THE HIGH COURT OF SINDH KARACHI
[Election Tribunal]

Election Petition No. 07 of 2024
[Khalid Mehmood Ali v. Election Commission of Pak & others]

Petitioner	:	Khalid Mehmood Ali son of Ali Jan through M/s. Sarfaraz Ahmed Metlo and Ghulam Nabi Shar, Advocates.
Respondent 1	:	Election Commission of Pakistan through Ms. Alizeh Bashir, Assistant Attorney General for Pakistan alongwith Mr. Abdullah Hanjrah, Deputy Director (Law), ECP, Karachi.
Respondent 4	:	Abdul Hakeem Baloch [**Returned Candidate**] through Mr. Irshad Ali Shar, Advocate.
Respondents 2, 3 5-27	:	Nemo.
Date of hearing	:	30-05-2024
Date of order	:	30-05-2024

O R D E R

Adnan Iqbal Chaudhry J. - Mr. Irshad Ali Shar, Advocate, files vakalatnama for the Respondent No.4, the returned candidate, and seeks time for written statement. However, service was held good against him on 20-05-2024, and even if the period of 7-days prescribed for a written statement by Rule 142 of the Election Rules 2017 is computed from said order instead of the date of actual service, that period has lapsed. Since counsel for the Respondent No.4 is not with a written statement even today, I am not inclined to adjourn the matter. But, if he makes an application for extending time for written statement, that will be considered on its merits.

2.   From the pleadings on the record, following issues are settled:

(i)   Whether Forms 45 relied upon by the Petitioner at Annexure E to E-10 to the petition are the ones that were in fact issued by the Presiding Officers of the respective polling stations ?

(ii)   Whether the official version of Forms 45 and Forms 46 filed at Annexure G to H/9 to the petition are fabricated or tampered to favour the Respondent No.4 or are otherwise invalid ?

(iii)   Whether the Petitioner or his agent was denied participation in the consolidation proceedings by the Returning Officer in collusion with the Respondent No. 4 ?

(iv)   Which entry in Form 48 does not reconcile with the official version of the Forms 45 and to what effect ?

(v)   Whether the facts merit an inspection and/or recount of the ballot papers ? If so, to what extent ?

(vi)   To what relief, if any, is the Petitioner entitled to, and what should the judgment be ?

3.   Of the listed applications, learned counsel for the Petitioner prays that CMA No. 1030/2024 may be decided at the outset which is for a recount and reconsolidation of votes polled at four (04) polling stations of the constituency NA-231, Malir-III, Karachi. A recount is also one of the reliefs sought in the petition. Learned counsel for the Petitioner submits that the difference between the Petitioner and the returned candidate namely Abdul Hakeem Baloch (Respondent No.4) was only of 389 votes, and even if the photocopies of Forms 45 relied upon by the Petitioner are ignored for the time being, a case for recount at 4 polling stations in the very least is made out on the basis of certified copies of Forms 45 and Forms 46 issued by the Returning Officer **[RO]** in respect of those polling stations. Learned counsel then took me through such record which is discussed *infra*.

4.   Heard learned counsel and perused the record.

5.   Even though the provisions of the repealed Representation of the People Act 1976 were not as explicit as to the powers of the Election Tribunal to order a recount, it was observed by the Supreme Court in *Dr. Sheela B. Charles v. Qaisar Ifraheem Soraya* (1996 SCMR 1455), *Nayyar Hussain Bokhari v. District Returning Officer NA-49,*

Islamabad (PLD 2008 SC 487) and *Muhammad Hussain Babar v. Election Commission of Pakistan* (PLD 2008 SC 495) that such power existed with the Election Tribunal.

6.   Presently, Rule 139(7) of the Election Rules 2017 reads:

> "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."

Albeit in the form a restrictive provision, Rule 139(7) clearly manifests the power of the Election Tribunal to order a recount of ballot papers. That much was observed by a Division Bench of this Court in *Muhammad Shahbaz Sharif v. Federation of Pakistan* (PLD 2018 Sindh 735), and acknowledged by the Supreme Court in *Mujib-ur-Rehman Muhammad Hassani v. Returning Officer PB-41, Washuk* (PLD 2020 SC 718), although in the latter case a recount was refused. I may add that the power of the Election Tribunal to order a recount is also implicit in section 101 of the Election Act and Rule 150 of the Election Rules in providing that the Election Tribunal may order the opening of packets of counter foils and certificates or the inspection of any counted ballot papers. The cases of *Nayyar Hussain Bokhari, Muhammad Hussain Babar and Muhammad Shahbaz Sharif* further observe that a prayer for recount should be decided as a preliminary issue.

