

ORDER SHEET
HIGH COURT OF SINDH, KARACHI

Suit No.2132 of 2017

<i>Date</i>	<i>Order with signature of Judge</i>
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Present
Mr. Justice Muhammad Ali Mazhar.

Karachi Customs Agents
Association.....Plaintiff

Versus

Provincial Assistant Registrar
& others.....Defendants

For hearing of C.M.A NO.13504/2017

Date of hearing 09.02, 14.03 & 21.03.2018

Mr.Ghulam Hyder Shaikh, Advocate for Plaintiff.

Muhammad Amir, General Secretary of Plaintiff.

Mr.Taimur Ali Mirza, Advocate for Defendant Nos.4 & 5

Mr.Zia-ul-Haq Makhdoom and Mr.Mueen Qamar, Advocates
for Defendant No.2.

Mr.Usman Tufail Shaikh, Advocate for defendant No.3

Ms.Rakshanda Waheed, State Counsel.

Syed Ibad and Mr.Saad-ur-Rasheed Abbasi, Law Officers of
SECP.

Mr.Junaid Ahmed, Provincial Assistant Registrar (Defendant
No.1).

Muhammad Asif Mehmood, Chief Election Commissioner
(Defendant No.3).

Muhammad Ali Mazhar-J: This suit has been brought
for declaration, specific performance and injunction. The
short-lived facts set out in the plaint are that plaintiff is a
nonprofit association formed under the provision of
Companies Ordinance, 1984 to encourage, promote and

protect the rights and interests of Customs Clearing & Forwarding Agents in Karachi. The annual elections for the year 2017-2018 were held on 16.09.2017 to the post of eight Office Bearers as well as twelve Members of the Managing Committee. The defendant No. 2 and 4 contested the elections for the post of president. The defendant No.3 (Election Commissioner) announced the provisional results whereby the defendant No.2 was declared returned candidate to the post of president. Some candidates raised the objections that counted votes are not reconciling with total number of casting votes therefore, the election commissioner mentioned this discrepancy in the provisional results. The defendant No.3 called upon the candidates to attend the recounting session on 26.09.2017 and on the same date final results were announced by means of which the defendant No.4 was declared successful to the post of president. Along with the main suit, the plaintiff has also filed CMA No.13504/2017 in which they have entreated for suspending the operation of letter dated 28.09.2017 issued by Provincial Assistant Registrar, Joint Stock Companies, Sindh Karachi to the Office Secretary of the plaintiff's association raising concern that no provision for recounting and or reconciliation of election results exists under the Articles of Association of the plaintiff, therefore a general meeting should be convened to form Caretaker Committee to conduct the elections under Article 31 (c) of the Articles of Association. On 02.10.2017, this interlocutory application was fixed for orders before the learned Single Judge of this court, while issuing notices, the court directed the parties to maintain status quo.

2. The learned counsel for the plaintiff argued that being an independent Chief Election Commissioner, the defendant No.3 was bound to conduct the elections and finalize the results in terms of Article 29 (a) of the Association. The process was completed in the late night at about 2.00 A.M. The defendant No. 3 was compelled to announce the provisional results however some contestants raised objections and moved applications that number of votes could not reconcile with the total number of votes cast, therefore, the defendant No. 3 had written a letter on 18-09-2017 to the defendant No.1 for inspection and reconciliation. The recounting was done by the defendant No. 3 with due notice to all candidates. The defendant No. 1 vide letter dated 21-09-2017 conveyed the defendant No. 3 that there is no provisions for interference into the affairs of Associations with regard to the process of reconciliation of votes by his office. However, he advised to take an appropriate action mentioned in Clauses 29 (a) and 31(c) of the Articles of Association of KCAA.

