

IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Mr. Justice Muhammad Shafi Siddiqui, CJ
Mr. Justice Omar Sial

C.P. D-1723 of 2024

Sirbuland Khan
Versus
Returning Officer PS 112 & others

Date of Hearing: 09.09.2024

Petitioner: Through Mr. Ali Tahir Advocate along with Mr. Muhammad Hashim Advocate.

Respondents No.1&2: Through Mr. Riaz Ahmed, Director (Law), Mr. Abdullah Hanjrah, Deputy Director (Law) and Mr. Sarmad Sarwar, Assistant Director (Law), Election Commission of Pakistan.

Respondent No.24: Through M/s. Mian Raza Rabbani, M. Zeeshan Abdullah, Saalim Salam Ansari, Okash Mustafa, Murtaza Ghumro and Syed Ghulam Shabbir Shah advocates.

On Court notice: Mr. Zia-ul-Haq Makhdoom, Additional Attorney General and Mr. Khaleeq Ahmed, Deputy Attorney General and Mr. Mehran Khan, Assistant Advocate General.

J U D G M E N T

Muhammad Shafi Siddiqui, CJ.- This petition involves a challenge to an order passed on 01.04.2024 by the Election Commission of Pakistan, encompassing recount of votes in respect of 26 polling stations, as identified in the impugned order, of the Provincial Constituency 112, Keamari, Karachi, including rejected votes.

2. While challenging the order of recount of the Election Commission of Pakistan in this petition, presumably under section 95(6) of Elections Act, 2017, the petitioner has raised two considerations:

- (i) That the minimum threshold provided by Subsection (5) of Section 95 of Election Act, 2017 i.e. difference and/or victory margin of less than 4000 votes or 5% of the total votes polled in the constituency, was not matched by the respondent No.24 who attempted to exhaust the remedy before the Election Commission of Pakistan by filing the petitions, which were allowed; and
- (ii) That subsection 6 of Section 95 is a continuation for/of Section 95(5) of the ibid Act and for its effectiveness, the same cap i.e. difference of 5% of the total votes polled in the constituency or difference of 4000 votes between returned and runner up candidates is applicable.

3. It is argued before us that this threshold ought to have kept in mind before the Commission could have exercised jurisdiction under section 96(6) of Elections Act, 2017.

4. The notices were ordered on 05.04.2024 and respondent No.24, who suggested for a recount, filed counter-affidavit along with annexures attached therewith. Parawise comments are also filed by the Provincial Election Commissioner Sindh. To these two responses, the petitioner has not filed any rejoinder affidavit and/or these responses were not rebutted in any form. Assistant Commissioner Revenue, the Returning Officer of PS-112, also filed his reply.

5. Mr. Raza Rabbani, learned counsel appearing for respondent No.24, at the very outset reiterated the issue of maintainability, which was noted in the earlier order of this Court dated 13.08.2024, and submitted that this petition is not maintainable in view of bar under Article 225 of the Constitution of Islamic Republic of Pakistan, 1973.

6. We have heard learned counsel appearing for the parties and perused material available on record.

7. There is no cavil that the point of jurisdiction of this Court is to be addressed first and at no point in time the merits of case should be discussed however the arguments of the petitioner's counsel are of such nature which compelled us to go into brief history of the case, which should, in any case, may not be counted as exercise of jurisdiction under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

8. The dispute in consideration is of recounting of the votes of 26 polling stations, identified in the application/petition for recount as well as in the order of the Election Commission of Pakistan, impugned before us. Along with the counter-affidavit an application for recounting of the votes was filed by respondent No.24 Muhammad Asif, which is available at page 339 of the file, which is an Annexure attached to the counter-affidavit of the said respondent. This along with other annexures is not rebutted in any forum by the petitioner. This application is also noted by the Election Commission in its order impugned before us. Nevertheless, this application, seemingly, not considered/ignored by Returning Officer under section 95(5) of Elections Act, 2017.

9. Section 95 of the Election Act, 2017 contains ten subsections and the relevant subsections being subsections (5) and (6) are hereby reproduced for their better understanding: -

95. Consolidation of results.—(1)

...