7.   In the final consolidation in Form 49, the Petitioner was indeed the runner-up, behind only by 389 votes, a margin less than 5% of the total votes polled in the constituency. The record shows that he made an application dated 09.02.2024 to the RO for a recount under section 95(5) of the Election Act, but was turned down *vide* order dated 10.02.2024. He challenged that order before the High Court *via* C.P. No. D–733/2024, which was disposed of by referring the matter to the Election Commission of Pakistan **[ECP]** to consider the same under section 9 of the Election Act. However, the ECP dismissed that application by order dated 23-02-2024 on the ground that the

Petitioner had a remedy before the Election Tribunal. The Petitioner thus demonstrates that his prayer for a recount meets the requirements of Rule 139(7) of the Election Rules.

8.   Learned counsel for the Petitioner places on record certified copies of Forms 45 and Forms 46 issued by the RO in respect of 4 polling stations. Per learned counsel, these Forms were uploaded by the ECP on its website as the official version. A perusal of thereof reveals as follows.

9.   The certified copy of Form 45 for polling station No.65, DMC Boys & Girls School Lal Kothi, Mansehra Colony, shows that the votes counted from the ballot box in favor of the candidate Jameel Ahmed Khan (Respondent No.7) were 102, but surprisingly he was given the benefit of 353 Tendered Votes. As per section 85 of the Election Act, 'Tendered Ballot Papers' are those which are issued to a person who claims to be the same voter who has already cast a vote. Such ballot papers are put in separate packets so as to enable the ECP to conduct a forensic inquiry. It is the Petitioner's case that the so called Tendered Votes amounting to 353 were in fact counted as his votes as reflected in the Form 45 filed as Annexure E to the petition.

10.   The certified copy of Form 45 for polling station No.71, Government Girls Primary School Jamal Goth, shows that the Petitioner received 24 votes and the candidate Jameel Ahmed Khan received 07 votes. But, the consolidation in Form 48 for the same polling station erroneously records the Petitioner's votes as zero and those of Jameel Ahmed Khan as 24.

11.   The certified copy of Form 45 for polling station No.98, Karachi Public School Star Gate, shows that the figure of 275 votes against the Petitioner's name was struck-out, and those votes have been shown in favour of the candidate Jameel Ahmed Khan. It is the Petitioner's case that those 275 votes were recorded as his votes as reflected in the Form 45 filed as Annexure E/4 to the petition.

12.   As per the certified copy of Form 45 for polling station No.175, Government Boys Primary School Garibabad, the returned candidate Abdul Hakeem Baloch (Respondent No.4) received 672 votes out of a total of 890 votes. Contrary to that, the certified copy of Form 46 of the same polling station shows that the total votes polled were '1890' instead of '890'; and the consolidation of those votes in Form 48 also records the votes of the retuned candidate as '1672' instead of '672'. There is also force in the submission that even the corresponding polling stations for the Provincial Assembly seat did not record as many voters. *Prima facie* there appears to be a manipulation of 1000 votes to favor the returned candidate.

13.   The facts discerned in paras 9 to 12 above are sufficient to order a recount for those polling stations. Therefore, CMA No. 1030/2024 is allowed with the following directions:

(a)   The Provincial Election Commissioner Sindh shall nominate an officer of the ECP, not being the officer who acted as RO of the subject constituency, to examine and recount all ballot papers polled at the following polling stations of NA-231, Malir-III, Karachi:

　　(i)   Polling station No.65, DMC Boys and Girls School Lalkothi, Mansehra Colony;

　　(ii)   Polling station No.71, Government Girls Primary School Jamal Goth;

　　(iii)   Polling station No.98, Karachi Public School Star Gate;

　　(iv)   Polling station No.175, Government Boys Primary School Garibabad.

(b)   For the aforesaid purposes, the recounting officer shall follow the procedure set out in Rules 86, 87 and 90 of the Election Rules, 2017, provided that:

　　(i)   the notice required to be given under Rule 86(a) shall also be given to the Registrar of this Tribunal;

(ii)   any one of the agents that had been appointed by the candidate under sections 76 of 77 of the Election Act shall be deemed to be his agent for the purposes of the recount;

(iii)   before opening the tampered-evident bags containing the ballot papers, the recounting officer shall satisfy himself that the seal of the bag was intact and he shall take photographs thereof which shall be annexed to his report;

(iv)   The recount proceedings shall be recorded by the recounting officer by video, the expense thereof to be borne by the Petitioner, and the original video recording shall be deposited with the Registrar of the Tribunal.

(c)   The result of the recount and reconsolidation as aforesaid shall be submitted by the recounting officer to the Registrar of this Tribunal within three weeks under cover of a report, whereafter any candidate desiring to file objections thereto may do so within 7 days.

To come up on **08-07-2024.**

JUDGE