3. It was further contended that the defendant No. 3 initiated the process of recounting on 26-09-2017 but neither anyone objected or complained that the exercise of reconciliation was not proper nor any allegation of rigging was raised to the provisional or final results. As a result of recounting/reconciliation of the votes the final results were announced and the AGM was called so that new committee could take the charge. The learned counsel further averred that it is common practice that in the event of any dispute, the recounting/reconciliation can be done by Election Commission. As a result of final

result, the managing committee took the charge of Association on 28-09-2017 thereafter the impugned letter dated 28-09-2017 was received to the plaintiff on 02-10-2017 from defendant No. 1 which is illegal, unlawful and without jurisdiction. As a fall back, he proposed an alternative that reconciliation/recounting of votes may be conducted before the Nazir of this court. In support of his contention, he cited the dictum laid down in the case of **Syed Khaliq Shah vs. Abdul Raheem Ziaratwal, PLD 2017 S.C. 684** and **Jam Madad Ali vs. Asghar Ali Junejo, 2016 SCMR 251**.

4. The learned counsel for the defendant No.2 argued that the defendant No.2 being a candidate to the office of President, secured 489 Votes and was declared successful according to the Provisional Results announced on the same day. The opponent candidate secured 488 Votes. After declaration of Election Results, the plaintiff's Existing Office Bearers in connivance with the Chief Election Commissioner (Defendant No.3), manipulated and changed the Election Results. The defendant No.2 received two Office Memorandums from Chief Election Commissioner dated September 18, 2017 and September 20, 2017 for the purposes of recounting/reconciliation of Votes on 20.9.2017 but the defendant No.2 objected the recounting. It was further contended that under Article 29 (c) (viii) of Articles of Association, the Provisional Result announced on September 17, 2017 was the only result of the Elections. There is no provision in the Plaintiff's Articles of Association for Recounting/Reconciliation of Votes after announcement of Election Results.

5. It was further contended that the plaintiff has no locus standi to file the suit as no rights or interests of the plaintiff have been affected by the Impugned Order passed by the defendant No. 1. The plaintiff being a corporate entity in terms of Section 42 of the Companies Ordinance, 1984 cannot be considered to have been affected by any Election Results declared on 17.9.2017. The plaintiff cannot file the suit to protect interest of the Existing Office Bearers which is violation of the fiduciary relationship. The final result is opposed to the directions given by the defendant No.1 in the letters dated 21.9.2017 and 25.9.2017.

6. It was further contended that in terms of Section 2 (1) and 26 and 31 of the Companies Ordinance, 1984 and Section 2 (3) and Section 17 of Companies Act, 2017, Articles of Association of a Company constitutes a binding contract between the Company and its Members. He placed reliance on **Lucky Cement Ltd. vs. Commissioner Income Tax, 2015 CLD 1482** and **Messrs. Kingsway Capital LLP vs. Murree Brewery Co. Ltd. 2017 CLD 587.**

7. The learned counsel for the defendant No.3 argued that the provisional result was announced but proper reconciliation could not be done due to late hours. He further argued that 1023 ballot papers were issued. One more slip was issued but the ballot paper was not issued. He also referred to note contained in the provisional result which shows that one vote was missing in total and there was also difference in total of 52 votes of the Members Managing Committee and according to provisional result, the defendant No.4 Faisal Mushtaq who contested the election for presidential candidate

obtained 488 votes whereas, the defendant No.2, (presidential candidate) from opponent panel obtained 489 votes so he was declared returned candidate. It was further contended that during the counting process some discrepancies occurred as the staff deputed for marking calculation sheets did not properly tick/mark the calculation sheets. He further argued that at the time of recounting polling agents of both panel were available. After recounting, Faisal Mushtaq secured 475 votes and Yahya Muhammad 474.

8. The learned counsel for the defendant No.4 and 5 argued that the defendant No. 1 has no authority or jurisdiction to declare the election results issued by the Chief Election Commissioner of the plaintiff association void or illegal. He further argued that the Provincial Registrar had no authority under the law to issue impugned letter dated 28.09.2017. The learned counsel referred to the case of **Marriage Hall Association vs. Chairman Central Board of Revenue, Islamabad, 1998 CLC 33.**

9. The law officer of SECP on court notice argued that the Associations not for profit are registered under Section 42 of the Companies Act, 2017 and Section 42 of the repealed Companies Ordinance, 1984. Associations other than the Trade Bodies usually form for promotion of commerce, arts, science, religion, health, education, research, sports, protection of environment, social welfare, charity etc. are registered under Section 42. Section 3 of the Companies Act, 2017 (Section 5 of the repealed Companies Ordinance, 1984) empowers Minister In charge of the Provincial Government to

register the Associations hence the Provincial Government may register and exercise similar powers as exercised by the Commission (SECP) in respect of aforesaid associations.

