

Order Sheet
IN THE HIGH COURT OF SINDH KARACHI
Election Appeal No. 06 of 2023

Date	Order with Signature of Judge
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For hearing of case on Priority.

1. For hearing of CMA No.3512/2023.

2. For hearing of Main Case.

Date of hearing : 24 May 2023.

Appellants : Ghulam Rasool & Another through Syed Mureed Ali Shah, Advocate.

Respondents : Chief Election Commissioner through M/s. Sarmad Sarwar and Abdullah Hanjra, Law Officers.

Respondents No.11&12 : Abdul Habib & Rahim Khan through Shabbir Ahmed Kumbhar and Muhammad Nawaz Tahiri, Advocates.

JUDGEMENT

MOHAMMAD ABDUR RAHMAN, J. This is an Appeal that has been preferred by the Appellants under Section 54 of the Sindh Local Government Ordinance, 2018 read with Section 155 & Section 229 of the Election Act, 2017 challenging the orders dated 10 April 2023, 12 April 2023 and 14 April 2023 passed by the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta in Election Petition No. 02 of 2023 ordering a recount of the voting in respect of the Election of Union Council 39 of Bhambhore, Taluka Mirpur Sakro, District Thatta.

2. The Appellants and the Respondents No.11 to 18 were all candidates for an election that was held on 15 January 2023 inter alia for the office of the

Chairman and Vice Chairman of Union Council No.39 Bhambhore, Taluka Mirpur Sakro, District Thatta. There is no dispute as between the parties as to their candidature or as to the date of the holding of the election. On 15 January 2023 the Appellants state that they had won the election by a margin of 2 votes. It seems that as the votes cast included 243 rejected votes and as the margin of their victory was very fine an application was moved by the Respondent No. 11 to 12 to the Returning Officer for the "recount" of the 243 rejected votes as well as the valid votes of all the polling stations as constituted in UC No 39, Bahmabore, Taluka Mirpur Sakro, District Thatta. The Returning Officer apparently did not pass a speaking order on the application and after issuing notices to all concerned, the Returning Officer "recounted" all the votes. The recount led to a tie being declared as between the Appellants and the Respondent No. 11 to 12. There being a tie, the Returning Officer in accordance with Rule 41 of the Sindh Local (Council) Rules 2015 drew lots and which having been drawn in favour of the Appellants led to them being declared as the elected representatives to the office of Chairman and Vice Chariman of UC No. 39, Bahmabore, Taluka Mirpur Sakro, District Thatta.

3. Being aggrieved by this result, the Respondent No. 11 and 12 filed an Election Petition bearing No. 02 of 2023 before the Election Tribunal of Local Bodies (which was presided over by Chairman of Election Commission of Local Bodies 2023 for the District Thatta) under Section 46 read with Rule 61 of the Sindh Local Council (Election) Rules 2015 and within which they maintained an application under Rule 46 read with Rule 40(4)(a)(b) and all other enabling provisions of the Sindh Local Government Act, 2013 praying in that application that all the votes, including the rejected votes at all the 6 polling stations located in UC No. 39 Bhambore Taluka Mirpur Sakro District Thatta, should be recounted. They premised their Appeal and this Application on allegations of improprieties, anomalies, miscalculations and tempering of the record in the Form XI that had

been submitted pursuant to that election by the Presiding Officer and Returning Office and also maintained in their Petition that the counter folio of all the votes cast at the six polling stations should be sent to the National Database & Registration Authority for verification.

3. Election Petition No. 02 of 2023 was heard by the District Judge Thatta who was serving as the Chairman of Election Commission of Local Bodies 2023 for the District of Thatta and who on 10 April 2023 passed the following order:

“ ... 3. After lengthy arguments it has been established that on an application for recounting submitted by the petitioners, no proper order was passed for its disposal, as according to such application 1285 votes were polled in favour of the petitioners; 1287 to the respondents No.11 & 12 and total number of rejected votes was 243; such fact is also apparent on the appendix-A (provisional result), but in Form-XIV (return of election) equal votes, each of petitioners and respondents No.11 & 12 viz. 1288 are shown. In this respect, a specific quarry was made from Returning Officer present in the Court, whereby he submits that though no proper order was passed on an application filed by the applicants, but in their presence rejected votes were recounted, whereby 03 votes were polled to the petitioners and 01 vote to the respondents No.11 & 12, therefore, it was held that both of them had secure equal number of the votes.