(5) Before commencement of the proceedings, the Returning Officer shall recount the ballot papers of one or more polling stations if a request or challenge in writing is made to that effect by a contesting candidate or his election agent—

(a) the margin of victory between returned and runner up candidates is less than five percent of the total votes polled in the constituency or eight thousand votes in case of National Assembly constituency and four thousand votes in case of a

Provincial Assembly constituency, as the case may be, whichever is less; or

(b) the number of votes excluded from the count by the Presiding Officer are equal to or more than the margin of victory: Provided that the Returning Officer shall recount only once.

(6) The Commission may, before conclusion of the consolidation proceedings and after notice to the contesting candidates, for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations.”

10. As is obvious from the perusal of subsections (5) and (6), the two subsections are seemingly independent in nature. Subsection (5) triggers before commencement of the proceedings when the Returning Officer is obliged to recount the ballot papers of one or more polling stations, if a request or challenge in writing is made to that effect by a contesting candidate or his election agent when; (a) the margin of victory between returned and runner up candidates is less than five percent of the total votes polled in the constituency or four thousand votes in case of a Provincial Assembly constituency, as the case may be, whichever is less; or (b) the number of votes excluded from the count by the Presiding Officer are equal to or more than the margin of victory. Whereas Subsection (6) of Section 95 is an independent one and even the events disclosed therein is different as it provides that the Commission may, before conclusion of the consolidation proceedings and after notice to the contesting candidates, for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations. This subsection is considered as an independent extension of Section 95 without contours/rigors when it comes to providing a cap of 5% of the total votes polled in the constituency and the difference of 4000 in case of provincial assembly, as well as the number of votes excluded from the count by the Presiding Officer which could be equal to or more than the margin of victory. This difference/independence of

two subsections was also appraised in the case of Mujib-ur-Rehman¹. More importantly in Subsection 6 Commission directs the Returning Officer, which is only identified in Subsection (5) to recount the ballot papers of one or more polling stations, as the situation demands. The Election Commission is empowered to act in such way without meeting of numerical threshold, before conclusion of the consolidation proceedings whereas under subsection (5) Returning Officer may do so while remaining within the frame of subsection (5)(a) and (5)(b) of Section 95 before commencement of the proceedings.

11. Both the learned counsel appearing for petitioner as well as for respondent No.24 have relied upon the case of Abdul Rehman Khan Kanju, one of the latest judgment of the Supreme Court, passed in Civil Petition No.1573 and others of 2024, which is still unreported, though approved. While this judgment embarks upon the events identified in Subsection (5) of Section 95 of the Elections Act, 2017, it does not discuss subsection (6) of the *ibid* provisions, as was not required. In the said judgment paragraph 21 deals with the issues which are somehow common with the instant case, which paragraph 21 is reproduced in the later part of this judgment i.e. in paragraph 17.

12. The petitioner disputes before us filing of such application for recount though without a rejoinder and also commencement of proceeding. Notice for consolidation of result was issued on 10.02.2024 for 10.02.2024 @ 9:00 p.m. Now when this notice was physically issued in terms of time and when it was served in terms of mode and time is a mystery.

13. With regard to jurisdiction being exercised under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the Supreme

¹ PLD 2020 SC 718 (Mujib-ur-Rehman Muhammad Hassani v. Returning Officer)

“19. It is important..... However, if an election does not meet the numerical threshold provided in section 95(5) of the Act, the law in section 95(6) of the Act, still provides for the ECP to order a Returning Officer directly to conduct a recount, if it deems the circumstances to be grave enough to warrant such a recount.”

Court went on to observe that counting and recounting of the ballot papers is not a judicial or even a quasi-judicial act; it is an administrative-ministerial act and that the only prerequisite to undertake such exercise is simply to determine the percentile/numerical difference between the candidates.

