IN THE HIGH COURT OF SINDH, AT KARACHI

C.P No. D-2873 of 2024

Present:
Yousuf Ali Sayeed and
Arbab Ali Hakro, JJ

Abdul Hakeem Baloch.....Petitioner

Versus

Election Commission of
Pakistan and others.....Respondents

Khawaja Shamsul Islam, Advocate for the Petitioner
Ali Tahir and Mohammad Hashim Sairani, Advocates for the Respondent No.4.
Kafeel Ahmed Abbasi, Addl. AG
Abdullah Hanjrah, Deputy Director (Law) and Sarmad Sarwar, Assistant Director (Law), ECP.
Kazi Abdul Hameed Siddiqui, D.A.G.

Date of hearing : 24.09.2024

ORDER

YOUSUF ALI SAYEED, J. - The Petitioner, being the returned candidate from NA 231-Malir Karachi (the "**Constituency**"), has invoked the jurisdiction of this Court under Article 199 of the Constitution, seeking to impugn the Order made by an Election Tribunal (the "**Tribunal**") on 31.05.2024 in Election Petition No.07 of 2024 instituted by the Respondent No.4 under Section 139 of the Election Act, 2017 (the "**Act**") in the matter of the general election held on 08.02.2024, whereby CMA No. 1030 of 2024 (the "**Application**") filed by that Respondent was allowed so as to direct the Provincial Election Commissioner

Sindh to nominate an officer of the Election Commission of Pakistan (the "**ECP**"), not being the officer who acted as the Returning Officer (the "**RO**") of the Constituency, to examine and recount all ballot papers polled at four specified polling stations in accordance with the procedure set out in Rules, 86, 87 and 90 of the Election Rules, 2017 (the "**Rules**"), subject to certain directions, and with the result of the recount and reconsolidation to be submitted to the Registrar of the Tribunal within three weeks under cover of a report, whereafter any candidate desiring to file objections thereto was left at liberty do so within 7 days.

2. Proceeding with his submissions learned counsel appearing on behalf of the Petitioner, contended that the impugned Order was bad in law as it had been made without adhering to the principle of natural justice enshrined in the maxim *audi alteram partem*, in as much as it was argued that the Petitioner had not been afforded a proper opportunity of hearing prior to the decision of the underlying application. In that regard, he submitted that the Application had not been filed along with the Election Petition at the outset, but had been preferred subsequently and came to allowed through the impugned Order without the Petitioner being properly put on notice thereof or provided a copy or any opportunity to file his reply/objections. He placed reliance in that regard on the judgments of the Supreme Court in the cases reported as Shaukat Aziz Siddiqui vs. Federation of Pakistan, Secretary Ministry of Law and Justice and another PLD 2024 Supreme Court 746, and Justice Qazi Faez Isa and others vs. The President of Pakistan and others PLD 2021 Supreme Court 1.

3. Learned counsel also argued that the Application was even otherwise not maintainable and had been wrongly entertained, as Rule 139(7) has been misconstrued in the impugned Order to be a provision enabling the Tribunal to order a recount but was is actually a barring provision which clearly mandated that if the election petitioner had failed to seek a recount of votes before consolidation, then such application for recount of votes could not be entertained. It was submitted that an application dated 09.02.2024 had been submitted by the Respondent No 4 before the Provincial Election Commissioner and not the R.O, which was the mandatory requirement under the law, and had also been submitted after the process of consolidation had been completed, hence, was dismissed as not maintainable. It was submitted that under such circumstances the Tribunal had erroneously exercised a power that was not vested in it.

4. Additionally, it was contended that the right to seek a recount had even otherwise been waived by the Respondent No.4 while filing Constitutional Petition No.733/2024 before this Court prior to the Election Petition so as to challenge an order of the RO dated 10.02.2024 whereby an application for recount had been dismissed, in as much as it had been stated in the Memo presented in the Constitutional Petition that the counting of votes was not being impugned at that stage. He prayed that the matter ought to be remanded for decision afresh by the Tribunal after granting an opportunity of hearing and filing of a reply/objections.

5. Conversely, learned counsel appearing on behalf of the Respondent No.4 argued that the the impugned Order did not infringe any right so as to give rise to any cause for invoking Article 199 Petition and was even otherwise not maintainable. He placed reliance upon Section 155 of the Act while pointing out that it was analogous to Section 67(3) of the Representation of the People Act, 1976 while citing the judgment of a larger Bench of this Court in the context of the erstwhile statute in the matter reported as Ali Gohar Khan Mahar vs. Election Commission of Pakistan through Secretary and 2 others 2014 CLC 776, as well as the majority judgment of the Supreme Court in Civil Petitions No.1573, 1673, 1729, 1767 and 2433 of 2024.

6. He submitted that the difference in the number of votes shown to have been cast in favour of the Petitioner as compared to the Respondent No. 4 in the consolidated result of the poll from the Constituency fell within the threshold for recount contemplated under Act, with the plea for recount thus being well founded and there being no waiver on the part of said Respondent in that regard even it were assumed for the sake of argument that the right to avail that statutory remedy admitted to such a measure. It was pointed out that it had even otherwise been stated for purpose of the pleadings in Constitutional Petition No.733/2024 that the count may be impugned later on, and the Order whereby the matter had been disposed of by this Court itself envisaged such recourse through the Tribunal.

7. For his part, while adopting the arguments advanced by learned counsel for the Respondent No.4, the learned DAG placed further reliance on the judgment of the Supreme Court in the matter reported as Muhammad Raza Hayat Hiraj and others versus The Election Commission of Pakistan and others 2015 SCMR 233.

