

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

C.P.No.D-5746 of 2018
C.P.No.D-5719 of 2018
C.P.No.D-5754 of 2018
C.P.No.D-5732 of 2018

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| Date | Order with signature of Judges |
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Present

Mr.Justice Muhammad Ali Mazhar
Mr.Justice Adnan Iqbal Chaudhry

1. Mian Muhammad Shahbaz Sharif
(C.P.No.D-5746 of 2018)
2. Fayyaz Kaimkhani
(C.P.No.D-5719 of 2018)
3. Abdul Hakeem Baloch
(C.P.No.D-5754 of 2018)
4. Saleheen
(C.P.No.D-5732 of 2018).....Petitioners

Versus

Federation of Pakistan & others.....Respondents

Date of hearing: 10.08.2018

Mr. M. Umar Lakhani Advocate along with Petitioner in C.P.No.D-5719/2018.

Mr. Irshad Ali Shar Advocate along with Petitioner in C.P.No.D-5754/2018.

Syed Hafeezuddin Advocate along with Petitioner in C.P.No.D-5732/2018.

Shaikh Jawaid Mir and Mr.Naseer Ahmed Khan advocates along with Muhammad Sagheer Khan, attorney of Petitioner in C.P.No.D-5746/2018.

Mr.Amir Nawaz Warraich, Advocate for Respondent No.3 in C.P.No.D-5719/2018

Respondent No.18 Kiran Masood in C.P.No.D-5732 of 2018.

Respondent No.11 Qadir Khan Mandokhail in C.P.No.D-5746/2018.

M/s. Mohammad Bin Mohsin & Hasnain Ali Chohan Advocates along with the Respondent No.14 in C.P.No.D-5746/2018.

Khawaja Naveed Ahmed & Mr.Irfan Bhutta Advocates along with Respondent No.3 in C.P.No.D-5754/2018.

Mr.Imtiaz Ali, Advocate for Respondent No.4 in C.P.No.D-5732 of 2018.

Mr. Salahuddin Khan Gandapur Advocate for ECP.

Ms. Memoona Nasreen, Legal Advisor ECP.

Mr. Abdullah Hanjra, Law Officer ECP.

Mr. Ghulam Shabbir Baloch, Assistant Attorney General.

Mr. Ghulam Shabbir Shah, Additional Advocate General.

Muhammad Ali Mazhar, J: The petitioners have brought these Constitution petitions to entreat a declaration that the learned Returning Officers have wrongly rejected the applications moved by them for recounting of votes in the General Elections 2018. The petitioners have also implored for the directions against the Returning Officers for recount in their respective constituencies.

2. The learned counsel for the petitioner in C.P.No.D-5719/2018 has filed *CMA No.25059/2018* under Order 6 Rule 17 CPC for making some amendment in the prayer clause. He contended that an application for recounting was moved to the Returning Officer and ECP but no order was passed. He further argued that due to some inadvertence and omission, the prayer clause for recounting of votes could not be spelled out in the memo of petition. No opposition was lodged by the counsel for respondents to the request for making amendment in the prayer clause. It is well settled proposition of law that the court may allow the amendment in the pleading at any stage of the proceedings. In our view, the amendment in the prayer clause does not in any case change the complexion or semblance of the case. The petitioner may add the prayer for recounting in the petition and amended prayer clause (*depicted as "d-ii" in C.M.A No.25059/2018*) may be incorporated and filed in the office within five days. The application is disposed of accordingly.

3. The transient facts are that the petitioners in C.P.Nos.D-5746, 5732 and 5754/2018 had moved separate applications to the Returning Officers for recount but their applications were rejected. According to the petitioner in C.P.No.D-5719/2018, he had also moved application for recounting to Returning Officer and ECP on 27.7.2018 but no order was passed on it. The petitioners in C.P.No.D-5746 & 5732/2018 also moved applications to ECP with the request of recount which was also declined. Vide separate interim orders passed in C.P.No.D-5746, 5732 and 5754 of 2018 on 7.8.2018, we jot down the controversy together with the difference of votes between the petitioners and the returned candidates as well as the number of rejected/invalid votes. As an interim measure, ECP was restrained from notifying the name of candidate who received the highest number of votes and stands elected for the constituencies involved in C.P.No.D-5746, 5732 and 5754/2018. Sanguine to some urgency in the matters, we also directed the Additional Registrar (Writ) to transmit the interim orders to the ECP through facsimile for compliance.

