearance before ECP and tendered his reply. A preliminary objection was raised in the reply to the effect that since the FIR has been registered against him under the provisions of Pakistan Penal Code, hence continuation of contempt proceedings would tantamount to 'double jeopardy' as provided under Article 13 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution). The referred objection was dismissed and ECP issued show cause notice to the petitioner on 13.06.2023 seeking his personal appearance for

21.06.2023. In the instant petition, the petitioner has challenged notice dated 27.01.2023 as well as show case notice dated 13.06.2023.

2. Learned counsel for the petitioner *inter alia* contended that since the petitioner is facing a case under the provisions of Pakistan Penal Code, hence contempt proceedings amount to double jeopardy and are not tenable. It was argued that show cause notice has been issued by the Secretary, ECP and the same is without lawful authority inasmuch as under section 6 of the Act, all decisions and actions are to be taken by ECP and/or any person authorized in this behalf, including the Chairman, Member (s) or any other Officer of ECP. It was submitted that there was no authorization in favour of Secretary, ECP. Learned counsel lastly argued that though the matter is pending before Lahore High Court, Lahore, but ECP is not a 'court', hence has no jurisdiction to institute contempt proceedings. In support of his contentions, learned counsel placed reliance on the reported cases mentioned in the footnote [1].

3. Learned counsel for Election Commission of Pakistan controverted the contentions of the petitioner; in this behalf, it was contended that ECP, vide order dated 27.01.2023, on the basis of derogatory language used by the petitioner and others, decided to initiate contempt proceedings. It was contended that in response to the contempt notice issued, preliminary objection which were taken, were rejected on 06.06.2023. Learned counsel apprised the Court that amendment has been made in Election Rules by way of amendment in sub-rule (8) of Rule 4 of the referred Rules through Notification dated 16.12.2022 bearing SRO No.2271(I)/2022. It was argued that under this newly incorporated sub-rule, the Secretary of the Commission is competent to issue a show cause notice. It was also argued that under section 10 of the Act, ECP is competent to punish any person in contempt of court and has the same powers as the High Court. It was also submitted on behalf of ECP that double jeopardy is not applicable in the facts and circumstances of instant case inasmuch as trial in the FIR in question is underway and no conviction or acquittal has yet been recorded.

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[1] Syed Alamdar Hussain Shah Vs. Abdul Baseer Qureshi and 2-others (PLD 1978 Supreme Court 121) & Saif Ur Rehman Khan Vs. Chairman, National Accountability Bureau, NAB Headquarter, Islamabad and others (2022 CLD 413)

It was submitted that only in the event of any verdict, the petitioner may have the plea of double jeopardy, whereas mere prosecution by charging any person with the same facts/allegations in two different cases, does not tantamount to double jeopardy. Reliance was placed on cases noted in the footnote [2].

4. Submissions made by the parties have been heard and the documents, placed on record, examined with their able assistance.

5. As noted in the preceding paragraphs, the petitioner is facing contempt proceedings initiated by ECP and also trial in the afore-noted FIR and on the basis of this fact, he agitates the plea of 'double jeopardy'.

6. The principle of 'double jeopardy', as it is commonly known, is enshrined in our Constitution in Article 13 of the same and it provides that no person shall be prosecuted or punished for the same offence more than once or shall, when accused of an offence, be compelled to be a witness against himself. It is only first part of Article 13 ibid, which is of relevance and significance in the instant case. The same principle has also been provided in section 403 of the Criminal Procedure Code (the Code).