10. Heard the arguments. Article 29 of Articles of Association of Karachi Customs Agents Association (Plaintiff) is concomitant and conjoined to the election which onsets and startups the process of appointment of the Election Commissioner by the Managing Committee not less than 21 days prior to the election. The appointment entails two third majority of Managing Committee. It is further provided that the declaration of results by the Election Commission shall be final. Sub-clause (c) (vi) imparts that the Election Commission shall be in charge of all arrangements connected with the election including counting of votes and announcement of results whereas sub-clause (vii) postulates that counting of votes shall take place immediately after the polling hours under the supervision of Election Commission. However, the learned counsel for the defendant No.2 with much weightiness articulated that no provision in the Articles of Association exists for declaring any final result but the provisional result announced by the Election Commission shall deem to have been announced as final result. For the ease of reference and convenience, Sub-clause (viii) of Clause (c) of Article 29 of the Articles of Association of Karachi Customs Agents Association is copied as under:-

“(viii).Provisional results will be declared by the Election Commission duly signed immediately after the counting of vote is completed”.

11. In actuality, there is no provision for declaring the final results or the recounting of votes in the Articles of Association, nevertheless, a minimal sight and preview to the provisional result in unison shows the signs of objections raised by the defendant No.4 that one vote is missing in total besides difference in total 52 votes of Members Managing Committee. The final result announced on 26.09.2017 exemplifies and represents the total numbers of votes secured by each candidate but what is perceptible and demonstrable on comparison of provisional and final results that in each candidature, (*office bearers and members managing committee*) there is difference of votes.

12. The record reflects that some of the candidates raised objections to the Election Commission against the recounting process. Some of them had also written letters to the Director Industries, Government of Sindh for opening election record in presence of the representative of the Director Industries. The Provincial Assistant Registrar, Joint Stock Companies, Sindh, Karachi on 21.09.2017 communicated the Chief Election Commission that there is no provision in the Societies Registration Act for interference in the affairs of the Association with regard to process of reconciliation of votes by their office. However, he suggested an appropriate action as provided under Article of Association. On 29.09.2017 notice was issued by the Election Commissioner for recounting of the votes on 26.09.2017. The Provincial Assistant Registrar, Joint Stock Companies, Sindh Karachi on 25.09.2017 advised the Election Commission that the result announced on 17.09.2017 is final as per Article 29 of the Articles of

Association. The Managing Committee for the term 2017-2018 had taken over the charge and submitted documents with the request to issue certified copy of the Form-29 but the Provincial Assistant Registrar, communicated the Office Secretary of the plaintiff on 28.09.2017 that on announcement of two results (provisional and final) by the Election Commission, the matter has become controversial between two panels, therefore, the result is dissatisfactory and illegal. The Office Secretary of the Association was also called upon to form caretaker committee to conduct fresh elections under the supervision of the Provincial Assistant Registrar, Joint Stock Companies, Sindh, Karachi.

13. The learned counsel for the plaintiff referred to the case of **Syed Khaliq Shah vs. Abdul Raheem Ziaratwal**, reported in **PLD 2017 S.C. 684**, which pertains to the Representation of People Act, 1979. An appeal was filed in the Supreme Court against the judgment of Election Tribunal, Quetta for the seat of Provincial Assembly. There were some allegations of rigging and corrupt practices. The Apex Court held that on the basis of unreliable oral evidence which was unsubstantiated by any credible independent evidence it would be unjust and unfair to unseat a returned candidate and disenfranchise the entire constituency. He next referred to the case of **Jam Madad Ali vs. Asghar Ali Junejo**, reported in **2016 SCMR 251**. In this case also appeal was filed in the Apex Court against the judgment passed by the Election Tribunal. The Apex Court held that the purpose of a recount in an election dispute was to verify and determine the authenticity and truthfulness of the allegations on the basis whereof the election result was