4. Since, no proper order is/was passed on an application filed by the petitioners and according to learned counsel for them at the time of count of the rejected votes, petitioners were not available there, therefore, without de-sealing/opening the proper bag in presence of respective parties, it is not possible to reach at the proper conclusion by the Tribunal. Not only this, but learned counsel of the petitioners also took plea that 10 votes polled in their favour were also put in the envelope in which vote polled in favour of councilor were kept, therefore, in order to ascertain truth, **I am of the opinion that it will be just and proper, if the bag of Polling Station No.324 GPS Allah Dino Baloch be opened first, more particularly the envelope, in which votes for councilor are kept. Accordingly, the District Accounts Officer is directed to deliver such bag to the Returning Officer on 11.04.2023, at 9.00 a.m. under proper escort being provided by the SSP, Thatta to be produced before the Tribunal.**”

(Emphasis is added)

It seems that on 11 April 2023, the bag holding the votes case at Polling Station No. 324 GPS Allah Dino Baloch were opened and the votes were recounted in the presence of all the parties.

4. Thereafter on 12 April 2023 the same Court in Election Petition No. 02 of 2023, passed the following order:

“ ... In continuation to the order dated 10.04.2023, learned counsel for the petitioners has placed on the record a statement with a prayer that he will be satisfied, if the rejected votes of all such 05 polling stations are re-counted on the pretext that, while recounting of polling station No.324, it was found that a vote rejected was polled/counted in favour of petitioners; the main grievance of the petitioners was that the votes polled in their favour were maliciously rejected and there are/were vital chances of the petitioners to win after examination of at least rejected votes. As against, learned counsel for the respondents Nos. 11 & 12 records objection on the plea that even while examining the votes polled in favour of either parties, one rejected vote was found polled in favour of petitioners.

02. After lengthy arguments, in order to avoid future complications, it will be just and proper to re-examine at least the rejected votes of 05 polling stations i.e. 322, GPS Filter Plan Gharo (Combined), 323 GPS Hashim Kachi (Combined), 325 GPS Nagina Colony (Combined), 326 GPS S.A.M.S Colony (Male) and 327 GPS S.A.M.S Colony (Female). Accordingly, the District Accounts Officer is directed to deliver the 05 bags of polling stations referred herein above to the Returning Officer; he will collect the same and produced before the Tribunal on 14.04.2023 positively under escort provided by the SSP, Thatta.”

The matter does not end there and on 14 April 2023 the final order was passed which reads as under:

“ ... 04. At the very outset, vide order dated 10.04.2023 an application under order 46 read with Rule 40(4)(a)(b) was allowed with the directions to open the bag of Polling Station No.324 of U.C 39 Bhambhore. Accordingly, the process of re-counting was done in the Chamber in presence of contesting candidates, their learned counsels as well as REC, DEC and Election Officer. The bag was found duly sealed, it was accordingly de-sealed and found the breakup as under:-

Number of ballot papers issued 1800 (01 ballot papers at Serial No.3423 missing)

Used votes	589	(including rejected votes; out of which 76 invalid, 02 spoiled 04 missing)
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Unused	1210
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05. On counting the number of the rejected votes as well as votes polled in favour of the respective candidates, it was observed that 01 valid vote counted in favour of petitioners was in fact rejected vote; therefore, the number of total votes polled in favour of petitioners at Polling Station No.324 GPS Allah Dino Baloch were 236 instead of 237.

06. Looking to the circumstances that in polling station referred hereinabove, there was difference in the count of the respective candidates, hence an statement was filed by the learned counsel for the petitioners for re-counting and re-examination of the rejected votes on remaining 05 polling stations in connection to earlier order dated 10.04.2023; such prayer in order to ascertain real facts was allowed vide order dated 12.04.2023 and bags of remaining 05 polling stations NOs.322, 323, 325, 326 & 327 were called through Returning Officer from the District Accounts Officer.