8. Having heard the arguments advanced and examined the relevant statutory provisions in light of the case law cited in the matter, it merits consideration that while the judgments cited on behalf of the Petitioner regarding the principle of natural justice and the right to a fair trial have their own place, more relevantly from the standpoint of the controversy at hand it was held in the case of Ali Gohar Khan Mahar (Supra) that

> "25. Having considered the decisions of the Supreme Court as above, in our respectful view, the controlling authorities for present purposes are Javaid Hashmii, Ghulam Mustafa Jatoi and Muhammad Nawaz Sharif. As noted, the last two decisions were of 5-Member Benches. In both, the general rule laid down in Javaid Hashmi was affirmed. In our respectful view, that general rule must be regarded as applicable to all disputes relating to or arising out of the election process or after that process has been completed. What has been stated in Ghulam Mustafa Jatoi ought to be regarded as an exception to the general rule, and what is stated in Muhammad Nawaz Sharif ought to be regarded as a restatement of the exception. It will be recalled (see para 13 above) that in Javaid Hashmi the Supreme Court expressly observed that the High Court could not in the exercise of its jurisdiction under Article 199 "question the correctness of the decision of the Election Tribunal on any ground whatsoever upon an election petition filed to question the validity of the election" (see Javaid Hashmi at pg. 423). Quite obviously, "the decision" being referred to includes an interlocutory order of the Election Tribunal. The

general rule thus clearly encompasses the matter before us, which is challenge to two interlocutory orders of the Tribunal. The only question therefore is whether, and if so to what extent, the matter comes within the scope of the exception? We have carefully considered the point. As restated in Muhammad Nawaz Sharif, for the exception to apply the order must be "patently illegal" and there should be no remedy available in law "either before or after the election process". Now, in respect of an election petition presented under section 52, there is a remedy available by way of a direct appeal to the Supreme Court under section 67(3). In Javaid Hashmi, the majority dilated at some length upon this aspect and, in our respectful view the existence of this statutory right of appeal is central to the reasoning that led the Court to lay down the general rule. The general rule is comprehensive. The exception on the other hand has been stated in narrow terms. The threshold is high: mere illegality will not do; the impugned order must be "patently" illegal. In our respectful view, if an interlocutory order of an Election Tribunal trying an election petition presented under section 52 is patently illegal, that will almost certainly furnish a ground for an appeal to the Supreme Court under section 67(3). In other words, in the present context, there will hardly ever be a situation where the remedy by way of statutory appeal will not be available and applicable. Put differently, one of the key elements for the exception to apply will not be found to exist. There will be a remedy available under law. That this remedy is not immediately available, but must await the "final" decision of the Election Tribunal is not determinative. In our respectful view, the manner in which the exception has been formulated, especially as restated in Muhammad Nawaz Sharif, precludes any such conclusion. It necessarily follows that a petition under Article 199 will not be maintainable against an interlocutory order of an Election Tribunal trying an election petition, even if such order is patently illegal. The aggrieved party will have its remedy by way of the statutory appeal under section 67, and must seek that remedy at the appropriate stage.

> 26. We are mindful of the fact that the foregoing conclusion may mean that an interlocutory order of an Election Tribunal must be allowed to stand and take effect, no matter how perverse or illegal it may be. That was perhaps the apprehension expressed by Nasim Hasan Shah, J. in his dissenting judgment in Javaid Hashmi. In our respectful view, the forceful and comprehensive manner in which the majority judgment stated the general rule, the repeated affirmation of that rule in subsequent Supreme Court decisions (given by larger Benches), and the care taken to narrowly circumscribe the exception carved from the general rule make clear that notwithstanding this concern and apprehension, the matter must be left for the Supreme Court itself to decide in any appeal to be preferred under section 67(3). If at all the position is otherwise, i.e., the exception is to cover a patently illegal interlocutory order of an Election Tribunal trying an election petition notwithstanding the existence of the statutory right of appeal, that is something for which guidance can only come from, and be given by, the Supreme Court itself."

9. That judgment was affirmed by the Supreme Court in the case of Muhammad Raza Hayat Hiraj (Supra), as follows:

> "…the interlocutory orders passed by the Election Tribunal impugned before the High Court were not liable to be set aside in its Constitutional jurisdiction as the petitioners before the Court had a remedy available to them by way of appeal under section 67 of the Act after disposal of the election petitions. The impugned judgment of the Lahore High Court dated 28-2-2014, therefore, is maintained and similar opinion of the High Court of Sindh in Ali Gohar Khan Mahar's case (supra) and of the High Court of Balochistan in Dur Muhammad Khan Nasar's case (supra) is affirmed."

10. Just as fundamentally, in terms of the Order dated 12.08.2024 made by the Supreme Court in Civil Petitions No.1573, 1673, 1729, 1767 and 2433 of 2024, it was held that:

> “29. There is yet another aspect to these Cases. The counting and the recounting of ballot papers is not a judicial or even a quasi-judicial act. It is an administrative-ministerial act. The only prerequisite to undertake it is for the Returning Officer to simply determine the percentile/numerical difference between the first two candidates, upon receipt of an application requesting recount. In these Cases it is admitted that applications seeking recount were submitted in respect of all four constituencies and that the difference in the margin of victory between the first two candidates was well within the stipulated percentile/number as prescribed in section 95(5) of the Elections Act.
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> 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.”

11. It was in view of the foregoing that we had found the Petition to be misconceived and non-maintainable, hence had dismissed the same vide a short Order made in Court upon culmination of the hearing on 24.09.2024.

JUDGE

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