7. The principle provided in Article 13 of the Constitution received judicial consideration in a number of cases. In case reported as Nazir Ahmed Vs. Capital City Police Officer, Lahore and another (2011 SCMR 484), where the petitioner was charged with an offence and was acquitted, but subsequently, disciplinary proceedings were initiated against him by his Department, raised plea of Article 13 ibid, the Supreme Court of Pakistan, while interpreting the referred provision of the Constitution, stated that initial condition for Article 13 to apply is that no person will be tried for an offence on the same set of facts, on which, he has already been acquitted or convicted. It was stated that for applicability of the rule '*autre fois acquit*', essential conditions to be satisfied are that; there must have been a trial of the accused for the offence charged against him; the trial must have been by a court of competent jurisdiction; there must have been

[2] Nazir Ahmed Vs. Capital City Police Officer, Lahore and another (2011 SCMR 484), Abdul Malik and others Vs. The State and others (PLD 2006 Supreme Court 365), Hassan and 2 others Vs. The State (PLD 2015 Sindh 250), Muhammad Ali Abbas Vs. The State and others (PLD 2014 Lahore 148) & Shafqat Hussain Vs. President of the Islamic Republic of Pakistan and 8 others (PLD 2016 Islamabad 1)

a judgment or order of acquittal; the parties in the two trials must be the same and fact-in-issue in the earlier trial must be identical with what is sought to be re-agitated in the subsequent trial. In case reported as Abdul Malik and others Vs. The State and others (PLD 2006 Supreme Court 365), the Supreme Court of Pakistan traced the genesis of Article 13 of the Constitution and observed that it can be traced to the English Common Law rule '*nemo debet bis vexari*', which, in literal means that a person may not be put twice in peril for the same offence. It was stated that this principle by now has come to assume a universal application and is found in Constitutions of most of the counties. The Supreme Court, while interpreting Article 13 ibid, laid down the implications of the same, which are as follows:-

> "*i) A person may not be tried for a crime in respect of which he has previously been acquitted or convicted;*
> *ii) In respect of the crime of which he could on some previous charge/indictment has been lawfully convicted;*
> *iii) Where the offence charged is in effect the same or substantially the same as one in respect of which the person charged has previously been acquitted or convicted or in respect of which he could, on some previous indictment, have been convicted;*
> *iv) The evidence necessary to support the second indictment or the facts which constituted the second offence would have been sufficient to procure a legal conviction upon the first indictment either as to the offence charged or as to an offence of which on the indictment, the accused could have been found guilty;*
> *v) The offence charged in the second indictment must have been committed at the time of the first charge i.e. a conviction or acquittal for an assault will not bar a charge of murder if the assaulted person later died;*
> *vi) The earlier adjudication leading to guilt or innocence of a person charged must have been through a valid process and by a Court of competent jurisdiction;*
> *vii) The conviction or acquittal in the previous proceedings must be enforced at the time of the second trial.*

Even, in the earlier case reported as Syed Alamdar Hussain Shah Vs. Abdul Baseer Qureshi and 2-others (PLD 1978 Supreme Court 121), the Supreme Court observed that fresh prosecution for same offence is barred only where prosecution is finally concluded and ended either in acquittal or conviction. In a fairly recent judgment reported as Saif Ur Rehman Khan

Vs. Chairman, NAB, Islamabad and others (PLD 2022 Supreme Court 409), Article 13 ibid received a fresh judicial ink and Syed Mansoor Ali Shah J., while authoring opinion for the Court, explained applicability of Article 13 (a) of the Constitution in the following words:-

> "Article 13(a) provides that no person shall be prosecuted or punished for the same offence more than once. The expressions "prosecuted" and "same offence" used in Article 13 are of vital significance in determining the scope of the protection guaranteed. The expression "prosecuted" means prosecuted on a charge of criminal nature before a Court of law; it does not include prosecution on the basis of breach of some code of conduct by a disciplinary authority or breach of some regulatory framework by an administrative authority. The expression "same offence" means offence constituted of the same ingredients and does not mean "same matter" or "same facts". The ingredients of the offence earlier charged and the offence subsequently charged should be the same, to attract the bar of Article 13, in the sense that the facts constituting the offence earlier charged were also sufficient to justify the conviction of the offence subsequently charged".