07. Today, all the 05 bags have been produced, same found duly sealed. The bags were de-sealed in presence of respective candidates, their learned counsels,

REC and Election Officer. After examination of the rejected votes, it was observed that almost on each polling station, the votes secured by both the petitioners and respondents No.11 & 12 respectively were not properly examined and wrongly rejected. The details of valid votes polled and shown rejected in favour of each petitioners and respondents Nos. 11 & 12 are as under:

S.No.	No. & Name of Polling Station	Votes in favour of		Remarks
		Petitioner	Respondents No. 11 & 12	
01	322 GPS Filter Plant Gharo (Combined)	06	02	
02	323 GPS Hashim Kachi (Combined)	02	01	
03	324 GPS Allah Dino Baloch (Combined)	-1	00	01 vote counted in favour of Petitioners was found rejected
04	325 GPS Nagina Colony (Comibined)	00	03	
05	326 GPS S.A.M.S. Colony(Male)	00	00	
06	326 GPS S.A.M.S. Colony(Female)	01	00	
Total		09-01=08	00	

08. Looking to the result of the count of rejected votes mentioned hereinabove, it is apparent that total number of the votes in favour of petitioners comes to 1296 and total number of votes polled in favour of respondents No.11 & 12 are 1294; as such the petition stands allowed and the petitioners Abdul Habib and Rahim Khan Shoro are declared as Returned Candidates for the seat of Chairman/Vice Chairman U.C No. 39 Bhambhore, District Thatta. Accordingly, Election Commission of Pakistan Islamabad is required to issue such revised notification in pursuance of this order.

09. The office is directed to communicate copy of the order to the Secretary Election Commissioner through Provincial Election Commissioner, Sindh Karachi, REC and DEC for information and record."

5. The Appellants are now obviously aggrieved by what is in effect a reversal of the results of the election and have maintained this Appeal under Section 54 of the Sindh Local Government Ordinance, 2018 read with Section 155 & Section 229 of the Election Act, 2017 challenging the orders dated 10 April 2023, 12 April 2023 and 14 April 2023 passed by the Chairman of Election Commission of Local Bodies 2023 for the District of Thatta .

6. Mr. Syed Mureed Ali Shah advanced arguments on behalf of the Appellants and after reiterating the facts that had occurred has stated that the order of the Chairman of Election Commission of Local Bodies 2023 for the District of Thatta was clearly wrong. He stated that the Respondent No. 1 & 12 had along with their Petition also maintained an Application for recounting of votes under Rule 46 read with Rule 40(4)(a)(b) and all other enabling provisions of the Sindh Local Government Act, 2013. He states that in fact this application was never heard nor decided and the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta, instead directly passed an order on the main Petition on 10 April 2023 whereby directions were initially given to “produce the bag of Polling Station No.324 GPS Allah Dino Baloch which should be opened first, more particularly the envelope, in which votes for councilor are kept.” He states that once this was done and the Respondent No. 11 & 12 were still not satisfied with the result, they then impressed that all the votes of each of the polling stations should be recounted and whereafter on 12 April 2023, the order on the main Appeal was in effect modified and it was then directed that so as to avoid “future complications”, it would be just and proper to re-examine at least the rejected votes of 05 polling stations i.e. 322, GPS Filter Plan Gharo (Combined), 323 GPS Hashim Kachi (Combined), 325 GPS Nagina Colony (Combined), 326 GPS S.A.M.S Colony (Male) and 327 GPS S.A.M.S Colony (Female). He contends that such an action on the part of the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta was illegal and needed to be set aside. He relied on the decision reported as **Jam Madad Ali vs. Ashgar Ali Junejo**¹ and wherein it was held that:

“ ... 9. The purpose of a recount in an election dispute is to verify and determine the authenticity and truthfulness of the allegations on the basis whereof the election result is challenged, however, in order to secure the sanctity of the election result and with a view not to encourage the losing candidates to attempt to frustrate the will of the people as expressed through the election and also in order to avoid