4. Section 95 of the Elections Act, 2017 germane to the consolidation of results which articulates that immediately after announcement of provisional results, the Returning Officer shall give the contesting candidates and their election agents a notice in writing of the day, time and place fixed for the consolidation of the results. In tandem, sub-section (2) expounds that before consolidating the Results of the Count, the Returning Officer shall examine the ballot papers excluded from the count and if he finds that such ballot paper should not have been so excluded, count it as a ballot paper cast in favour of the contesting candidate for whom the vote has been cast. However, under sub-section (5) of Section 95 of the Elections Act, 2017, before commencement of the consolidation proceedings, it is the responsibility of the Returning Officer to recount the ballot

papers of one or more polling stations if a request or challenge in writing is made by a contesting candidate or his election agent and the margin of victory is less than five percent of the total votes polled in the constituency or ten thousand votes, whichever is less, or the Returning Officer considers such request as not unreasonable. The noticeable variance in the implication and niceties of sub-section (5) and sub-section (6) of Section 95 is that in sub-section (5), the powers have been ascribed to the Returning Officer for recounting before commencement of the consolidation proceedings but under the exactitudes of sub-section (6), the Commission (ECP) may before conclusion of the consolidation proceedings for reasons to be recorded direct the Returning Officer to recount the ballot papers of one or more polling stations.

5. The record reflects that the petitioner in C.P. No.D-5732, 5746 and 5754 of 2018 applied for recounting before consolidation of results but the Returning Officer dismissed their applications thereafter ECP also declined the request made by the petitioners in C.P.No.D-5746 & 5732/2018. We have also observed that in the application for recount various grounds were raised before the Returning Officers but the applications were rejected. We have also scanned "Final Consolidated Result" (Form-49) and find out in C.P. Nos. D-5732, 5746 and 5754/2018, a nominal margin in the total number of votes secured by the petitioners in their individual constituencies and the votes secured by the Returned Candidates which is obviously below the quantum of rejected/invalid votes. So keeping in mind the dictates and meticulousness of Section 95, the Returning Officer could have exercised his jurisdiction for recount with proper application of mind but all such applications were rejected. We have also noted that the applications for recounting were rejected on 27.07.2018, regardless of that two petitioners approached this court on 6.8.2018 and two petitioners on 07.08.2018 which is obviously

the dates after announcement of “Final Consolidated Result”. The learned counsel for the respondents argued that the petitions are not maintainable as the remedy to raise election dispute is available through election petitions before the Election Tribunal constituted under the Elections Act, 2017.

6. Under the tenets and precepts of Article 225 of the Constitution of Islamic Republic of Pakistan, it is clearly provided that no election to a house or a provincial assembly shall be called in question except by an election petition presented to such Tribunal and in such a manner as may be determined by the Act of Majlis-e-Shoora (Parliament). In unison, Chapter-IX of the Elections Act, 2017 is pertinent to the Election Disputes. Under Section 139, it is distinctly laid down that no election shall be called in question except by an election petition filed by a candidate for that election. The Election Tribunal is constituted under Section 140. It is a matter of record that the consolidation of result was finalized before filing these petitions and notification of returned candidates has been uploaded at the ECP website so at this juncture, we have to analyze our jurisdiction as to whether this court under Article 199 of the Constitution can intervene and may issue directions to Returning Officers to conduct the exercise of recount when the election process has already been completed and function and task of Returning Officer is over. Even at this stage, ECP cannot order for recounting but recourse is available by way of Election Petition.

7. In the case of **Election Commission of Pakistan vs. Javaid Hashmi**, reported in **PLD 1989 Supreme Court 396**, the apex court held that in enacting Article 225 in the Constitution the purpose of Legislature is obvious that it did not contemplate two attacks on matters connected with the election proceedings; one while the election process is on and has not reached the stage of