14. Although in the instant case an application claimed to have been filed for recounting the votes, but seemingly it is not within the frames provided under subsection (5)(a) and (b) of Section 95 of Elections Act, 2017, as not even insisted. It is rather an independent order of the Commission in terms of subsection (6) before the conclusion of the consolidation proceedings, passed in petitions shown to have been filed before Election Commission under section 8 of Elections Act, 2017. Hence, for the purposes of relying on an application for recounting the votes under subsection (5) of Section 95 and the notice for consolidation of results by the Returning Officer of PS-112 is insignificant when the Commission acted independently on the basis of petitions (one petition is claimed to be an amended version of first petition), which include recount of the votes. If there was any challenge to be made on whatever consideration then the jurisdiction could only be assumed by the Tribunal, unless a case within exceptions identified in the Kanju case is made out.

15. It is not desirable if a deeper appreciation of facts is taken into consideration as our jurisdiction is limited and confined within the scope of Article 199 read with Article 225 of the Constitution of Islamic Republic of Pakistan, 1973, as adjudged/observed by the Supreme Court in the case of Abdul Rehman Khan Kanju, referred above. While framing the constitutional mandate of the High Court in respect of the election matters, the Supreme Court has expressed its view and concluded in paragraph 33 by converting the petitions in appeals and allowing them

after setting aside the order of the High Court whose judgments were impugned therein and dismissed the writ petitions filed before High Court. Thus the question here in the instant petition is not at all different from the one pictured in the aforesaid case.

16. Learned counsel for the petitioner has however relied upon an order of the Supreme Court which is a leave refusing order in the case of Ali Gohar Khan v. Election Commissioner of Pakistan in Civil Petition No.2477 of 2024, whereby indulgence was shown when the Lahore High Court entertained a Writ Petition No.24978 of 2024, which was accepted in respect of the recount of the votes, as required under section 95(5) of the Elections Act, 2017. The said case of Ali Gohar Khan, which is a leave refusing order, distinguishes the case of Abdul Rehman Khan Kanju, supra, on the count that there was no application for recount ever filed and hence there was no occasion for respondent No.1 (Election Commission) to accept the representation of the petitioner therein and issue directions to Returning Officer for recount of the votes after consolidation of the result of the count.

17. In our understanding the case of Abdul Rehman Khan Kanju in principle discussed the contours of jurisdiction of the High Court. We find that an order of recount or an order refusing the recount on any ground, as far as their challenge is concerned is equally catered by the judgment of the Kanju (Supra) and that is whether under article 199 of the constitution, Jurisdiction of this Court could be invoked in presence of Article 225 of the Constitution of Islamic Republic of Pakistan, 1973 and the Kanju judgment has answered it in the following way:-

“20. Though this case has been referred to in a number of the impugned judgments it is not relevant since the present controversy is with regard to allowing or not allowing recount of the ballot papers under section 95(5) of the Elections Act.

21. Having set out the legal and constitutional provisions and the precedents of this Court, we now proceed to examine these Cases. However, before doing so it needs stating that the following factual

matters were raised before us: (1) Whether the applications to recount were submitted before the consolidation of results, (2) whether the recount was prevented and (3) whether a ‘notice in writing of the day, time and place fixed for the consolidation of the result’ (as required by subsection (1) of section 95) was given by the Returning Officer. The contesting parties controvert each other on these matters. In respect of disputed facts as a general rule the High Courts do not exercise writ jurisdiction under Article 199 of the Constitution.

....

30. The High Court’s jurisdiction under Article 199 of the Constitution can only be invoked if a petitioner is an ‘aggrieved’ person. It is not understandable how anyone can be stated to be aggrieved if the ballot papers are recounted. Grievance against the administrative-ministerial act of recounting of ballot papers is also not envisaged in Article 199. If a Returning Officer does not do an honest recount or does not do the recount in accordance with the law, then the affected party has available remedies. Depending upon the particular facts of the case this could be by approaching the Commission or filing an election petition before the Election Tribunal, constituted under Article 225 of the Constitution. Thereafter, the jurisdiction of this Court can also be invoked.