challenged. The discretion to exercise power of recount may not be exploited for a roving inquiry to fish out material for reversing the election or for declaring it void. In contrast, the learned counsel for the defendant No.2 took a plea that there is no provision in the Articles of Association for declaring any final results and the provisional result announced by the Election Commission shall be treated as final. In this phraseology, he referred to the case of **Lucky Cement Ltd. vs. Commissioner Income Tax**, reported in **2015 CLD 1482**. The hon'ble Supreme Court laid down a dictum that anything done by a company beyond the scope of its Memorandum of Association was ultra vires and thus would not be given any legal sanctity. A prohibitory clause, couched in the negative language should be construed and applied strictly. However it should not be construed and interpreted to render any other specific provision/clause as nugatory and efforts should be made to save each and every provision of the statute. He also referred to the case of **Messrs. Kingsway Capital LLP vs. Murree Brewery Co. Ltd.** reported in **2017 CLD 587** in which the learned Judge of the Lahore High Court referred to the effect of Memorandum and Articles provided under Section 31 of the Companies Ordinance, 1984 which made much emphasis that the memorandum and articles shall, when registered, bind the company and the members thereof to the same extent as if they respectively had been signed by each member. Whereas, the learned counsel for the defendant No.4 referred to the case of the **Marriage Hall Association vs. The Chairman Central Board of Revenue, Islamabad**, reported in **1998 CLC 33**. In this matter, the court held that no penal consequences were provided in the

Societies Registration Act, 1860 in case registered Society acting contrary to provisions of law. Affected party could move concerned Authority for its de-registration, if such provision was available in law.

14. The veneer of this lawsuit has unambiguously divulged that after recounting, new Managing Committee has already taken over the charge on 28.09.2017. It is quite obvious and discernible when the suit was presented on 02.10.2017, the new Managing Committee was in the office. The returned candidate according to the provisional result, Yahya Muhammad has never instituted any proceedings in court to challenge the final result or exercise of recounting. Faisal Mushtaq and Mehmood-ul-Hasan Awan, the returned candidates to the post of President and Assistant Vice President in accordance with final results filed applications under Order I Rule 10 C.P.C. for impleading them as defendants and their applications were allowed by consent. The learned counsel for the defendant No.2 contended that the plaintiff had no right and authority to institute this suit for the reasons that being a corporate entity the plaintiff cannot be considered to have been adversely affected by the election results and instead of individual candidates, the association has filed this suit. I do not cogitate and mull over much weight in this argument for the reason that the plaintiff has precisely impugned the letter which was written by the Provincial Assistant Registrar after taking over the charge by the new Managing Committee on 28.09.2017. Along these lines, filing of the suit for challenging the action of Provincial Assistant Registrar in my view does not lead to any serious legal repercussion or ramification on its

maintainability. It is well settled turn of phrase that for dispensation of substantial justice, the court must avoid and sidestep technicalities or hyper technicalities.

15. No doubt under the Articles of Association it is provided that provisional result will be declared by the Election Commission but at the same time no inference can be drawn that in all circumstances and situations, the provisional results shall be considered final. If it is assumed that except provisional result, no result can be announced as final result then fundamentally, the election commission has to declare the results void on every dispute and the plaintiff has to announce fresh elections on every such occasion. It would be extremely difficult and problematic task for the Election Commission to hold the election efficiently and impartially and the members have to be ready on any such dispute for the new election which is beyond the spirit and embodiment of electoral laws. A wide-ranging survey and review of assorted lexicons and websites the word “provisional” is defined as under:-

Provisional

“To describe something that has been arranged or appointed for the present, but may be changed in the future; temporary; interim; transitional; stopgap; something allowed, made, or used until the correct, definitive, or permanent successor is available or comes into being; Temporary but with the intention of eventually becoming permanent or being replaced by a permanent equivalent; preliminary; taken or done by way of precaution or ad interim; alterable, conditional, dependent on circumstances, equivocal for a time; in a state of uncertainty; nonpermanent of short duration, passing, provisory, tentative; subject to change, transitional, unascertained”

