

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

**Present:-**

**Mr. Justice Zafar Ahmed Rajput**

**Mr. Justice Shamsuddin Abbasi.**

**Const. Petition No.D-1095 of 2022**

Petitioner Mir Punhal Khan Talpur son of Ghulam Ali Khan Talpur through Mr. Haq Nawaz Talpur, Advocate.

Respondents 1 to 5 The Election Commission of Pakistan through its Secretary, Constitution Avenue, Islamabad & Others.  
Through Mr. Zeeshan Haider, Law Officer, ECP.  
M/s Shafi Muhammad Chandio & Mehboob Ali Wassan, AAG.  
Mr. Ashfaq Hussain, Assistant Attorney General.

Respondent No.6 Mansoor Ali Bugti son of Mir Muhammad through Mr. Mukesh Kumar G. Karara, Advocate.

Dates of hearing 20.09.2022, 27.09.2022, 04.10.2022 and 05.10.2022

Date of order ~~20.10~~<sup>27</sup>-2022

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**ORDER**

**Shamsuddin Abbasi, J:-** By means of this constitutional petition filed under Article 199 of the Constitution of Islamic of Pakistan, 1973, the petitioner seeks following relief(s):-

- (i) *Declare that Impugned Order is coram non judice, illegal, unlawful, unconstitutional, per incuriam in nature and a nullity in the eyes of law;*
- (ii) *Set aside the Impugned Order being coram non judice, illegal, unlawful, unconstitutional, per incuriam in nature and a nullity in the eyes of law;*
- (iii) *Issue a writ of Mandamus direction the Respondent No.1 to declare the Petitioner as the returned candidate and issue notification to that effect;*
- (iv) *Restrain the Respondents alongwith their agents, cronies, associates from acting upon the Impugned Order in any manner whatsoever;*

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- (v) Order for award of costs of the instant proceedings in favour of the Petitioner; and
- (vi) Grant any other relief(s) that this Hon'ble Court may deem appropriate in the interest of justice.

2. The Petitioner and Respondent No.6 contested Local Government Elections Sindh, 2022 (Phase-I) on the seat of General Member from Ward No.3, Town Committee, Kotdji, District Khairpur Mirs, held on 26.06.2022, on the tickets of Grand Democratic Alliance (GDA) and Pakistan Peoples' Party Parliamentarian (PPPP) respectively. The Petitioner was declared as a Returned Candidate securing 489 votes, out of 929 valid votes polled, whereas the Respondent No.6 obtained 434 votes and declared as a runner up candidate with a difference of 55 votes. The Returning Officer (RO) issued Form-XI and Form-XII and after the consolidation of the results, he issued Form-XIII followed by Form-XIV on 29.06.2022 declaring the petitioner as a Returned Candidate. After about a month, the Respondent No.6 approached the Election Commission of Pakistan (ECP) and filed Election Petition No.23(283)/2022-Law on 25.07.2022 seeking recounting of votes. The ECP vide order dated 22.08.2022 allowed the election petition by observing as under:-

*"The Commission after due consideration is of the opinion that it is a fit case of recounting. Resultantly we allow the instant petition and direct the Returning Officer concerned that he shall carry out the recounting of votes of this constituency in the presence of all the parties strictly in accordance with law. Returning Officer is further directed to complete the process of recounting within one week and thereafter result be communicated to this Commission".*

3. Feeling aggrieved by the order of ECP, referred above, the petitioner has filed the instant petition, seeking relief(s) as detailed in para-1 supra.

4. It is contended by the learned counsel for the petitioner that ECP was not competent to issue direction to the Returning Officer for recounting of the votes when the difference of votes was more than five percent of the total votes polled. The impugned order is, thus, in violation of Section 95(5) of the Elections Act, 2017 (The Act). It is next submitted

*Shir Ali*

that the Respondent No.6 in connivance with Assistant Returning Officer managed to file application for recounting of votes, without bringing it into the notice of Returning Officer, which admittedly was not entertained by the Returning Officer within 24 hours of the elections. Hence such an application was of no legal effect. It is also submitted that the ECP through its decision has extended undue favour to the Respondent No.6 and failed to apply the relevant procedure and law. The impugned order, is, thus, coram non judice, illegal, unlawful, unconstitutional, per incuriam in nature and nullity in the eyes of law and liable to be set-aside.