31. The Constitution is divided into twelve parts of which Part VIII deals entirely with ‘Elections’. Its Article 218(3) mandates that it is the duty of the Commission to organize and conduct elections, and to conduct them honestly, justly, fairly and in accordance with the law. The law is the Elections Act and its section 95(5) stipulates that the Returning Officer shall recount the ballot papers provided an application seeking recount is submitted and the difference in the margin of victory between the first two candidates is less than five percent or the stipulated number of votes. In these cases the difference in the margin of victory was well within the stipulated percentile/number. Nonetheless, the contesting respondents challenged the order of the recount and/or challenged the result of the recount by filing writ petitions in the High Court under Article 199 of the Constitution. The learned Judges overlooked the constitutional preconditions before exercising jurisdiction under Article 199 of the Constitution, which were that the petitioner must be aggrieved and must not have other adequate remedy; on both these counts the writ petitions were not maintainable. They also failed to observe that Article 199 commences with the words – ‘Subject to the Constitution’ and that this limitation was absent from Article 225 of the Constitution, whereunder election petitions are filed before the Election Tribunals.

32. The learned Judges of the High Court also allowed the writ petitions without considering the law, which had been interpreted and explained in the cited precedents of this Court, particularly of the larger four and five member Benches, respectively in the cases of Javaid Hashmi, Ghulam Mustafa Jatoi and Aftab Shahban Mirani (above). In these precedents of this Court it was stated that the jurisdiction of the High Court (under Article 199 of the Constitution) can only be invoked when ‘no legal remedy is available to an aggrieved party’ ‘or in respect of the orders which are coram non iudice, without jurisdiction or mala fide.’ The contesting respondents who had invoked the jurisdiction of the High Court

could not be considered to be aggrieved by the administrative-ministerial act of recounting. Moreover, they had other adequate remedy. Therefore, the two prerequisites (aggrieved person and absence of adequate remedy) necessary to invoke Article 199 were not met. The Commission was also not coram non judice nor lacked jurisdiction in ordering recount. The Constitution has bestowed on the Commission (and not on the High Courts) the duty to conduct elections in accordance with law. And it cannot be contended that, when the circumstances envisaged in section 95(5) of the Elections Act were met the seeking of and the ordering of recount of the ballot papers was mala fide. Instead of filing writ petitions the contesting respondents could have filed election petitions before the Election Tribunals. And, any person aggrieved by the decision of the Election Tribunal could then have filed an appeal to the Supreme Court, under section 155 of the Elections Act.”

18. Now since our jurisdiction is contoured in terms of vely couched Article 225, having essence of mandatory application, read with numerous judgments of Supreme Court providing a limited scope to thrive, we could also draw an inference that both acceptance and denial to a recount of votes on any ground could fetch and attract the jurisdiction of the Tribunal followed by orders of Returning Officer/ Commission.

19. At the best if someone is aggrieved of result of recount or if at all the application of recount is rejected/allowed for any reason disclosed therein then in pursuance of the Kanju judgment the jurisdiction to challenge vests with the Election Tribunal. Paragraph 32 of the said judgment highlights some of the judgments of previous regime (Representation of the People Act, 1976) i.e. in the cases of Jawed Hashmi², Ghulam Mustafa Jatoi³ and Aftab Shaaban Mirani⁴ and the *pari materia* to the current law is Sections 38/39 of 2017 Act. Old concepts are not different than the current law except as identified in Para 8 and 9 of Kanju’s judgment. The two hurdles that is being of an aggrieved person and absence of adequate remedy was not found in the case of recounting of votes hence Article 199 could not be invoked. This being

² PLD 1989 Supreme Court 396 (Election Commission of Pakistan v Javaid Hashmi)

³ 1994 SCMR 1299 (Ghulam Mastafa Jatoi v Additional District and Sessions Judge)

⁴ PLD 2008 Supreme Court 779 (Aftab Shahban Mirani v Muhammad Ibrahim)

the position, we are faced with the similar situation when an order of recount of the votes was made by the Election Commission in petition filed under section 8(b) and (c) of the Elections Act, 2017 and the consequences could not be different.

20. As far as merits of the order of recounting of votes are concerned since we have already adjudged our jurisdiction to have been improperly invoked, we would avoid from passing any such comments in this regard, as it may prejudice case of either parties who may wish to plead/agitate before the proper forum, if approached.

21. Upshot of the above discussion is that this petition is not maintainable and consequently the same is dismissed along with pending application.

22. Above are reasons of our short order dated 09.09.2024.

Dated:

Chief Justice

Judge