16. The powers of recounting in case of complaint and declaration of final results after some time of declaring

provisional results are inherent and instinctive virtues and attributes to the office of election commission. On permission, the defendant No.3 also addressed the court and he reiterated that total 1023 ballot papers were issued. One more slip was issued but the ballot paper was not issued. He further contended that during counting process some discrepancies occurred as the staff deputed for marking calculation sheets did not properly tick/mark the calculation sheets therefore he carried out the exercise of recounting on notice to all candidates. The relevant Article expressed that **“Provisional results will be declared by the Election Commission duly signed immediately after the counting of vote is completed”**. The above stipulation only insists to announce the provisional results. The meaning of the word “provisional” has already been accentuated by me. There is no restrictive clause or negative covenant either in the directory or mandatory nature that after provisional results the matter will attain finale being past and closed transaction. On the contrary, while appreciating dictionary meanings on its face value, the purpose of every provisional arrangement, set up, format is treated temporary or tentative requiring to be culminated in finality on fulfilling legal requirements, due diligence and exigencies. So in my considerate outlook, the exercise of recounting cannot be considered barred or against the above provision of Articles of Association. The election commission or the commissioner in the case in hand cannot be believed so helpless, powerless or feeble who could not even undertake and initiate recounting process to examine and sort out complaints of candidates and announcement of final results. It was the duty of Election Commission to conduct free and fair elections

with responsibility to bring forth timely decision on each and every aspect of the elections right from the announcement of elections to the declaration of the final results. In the event of silent or insufficient provisions to deal with a given situation in the conduct of elections, the Election Commission has the residuary powers to act in a suitable manner. Essentially, the Election Commission is regarded as the guardian and overseer of free and fair elections. Recounting of votes is basically a repeat tabulation of votes in an election which may carry out to determine the correctness of an initial count. Errors can be found or introduced from human factors, such as transcription errors or misread of paper ballots.

17. The defendant 1 and 2 have neither raised any allegation of rigging, fraudulent means or corrupt practices nor any allegation against election commission for any rigging or unfair means. Mere allegation of manipulation in the final results without any evidence cannot be accepted. On the basis of unreliable oral evidence which was unsubstantiated by any credible independent evidence and in the absence of cogent evidence it would be unjust and unfair to unseat a returned candidate and disenfranchise all association members. However in order to meet the ends of justice, fair play and to satisfy the conscience, misgivings and reservations of the defendant No.1 and 2, it would be adequate to order recounting of all votes under the supervision of Nazir of this court and in presence of all candidates or their duly authorized representatives. In the present facts and circumstances of the case I do not endorse and subscribe to the aspiration of the defendant No.1 to form interim setup and then hold fresh elections

for which the defendant No.1 engaged in the communication and also conveyed his wishes to the plaintiff's association in a slipshod manner without holding any inquiry to the election process.

18. In the wake of above discussion, the listed application is disposed of in the following terms:-

1. The direction issued by Provincial Assistant Registrar, Joint Stock Companies, Sindh, Karachi vide impugned letter dated 28.9.2017 to form caretaker committee to conduct fresh elections is set aside.

2. The Nazir of this court is appointed Commissioner to supervise and monitor the recounting of votes afresh for the satisfaction of all candidates who contested the elections.

3. The Nazir shall communicate the date and time for recounting of votes in the plaintiff's office to all candidates in writing.

4. The defendant No.3 shall handover entire election record including sealed bags of votes, counterfoils, calculation/tabulation sheets etc. to the Nazir of this court within three days.

5. The defendant No.3 after recounting in presence of Nazir, compile the result and handover the certified copy to the Nazir who will submit the report in court.

6. The entire process shall be completed within ten days positively.

7. The Nazir fee shall be Rs.50,000/- (Rupees Fifty thousand only) which will be paid by the plaintiff in advance.

**Karachi:-
Dated.22.5.2018**

Judge