¹ 2016 SCMR 251

creating an incentive for the losing candidates to in any way, indulge in post poll tampering or manipulation of the election record, a conscious effort is to be made that it is only in the circumstances which clearly justify, rather demand a recount, that the recount is allowed. As to what should be the criteria or the essential pre-requisites for satisfying the conscience of the Court for permitting a recount, perusal of the case law laying down our jurisprudential principles in this regard, would show that the minimum criteria is that there should be specific allegation of tampering, manipulation and maneuvering in very clear terms along with the necessary details and prima facie material supporting such allegations. It should also be kept in mind that secrecy of the ballot should not be violated on the basis of frivolous, vague and totally unfounded allegations and that the primary object should be to do full justice in the matter. The learned Tribunal should also be mindful that 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 and thus it should be seen that as to whether in view of the statement of material fact, and the material placed before the Tribunal the request is fair and reasonable or not."

He concluded his arguments by contending that the criteria that had be set by the Supreme Court of Pakistan had clearly not been met by the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta while adjudicating Election Petition No. 02 of 2023 and no occasion had arisen to have ordered a recount of the votes. He therefore sought directions to set aside the recount of the vote and thereafter to declare the Appellants as the returned candidates for the office of the Chairman and Vice Chairman of UC No. 39, Bahmabore, Taluka Mirpur Sakro, District Thatta.

7. On behalf of the Respondent No. 11 and 12, Mr. Shabbir Ahmed Kumbhar entered his appearance. He contended that the Form XI that was filed by the Presiding Officer in respect of the Polling Station 324 GPS Allah Dino Baloch indicated that no votes were rejected in that Polling Station while the Form XIII that was submitted showing the consolidation of results of all that Polling Stations conversely showed that 83 votes were in fact rejected in Polling Station 324 GPS Allah Dino Baloch. This he states cannot be reconciled and on this basis alone there prima facie existed a discrepancy which necessitated a recount. In support of his contentions he relied on the decision reported as **Sheikh Iftikhaurddin vs.**

District Judge Bahawlpur Exercising Powers Of Election Tribunal For Union Council Of District Lodhran And 8 Others,² Sohail Akhtar Abbasi vs. Syed Amir Ali Shah,³ Yawar Ali Khan vs, Aabid Hussain Rajput⁴ Ghulam Haider vs. Muhammad Younis,⁵ Muzzafar Abbas vs. Election Commission of Pakistan through Chairman and others,⁶ Muhammad Ibrahim Qasmi vs. Syed Aliq Shah⁷ and Ijaz Ahmed Cheema vs. Syed Iftkhar Hussain and another.⁸

8. The Election Commission of Pakistan was represented through its Law Officers and each of whom stated that they would abide by the orders of the Court.

9. I have heard the Counsel for the Appellant and the Counsel for the Respondents and perused the record. Section 71 of the Sindh Local Government Act, 2017 clarifies that unless specifically excluded, the provisions of the Elections Act, 2017 would be applicable to the elections and the election process for the conduct of elections under the Sindh Local Government Act, 2013. The jurisdiction of an Election Tribunal in respect of Local Government Elections to order the recounting of votes cast in an election is contained in Section 101 of the Elections Act, 2017 and which are, with one exception, *para materia* the same as Section 46 of the law that it repealed i.e. The Representation of the People Act, 1976. For ease of reference both of the sections are reproduced below:

² 2002 SCMR 1253

³ 2006 CLC 1319

⁴ 2004 YLR 1546

⁵ 1990 CLC 1

⁶ PLD 2018 Lahore 678

⁷ 2011 CLC 606

⁸ 1995 CLC 1426

Representation of the People Act, 1976	Elections Act, 2017
<p>46. Order for production of documents. – (1) A Tribunal may order the opening of packets of counterfoils and certificates or the inspection of any counted ballot papers.</p> <p>(2) An order under sub-section (1) may be made subject to such conditions as to persons, time, place and mode of inspection, production of documents and opening of packets as the Tribunal making the order may think expedient :</p> <p>Provided that in making and carrying into effect an order for the inspection of counted ballot papers, care shall be taken that no vote shall be disclosed until it has been held by the Tribunal to be invalid.</p> <p>(3) Where an order is made under sub-section (1), the production by the Commission of any document in such manner as may be directed by the order shall be conclusive evidence that the document relates to the election specified in the order and any endorsement on any ballot papers or packet of ballot papers or documents so produced shall be <i>prima facie</i> evidence that the ballot papers or documents are what the endorsement states them to be.</p> <p>(4) The production from proper custody of a ballot paper purporting to have been used at an election and of a numbered counterfoil bearing the signature or thumb impression of the elector shall be <i>prima facie</i> evidence that the elector whose vote was given by that ballot paper was the elector who had on the electoral rolls the same number as was written on the counterfoil.</p> <p>(5) Save as is provided in this section no person shall be allowed to inspect any rejected or counted ballot papers in the possession of the Commission.</p>	<p>101. Order for production of documents. –(1) An Election Tribunal may order the opening of packets of counterfoils and certificates or the inspection of any counted ballot papers.</p> <p>(2) The Election Tribunal may refuse to issue order under sub-section (1) if it is not likely to have an impact on the result of the election.</p> <p>(3) An order under sub-section (1) may be made subject to such conditions as to persons, time, place and mode of inspection, production of documents and opening of packets as the Tribunal making the order may think expedient.</p> <p>(4) Where an order is made under sub-section (1), the production by the Commission of any document in such manner as may be directed by the order shall be conclusive evidence that the document relates to the election specified in the order and any endorsement on any ballot papers or packet of ballot papers or documents so produced shall be <i>prima facie</i> evidence that the ballot papers or documents are what the endorsement states them to be.</p> <p>(5) The production from proper custody of a numbered counterfoil bearing the signature or thumb impression of a voter shall be <i>prima facie</i> evidence that the voter was the same person whose name was on the electoral rolls with the same number as was written on the counterfoil.</p> <p>(6) Save as is provided in this section, no person shall be allowed to inspect any rejected or counted ballot papers in the possession of the Commission.</p>

It would seem while the main provisions are the same, the difference that does exist between these two sections is the introduction of Sub-Section (2) of Section 101 of the Elections Act, 2017 which identified the right of the Election Tribunal to refuse to carry out a recount of votes in the circumstances where the Tribunal considers that “it is not likely to have an impact on the result of the election”. Needless to say, Sub-Section (2) of Section 101 of the Elections Act, 2017

in effect curtailing the discretion of the tribunal under Sub-Section (1) of Section 101 of the Elections Act, 2017, it would be proper to consider the powers of the Election Tribunal as contained in that Sub-Section which reads as under:

“ ... *An Election Tribunal may order the opening of packets of counterfoils and certificates or the inspection of any counted ballot papers.*”

As per this Section the use of word “may” would prima facie imply that a general discretion vests with the Election Tribunal to in effect order a “recounting” of votes case. Sub-Section (2) of Section 101 of the Elections, Act 2017 having again used the word “may” if literally interpreted would simply clarify one of the reasons that the Election Tribunal may give to refuse to order a recount and which to my mind would already be within the discretion conferred on the Election Tribunal under Sub-Section (1) of Section 101 of the Elections Act, 2017 in effect rendering the provision as otiose. I do not think that this was the intent of the legislature. I do believe that the intent of the legislature was to compel the Election Tribunal, where circumstances existed to show that the recount would have no impact on the result of the elections to mandatorily reject any application or appeal and to refuse the recount on such a ground. The word “may” as contained in Sub-Section (2) of Section 101 of the Elections Act, 2017 should therefore be read as “shall” and would completely exclude the discretion of the Election Tribunal under Sub-Section (1) of Section 101 of the Elections Act, 2017 to order a “recount” of the votes where such a “recount” would have no impact on the result of the elections.

10. In this appeal it is not the case of the Appellant that the Election Tribunal did not have the jurisdiction to order a recount of the votes. That

power as stated above is clearly available in Sub-Section (1) of Section 101 of the Elections Act, 2017. It therefore remains to be seen as to whether:

- (i) the Election Tribunal was excluded from exercising its discretion to order a recount under Sub-Section (2) of Section 101 of the Elections Act, 2017, and
- (ii) If such a right had not been excluded by Sub-Section (2) of Section 101 of the Elections Act, 2017 whether it had exercised its discretion properly in ordering the recount.