5. On the other hand, the learned counsel for Respondent No.6, Law Officer of ECP and learned AAG, have opposed the stance taken by learned counsel for the petitioner, and submitted that an order under Section 95(5) The Act was necessarily required to be passed by the Returning Officer and on failure to pass such an order by him, the ECP was competent to pass the impugned order for recounting of votes, hence the impugned order is just and in accordance with law and calls for no interference by this court.

6. Heard, record perused.

7. There is no denial to the fact that after the results were consolidated, the Returning Officer finally issued Form XIV (Return of Election) on 29.06.2022, available at Page 43 of the file, which shows 489 valid votes polled in favour of petitioner and 434 votes in favour of Respondent No.6, meaning thereby the petitioner won the election with the lead of 55 votes, which is six percent of the total votes polled. Section 95(5) of the Act, empowers the Returning Officer to entertain the application for recounting of ballot papers in case the margin of victory is less than five percent of the total votes polled of ten thousand votes. We deem it conducive to reproduce Section 95 of the Act, which reads as under:-

**95. Consolidation of results.---**(5) Before commencement of the consolidation proceedings, the Returning Officer shall 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:

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*Provided that the recount shall be made by the Returning Officer only once".*

8. Reviewing the above Section, it is noted that recounting of votes is within the power of Returning Officer only before commencement of consolidation proceedings and such a recount could only be triggered on a written request of a contesting candidate or his election agent in an election where the margin of victory was less than five percent of the total votes polled or ten thousand votes. Undisputedly, the petitioner won the election with the lead of 55 votes, which is six percent of the total votes polled. We are, thus, of the view that impugned order passed by the ECP directing the Returning Officer to recount the votes and communicate the fresh result to the Commission, is in utter violation of Section 95(5) of the Act.

9. Insofar as the contention that Respondent No.1 filed application for recounting of votes with the Returning Officer well before consolidation of results is concerned, suffice it to say that such an application alleged to have been received by Assistant Returning Officer (Mr. Hazoor Bux Rid) on 26.06.2022 at 9:00 pm (the date and time mentioned in the application available at page 57 of the case file). The ECP in its order has noted that Returning Officer appeared in the proceedings and submitted his report that after the results were consolidated and issuance of Form-XIV, the Assistant Returning Officer (Mr. Hazoor Bux Rid) disclosed him about filing of application for recounting of votes, duly received by him (Assistant Returning Officer) at 9:00 pm on 26.06.2022. This statement of the Returning Officer before ECP is belied from his own letter dated 04.07.2022, sent through District Returning Officer, Khairpur, to Regional Election Commissioner, Sukkur informing that no application for recounting of votes of the subject ward was ever filed and the consolidation of results were already carried out as per Rule 40 of Local Government Election Rules, 2015. Even otherwise, there was an application received by the Assistant Returning Officer (Mr. Hazoor Bux Rid) on the day of elections well before consolidation of results, why he kept mum for three days and did not inform the Returning Officer about filing of the application till consolidation of the results and issuance of Form-XIV on 29.06.2022 by the Returning Officer declaring the petitioner as a Returned Candidate. The order further reveals that on 16.08.2022 Assistant Returning Officer appeared before the ECP in the election