its completion by recourse to an extraordinary remedy provided by Article 199, and another when the election has reached the stage of completion by means of an election petition. It is also of utmost consideration that in the case of two attacks on a matter connected with the election proceedings there is likelihood of there being two inconsistent decisions; one given by the High Court and the other by the Election Tribunal which is also an independent Tribunal and this could not be the intention of the Legislature. It is, therefore, that the Constitutional provision is expressed in the negative form to give exclusive jurisdiction to the Tribunals appointed by the Election Commissioner and thus to exclude or oust the jurisdiction of all Courts in regard to election matters and to prescribe only one mode of challenge. Likewise in the case of **Aurangzeb Khan vs. Election Commissioner of Pakistan**, reported in **PLD 2010 Supreme Court 34**, the apex court held that while enacting Article 225 of the Constitution, the terminology used by the legislature is quite emphatic, clear and unambiguous, not capable of any two interpretations. The very language thereof starts with negative, phraseology, which most commonly is interpreted for ousting any possibility other than one given in the Article itself. So it cannot be challenged except by an election petition presented to such Tribunal, and in such manner, as may be determined by the law. Once the election is over, it can be challenged only before the Election Tribunal. The provisions of Article 199 of the Constitution can be invoked to challenge any irregularity that is committed during the process of election but once the election process is completed, it can only be challenged before the Election Tribunal. The apex court in the case of **Ayatullah Dr. Imran Liaquat Hussain vs. Election Commission of Pakistan**, reported in **PLD 2005 Supreme Court 52** held that if the election dispute is about the conduct or validity of election, it could only be challenged through election petition, a statutory remedy provided under the law. Therefore, writ jurisdiction is

barred as other adequate remedy is available. Whereas in the case of **Muhammad Hussain Babar vs. Election Commission of Pakistan**, reported in **PLD 2008 Supreme Court 495**, the grievance of the petitioner was confined only to the extent of consolidation of result and the recount of the rejected votes. The Supreme Court, notwithstanding the question of jurisdiction of the election authorities and the high court disposed of the petition for leave to appeal with direction that if the petitioner avails the remedy of election petition under Section 52 of the Representation of the People Act, 1976 before the Election Tribunal established in terms of Article 225 of the Constitution, the Tribunal at the first instance will consider the question relating to the recount or count of rejected votes, as the case may be, as preliminary issue and without decision of the same in possible short time, will not proceed on merits. In the same parlance, the case of **Syed Nayyar Hussain Bukhari versus District Returning Officer NA-49, Islamabad**, reported in **PLD 2008 SC 487** is also significant, in which the apex court held that “Be that as it may, adverting to the question relating to the recounting of ballot papers by the Returning Officer under section 39 of the Representation of the People Act, 1976, and under section 103-AA of the ibid Act by the Election Commission of Pakistan, we find that the application of the petitioner in this behalf was not considered in proper exercise of jurisdiction and similarly the High Court dismissed the writ petition in a perfunctory manner, therefore, the petitioner may either approach the Election Commission of Pakistan afresh under section 103-AA of Representation of the People Act, 1976, or avail the remedy of election petition under section 52 of the ibid Act. In view of the above, notwithstanding the judgment of the High Court and the order passed by Returning Officer as well as Election Commission of Pakistan, we direct that subject to all just exceptions, the concerned forum to be chosen by the petitioner, shall decide the matter quite independently on its

own merits without being influenced by the orders assailed before us or by this order and also at the first instance, will decide the matter relating to the recounting of the ballot papers as preliminary issue within the possible short time”.

8. Under Section 69 of the Repealed Representation of People Act, 1976 (ROPA) it was provided that the Tribunal shall declare the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected, if it is so claimed by the petitioner or any of the respondents and the Tribunal is satisfied that the petitioner or such other contesting candidate was entitled to be declared elected. However in the corresponding Section 157 of the Elections Act, 2017, the provision is almost couched in the same language where the satisfaction of the Tribunal is required to hold that the petitioner or other contesting candidate obtained more votes than the returned candidate. Chapter IX of the Election Rules, 2017 is associated with the election disputes. In all-encompassing foresight, though the Election Tribunal has jurisdiction to direct recount, however, under sub-rule 7 of Rule 139, the Election Tribunal may refuse to issue order for recount if the petitioner had failed to seek recount of votes before consolidation of the result or where it is not likely to have an impact on the result of the election. In the petitions in hand, three petitioners had applied for recounting before commencement of proceedings for consolidation of results but their applications were rejected while one petitioner had also moved the application before commencement of consolidation proceedings but no order was passed on his application.