11. Averring to the first question and keeping in mind that the margin of victory as between the Appellants and the Respondent No. 11 & 12 was at any given time between a tie or two votes either way, it can clearly be considered that the recount of the votes could easily have an impact on the result of the election. As such, I am of the opinion that the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta was clearly not prohibited under Sub-Section (2) of Section 101 of the Elections Act, 2017 from conducting a recount of the votes for the election of Union Council 39 of Bhambhore, Taluka Mirpur Sakro, District Thatta.

12. The question remains as to whether the Election Tribunal has therefore exercised its discretion properly in ordering the recount. It is apparent that the Returning Officer had conducted the recount without any application before it and without passing a speaking order. This itself would merit some concern for the Election Tribunal to consider the legality of the recount that was ordered by the Returning Officer and would have necessitated some intervention. However, the discretion of the Election Tribunal is better examined as against the criteria stated

in the case reported as **Jam Madad Ali vs. Ashqar Ali Junejo**⁹ wherein the Supreme Court of Pakistan had stated that prior to ordering a recount the tribunal should:

- (i) ensure that there should be a specific allegation of tampering, manipulation and maneuvering in very clear terms along with the necessary details and prima facie material supporting such allegations. i.e. if the allegations are frivolous, vague and totally unfounded then such a discretion should not be exercised;
- (ii) if the recount is ordered the Election Tribunal should not carry out a “roving inquiry to fish out material for reversing the election or for declaring it void” and rather it should fetter its discretion against the criteria to see as to whether in view of the statement of material fact, and the material placed before the Tribunal the request is fair and reasonable or not

13. I have examined the contents of the Appeal that has been maintained by the Respondent No. 11 & 12 before the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta and note that while there are some allegations that can be considered as vague, there are specific allegations that have been made regarding the acts and omission of the returning officers which are as follows:

- (i) the Returning Officer illegally rejecting votes that were cast in favour of the Respondent No. 11 and 12 by the Returning Officer;

⁹ 2016 SCMR 251

- (ii) the Returning Officer specifically withholding votes that were cast in favour of the Respondent No. 11 and 12 by the Returning Officer.

I have also examined the Form XI that was filed for Polling Station 324 GPS Allah Dino Baloch and note that in that form there is no mention of any votes having been rejected therein. However, in the consolidated statement that has been filed under Form XIII a total of 83 votes are shown to have been rejected from Polling Station 324 GPS Allah Dino Baloch and which cannot be reconciled as against the Form XI that has been filed by the Returning officer for that Polling Station. The contentions of the Respondent No. 11 and the Respondent No. 12 are therefore prima facie established.

14. Confronted with this position the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta had in Election Petition No. 02 of 2023 on 10 April 2023 ordered for a recount of the votes case at Polling Station 324 GPS Allah Dino Baloch. However, so as to ensure that there was complete transparency in the recounting process he thereafter on 12 April 2023 had ordered a recount of votes for the remaining Polling Stations located in Union Council 39 of Bhambhore, Taluka Mirpur Sakro, District Thatta as well. To some this may look like a roving inquiry and while I too was concerned with the piecemeal nature of the manner in which the votes were recounted, on reflection the intention of the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta, when confronted with the discrepancy as between the Form XI for Polling Station 324 GPS Allah Dino Baloch and the Form XIII seem to be to carry out a complete recount of the rejected votes so as to ensure that the no future complications would exist and the matter would conclude. I do believe that in the end the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta had exercised his

discretion judiciously and fairly and therefore I cannot fault his findings in Election Petition No. 02 of 2023 and uphold the same.

15. For the foregoing reasons I do not consider there to be any illegality of irregularity that has been committed by the Chairman of the Election Commission of Local Bodies 2023 for the District of Thatta while adjudicating Election Petition No. 02 of 2023 in respect of the Election of Union Council 39 of Bhambhore, Taluka Mirpur Sakro, District Thatta and the orders passed by him in Election Petition No. 02 of 2023 are therefore sustained. This Appeal is therefore misconceived and is dismissed with no order as to costs.

J U D G E

Nasir/PS