In case reported as Mst. Naushad Bibi Vs. Sher Khan (2013 P Cr. LJ 666), the Peshawar High Court observed that protection against double jeopardy had been provided against double punishment and not the trial of the offence. Similar observations were made in case reported as Khadim Hussain Palh Vs. The State (2014 P. Cr. LJ 1698), where observation was made by Division Bench of Sindh High Court that mere lodging of FIRs would not attract rule of double jeopardy and concept of double jeopardy is attracted where accused has been tried for the offence charged in the competent court and there is judgment of conviction or acquittal. While observing so, reliance was placed on cases Muhammad Ashraf and others v. The State reported in 1995 SCMR 626 and Abdul Hafeez v. Additional. District Judge-VII, South Karachi and 2 others, reported in PLD 200 Karachi 350. Similarly, in a case from the jurisdiction of across the border reported as T.S. Baliah Vs. T.S. Rengachari (AIR 1969 SC 701), the Supreme Court of India had interpreted that criminal action initiated under the special law i.e. section 52 of the Income Tax Act, 1922 and the effect thereof with general provision of section 177 of Indian Penal Code, 1860. In the referred case, the prosecution was initiated against the appellant under section 52 of the Income Tax Act, 1922 as well as section 177 of Indian Penal Code and it was argued that since there is a special provision of

section 52 which subsequently was repealed during pendency of criminal proceedings, no proceedings under section 177 can be initiated as well. The Supreme Court spurned the referred argument that section 52 impliedly repeals section 177 of the Indian Penal Code and observed that they are distinct provisions and the former does not impliedly repealed the latter. In so far as double jeopardy was concerned, which is provided in Article 14 of the Indian Constitution, the Supreme Court held the choice of prosecution for submitting false statement in verifying for income tax returns either under section 177 of the Indian Penal Code or section 52 of the Income Tax Act, 1922 is not violative of Article 14 of the Constitution.

8. In light of the discussion with reference to the above case law and Article 13 of the Constitution, since no conviction or acquittal has been recorded against the petitioner in the trial faced by him in the afore-noted case under the provisions of Pakistan Penal Code, it cannot be said that Article 13 ibid or section 403 of the Criminal Procedure Code shall come into play and would make the contempt proceedings barred under the law. In other words, the plea of 'double jeopardy' is not available to the petitioner, atleast at this stage.

9. In so far as competency of the notices issued to the petitioner is concerned, the amendment made in Election Rules, 2017 by incorporating sub-rule (8) of Rule 4 through SRO No. SRO No.2271(I)/2022 dated 16.12.2022, empowers the Secretary of the Commission to issue notice or show cause notice for that matter. The referred sub-rule (8) is as follows:-

> '*(8) If the Commission on the basis of opinion expressed by the Commissioner or the member mentioned in sub-rule 97), decides that action should be taken in the matter, it may direct a notice or a show cause notice to be issued to the alleged contemnor by the Secretary of the Commission or in his absence, any other officer of the Commission and copy of such notice or show cause notice shall be sent to the Advocate General, Islamabad who shall in that event either conduct proceedings himself or depute an Additional Advocate General or Deputy or Assistant Advocate General for the purpose*".

The main thrust of reliance on argument of the petitioner was on section 6 which provides for delegation of powers. It seems that through Rules, specific delegation has been made to the Secretary of the Commission to

issue notice or show-cause notice hence there does not seem to be any violation of section 6 or the Election Rules, 2017 as exists after amendment.

10. In the instant case, vires of section 10 of the Act has not been challenged, which perhaps is the subject matter before Lahore High Court, however, ground has been agitated that ECP cannot proceed for contempt against any person. Be that as it may and without prejudice to the matter pending before Lahore High Court, Lahore, section 10 of the Act of 2017 does empower ECP to exercise contempt powers as are available to any High Court to call for any person in contempt of court. In this behalf, by reference, in place of the words 'Court' and 'Judge' as provided in Contempt of Court Ordinance, 2003 and/or any other law, reference is to be made to the 'Commission' or the 'Commissioner', as the case may be.

11. The Election Commission of Pakistan did deal with the objections raised by the petitioner in reply to the notice and through order dated 06.06.2023, elaborately dealt with all the objections. The order of the ECP is well-reasoned and does not suffer from any illegality or jurisdictional defect.

12. For the above reasons, instant petition is without merit and is accordingly dismissed.

(CHIEF JUSTICE)

Announced in Open Court on 25.09.2023

(CHIEF JUSTICE)

Approved for reporting

Zawar