9. One more characteristic is quite noteworthy which come to light thru dissection of two provisions encompassed in ROPA and Elections Act 2017 with regards to consolidation of results. Section 39 of repealed ROPA was dealing with the provision for

“Consolidation of Results”. The power of recount by the Returning Officer was provided under sub-section (6) in which the Returning Officer could recount the ballot papers upon the request of or challenge in writing made by a contesting candidate or his election agent if the Returning Officer is satisfied that the request or the challenge is reasonable or if so directed by the Commission. The corresponding provision for **“Consolidation of Results”** in Elections Act 2017 is provided under Section 95 in which before commencement of consolidation proceedings, the Returning Officer has jurisdiction to order recount on a request or challenge in writing by contesting candidate if the margin of victory is less than five percent of the total votes polled in the constituency or ten thousands votes whichever is less or the Returning Officer considers such request as not unreasonable. [Emphasis applied] In tandem, ECP has also been given independent powers under sub-section 6 of the same section to direct Returning Officer for the recount but before conclusion of the consolidation proceedings. [Emphasis applied] It deciphers that powers of recount bestowed by the legislature in the Election Act 2017 to the Returning Officer and ECP are more potent and effective which may be exercised in suitable cases and the threshold of exercising such powers and jurisdiction is well entrenched and guided in the section. Had the petitioners approached in time, which means before the consolidation of results, the situation might have been different as before consolidation of results the Returning Officer and or ECP both could have exercised the powers of recount and this court could have examined the legality or propriety of the order passed by the Returning Officer or ECP keeping in mind the niceties and minutiae of sub-section 5 and 6 of Section 95 of the Elections Act 2017 which have different thoughtfulness and precision as compared to the provision of recount contained under Section 39 of the repealed ROPA. The provisions of Article 199 of the Constitution could be

invoked to challenge any irregularity committed during the process of election but once the election process is completed, it can only be challenged before the Election Tribunal so at this belated stage, when the process of election has been completed, function and duty of Returning Officer is over and even ECP has no jurisdiction at this stage to order recounting therefore in the present scenario, the recourse is available to the petitioners to file election petitions where they may raise all available grounds for consideration. If the interim order passed by us is extended in the present circumstances, this will amount to disenfranchising a number of voters who have elected their representatives. The counsel for the petitioners on instructions have shown their willingness to file Election Petitions before the Election Tribunal along with the applications for recounting. They jointly made a request that at least some directions may be issued to the learned Election Tribunal that if any application for recounting is filed with the election petition, the same shall be decided first before proceeding with the election petition on merits which will expedite the proceedings and the petitioners shall not have to wait for a long time for the decision of their election petitions by the Election Tribunal which normally takes much time to conclude and decide. This request seems to be quite fair and reasonable in line with the judgments of apex court rendered in the case of Muhammad Hussain Babar and Syed Nayyar Hussain Bukhari (supra). The learned counsel for the respondents including ECP have also consented to this request.

10. Syed Hafeezuddin, Advocate for the Petitioner in C.P.No.D-5732/2018 pointed out his prayer clause and argued that besides a relief of recounting of votes, the petitioner has also sought the declaration that the respondent No.4 is not qualified to be a member of provincial assembly by deposing false affidavit, therefore, he is not entitled to hold the seat under

Article 62 and 63 of the Constitution. What we have found out that petition is mainly focused on the issue of recounting and even at this stage, the writ in the nature of quo warranto is premature. After arguing this particular aspect at some length, the learned counsel consented and wished to file separate petition. It is clarified that to give up the plea of quo warranto in this petition shall not create any embargo and if any such petition is filed separately that will be decided in accordance with law.

11. As a result of above discussion, the aforesaid petitions are disposed of along with pending applications in the following terms:-

(i). The petitioners may file their Election Petitions in accordance with law. If any application for recounting is moved before the Election Tribunal along with the election petition, the learned Tribunal at the first instance will consider the application for the recount in accordance with law before proceeding on merits.

(ii). The application for recounting may be decided after providing opportunity of hearing to all stakeholders preferably within 15 days. If the recounting is ordered by the learned Tribunal then the efforts shall be made to ensure that recounting process is completed within next fifteen days preferably.

(iii). The interim orders passed on 7.8.2018 in C.P.Nos.D-5732, 5746 and 5754 of 2018 are vacated while no interim order was passed in C.P.No.D-5719/2018.

(iv). The Additional Registrar (Writ) is directed to transmit copy of this order to the concerned Election Tribunals and ECP.

Judge

Judge