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proceedings and submitted his reply stating therein that he showed the application for recounting of votes to the Returning Officer and under his direction placed the same on his (Returning Officer) table without passing any order. This reply of the Assistant Returning Officer, on the face of it, contradicts the statement of Returning Officer before the ECP that after the results were consolidated and issuance of Form-XIV, the Assistant Returning Officer provided him an application for recounting of votes with the explanation that such an application could not be produced on the same day due to rush of work and submission of election material on that day. This explanation, on the face of it, seems to be after thought and is unsafe to rely upon. Even otherwise the appearance of the Assistant Returning Officer before the ECP, without notice, has drawn an adverse inference against him and finds support to the plea taken by the petitioner that he has extended undue favour to the Respondent No.6. It is also important to note that appointment of Mr. Hazoor Bux Rid as Assistant Returning Officer was challenged by the petitioner on 29.04.2022 well before holding of election process because of his past history to support the Respondent No.6 and affiliation with his ruling party (PPPP). This application is available at page No.93 of the case file. All this has led us to an irresistible conclusion that Assistant Returning Officer has failed to perform his National Duties in the manner as provided under the law. His conduct has undermined the confidence of general public in the rule of law and good, fair and effective administration of justice, which gives rise to many questions, which can only be resolved adverse to the Respondent No.6's case. At this juncture, we are in agreement with the learned counsel for the petitioner that act of Assistant Returning Officer was highly doubtful and he has given undue favour to the Respondent No.6 with malafide intention and ulterior motives and such favour has further been extended by the ECP while allowing the election petition of Respondent No.6 with a direction to the Returning Officer to recount the votes more particularly when the margin of victory was more than five percent of the total of votes polled.

10. There is no denial of the fact that instant petition was filed on 05.09.2022 and on the same day injunctive orders were passed, whereby the operation of the impugned order, passed by the ECP, was suspended till the next date of hearing. As to the contention that process of



recounting of votes was initiated pursuant to the order of ECP on 05.09.2022 at 1:30 pm and completed at 4:00 pm and based on such recounting the revised Forms XIII and XIV were issued by the Returning Officer declaring the Respondent No.6 as a Returned Candidate and till such time the injunctive orders, passed by this Court, were neither communicated nor received by the Returning Officer. Suffice to observe that injunctive orders were passed on 05.09.2022 (the day of recounting of votes and issuance of revised Forms XIII and XIV), which took effect from the time it is passed and non-communication or receipt of such order by the Returning Officer till recounting of votes is of no significance. Reliance may well be made to the case of *Haji Abdul Jalil v Javed Ahmed* (1983 SCMR 869), wherein the two Judges of Hon'ble Supreme Court of Pakistan observed as under:-

*"There is no dispute with the principle that stay order takes effect from the time it is passed irrespective of the fact whether or not it has been served on the person concerned. But the question in this case is whether the stay order dated 2-11-1976 was passed by the learned District Judge, Peshawar, prior to the passing of the ex parte order of ejection by the Rent Controller on 2-11-1976. Since it is the respondent who alleges that the stay order was already operative when the learned Rent Controller passed the ex parte order of his eviction, the onus of proving that it had been passed earlier in time, lies on him. But as already mentioned above, he has not cared to turn up despite service of notice. Nor has he made any arrangement for his being represented through a counsel to contest the appeal- As such in the absence of any material on the record to that the stay order had been passed prior to the passing of the order of respondent's eviction, we are unable to hold that the order of eviction dated 2-11-1976 had been passed during the existence of the stay order.*

*The appeal is, therefore, allowed, and the impugned judgment is set aside, with the result that the ex-parte order of respondents eviction stands revived' There shall, however, be no order as to costs.*

11. We have already held the order of the ECP directing the Returning Officer for recount of the votes to be illegal and in utter violation of Section 95(5) of the Act as well as the act of the Assistant Returning Officer to be based on ill intention, therefore, the Respondent No.6 cannot be allowed to be benefited for declaring him as a Returned Candidate.

12. In view of the analysis and combined study of the entire record,

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coupled with the relevant law with care and caution, we are of the considered view that the petitioner has been able to make out a case for interference. The petition is, therefore, allowed and the order dated 22.08.2022, passed by the ECP, is set-aside. In view thereof, the revised result, consolidated by the Returning Officer on 05.09.2022 after recounting pursuant to directions of ECP, declaring Respondent No.6 as a Returned Candidate, is declared as null and void and the petitioner is held to be the Returned Candidate. The Election Commission of Pakistan and the Returning Officer concerned are directed to act accordingly.

13. The C.P. No.D-1095 of 2022, listed above, stands allowed in the foregoing terms.

  
JUDGE


  
17/12/2022  
JUDGE

Announced by US



20.12.2022

Justice Zafar Ahmed Raza

  
20.12.2022  
Khadija Humaira