

# ELECTION COMMISSION OF PAKISTAN

**PRESENT:**

MR. SIKANDAR SULTAN RAJA	CHAIRMAN
MR. NISAR AHMED DURRANI	MEMBER-I
MR. SHAH MUHAMMAD JATOI	MEMBER-II
MR. BABAR HASSAN BHARWANA	MEMBER-III
MR. JUSTICE (R) IKRAM ULLAH KHAN	MEMBER-IV

Case No. F.2(177)/2022-LAW-II

In ref: WP.NO.2094 OF 2022 TITLED MUHAMMAD SHABBIR AWAN VERSUS  
ELECTION COMMISSION OF PAKISTAN UNDER ARTICLE 199 OF THE  
CONSTITUTION OF ISLAMIC REPUBLIC OF PAKISTAN(TREATED AS APPLICATION  
UNDER SECTION 95(6) OF THE ELECTIONS ACT ,2017

Muhammad Shabbir Awan.

...Applicant

VS

Election Commission of Pakistan & Others

...Respondent

For the Petitioner Petitioner in person along with Barrister Raja

Jibran and Shoukat Rauf Siddiquie Advocates

For the Respondents

Raja Sagheer Ahmed in person along with  
Barrister Taimoor Aslam Khan

Returning officer

In Person

On behalf of Commission

Omar Hamid Khan Secretary Ecp, Zafar Iqbal  
Special Secretary Ecp, Muhammad Arshad  
DG Law, Mr Khizar Aziz DG IT, Mr Khurram  
Shahzad ADG Law,

Date of hearing:

21.07.2022

**ORDER**

Sikandar Sultan Raja, Chairman: Brief facts of case are that Election Commission of Pakistan, vide Notification No. F8(5)/2022-Cord-(1) announced bye-elections for the 20



seats of provincial assembly Punjab, accordingly polling was conducted on 17-07-2022. Mr. Shabbir Ahmed contested the election as candidate from PP-07 Kahuta Rawalpindi-II, and petitioner was declared as runner up candidate by a margin of 49 votes. Petitioner, filed an application for recounting of votes polled in connection with bye-election PP-7 Rawalpindi-II, before the returning officer Concerned. The Returning officer issued notices to all the contesting candidates and heard the case at length and rejected the application of the petitioner, through order dated 19-07-2022 on the ground that the petitioner had not produced any substantial evidence of any irregularity throughout the polling process.

2. Petitioner being aggrieved from the order of the returning officer filed a Writ petition before the Hon'ble Lahore High Court Rawalpindi Bench, the Honourable High court through order dated 20-07-2022 referred the matter to the Election Commission of Pakistan to treat the writ petition as an application on behalf of the petitioner under Section 95(6) of the Act and shall pass a decision thereon after hearing the petitioner on 21-07-2022 at 10:00 a.m. The Hon'ble court also restrained the returning officer from consolidation of results of PP-07 Kahuta Rawalpindi-II.

3. In compliance of the order of Hon'ble Lahore High Court, Rawalpindi bench, the notice was issued to Raja Sagheer Ahmed contesting candidate of PMLN to appear before the Commission. The petitioner was directed by the High Court, he was also informed through the concerned DEC and the matter was fixed for hearing on 21-07-2022 at 10:00 a.m.

4. Mr. Shabbir Ahmad candidate for PTI has appeared in person alongwith his counsel and argued that an application for recounting of votes was moved before the concerned returning officer under Section 95(5) of the Elections Act, 2017 which was rejected by the RO on 19-07-2022. He also argued that the margin of victory is less than 5% of the total votes polled in the constituency as the difference of votes between the winner candidate and runner up candidate is only of 49 votes. He also submitted that the application for recounting was filed well within time and when the result of 265 polling stations, out of 266 was uploaded on the RTS, petitioner was in lead of 312 votes and at the climax of the result, the RTS broke down. He further added that after considerable time, when RTS system was restored PMLN candidate was shown as winner candidate by a small margin of 49 votes. He pointed out that PMLN candidate secured 68,906 votes whereas, the petitioner being candidate of PTI secured 68,867 votes. He submitted that under section 95(5) of the Act, petitioner had the right to file an application for recounting of votes. He further argued that the impugned order was passed by the RO after 17:00





PM and the notice for the consolidation was issued by RO on the same date i.e. 19-07-2022 late night. He drew attention towards the copy of notice annexed at page 44 of the writ petition and contended that RO in the said notice has written to resolve the matter amicably which is against the provisions of law and the spirit of the section 95(5) of the Act. He also added that the RO has rejected the application merely on the ground that the plea of the petitioner does not carry any weight and the petitioner could not produce any material evidence in this respect. He further contended that the judgment of august Supreme Court reported in PLD 2020 SC 718, cited by RO in impugned order is altogether different in facts. He also submitted that RO rejected the application on factual controversies and there is no reasonableness in the order. He argued that he filed the application soon after the result was announced at 1.40 AM on 18-07-2022 and the petitioner also provided the list of 21 polling stations on the demand of RO. While interpreting section 95(5) of the Act, the counsel for the petitioner submitted that the section has two portions. He elaborated that according to first portion recounting is mandatory to be carried out by the RO in case of margin of victory is less than 5% but in the second portion in case of grave irregularities it is the discretion of the RO to order for recount by recording detailed reasons. He also added that section 95(5) should be read conjunctively and not in isolation. He further added that the reasonableness requires that if the situation goes beyond the threshold given under section 95(5) the RO can order for recount after giving detailed reasons. In support of his arguments, he has placed reliance on the judgment reported as PLD 1974 Lahore 178. By concluding his arguments, the counsel for the petitioner prayed for acceptance of his application and order for recounting on 21 polling stations.

5. Raja Sagheer Ahmed appeared in person along with counsel Barrister Taimur Aslam. The counsel for the Respondent at the very outset raised the objection that the petitioner has concealed material facts from the Commission as well as from the Hon'ble Lahore high Court Rawalpindi bench. He submitted that petitioner has moved another application for recounting on 20-07-2022 which has also been rejected by the RO vide order dated 20-07-2022. The copy of the second application for recounting and order dated 20-07-2022 is provided to the Commission. He also argued that the counsel for the petitioner did not disclose the fact before the hon'ble Lahore High Court and also did not attach the second application for recounting along with writ petition. He also added that the petitioner has changed his stance in all the three applications before RO and Hon'ble Lahore High Court. He elaborated that in first application for recounting moved before the RO on 18-07-2022, recounting for entire constituency was prayed by the petitioner.



however, in his second application 21 polling stations only were mentioned. He further argued that the petitioner raised the objection before the Lahore High Court that he has also moved an application for recounting before the Commission which the Commission is not entertaining. In fact, the petitioner withdrew the said application and nothing is pending before the Commission. He argued that the request of the petitioner is not reasonable and the judgment passed by the august Supreme Court reported in PLD 2020 SC 718 has set out the procedure for recounting and the judgment of Supreme Court is binding under Article 189 of the Constitution of Islamic Republic of Pakistan, 1973. He further added that RO has repeatedly given time to the petitioner for production of specific documents/evidence in support of his allegations. He also emphasized that the petitioner did not point out any illegality or irregularity on the poll day before the Presiding Officer nor he raised objection in respect of credibility of any presiding officers of the concerned polling stations. He added that no application or document in this respect has been attached by the petitioner with the writ petition. He extended his arguments that the picture is still not clear regarding the prayer of the petitioner that whether he wants the recounting on 21 polling stations or on the entire constituency comprising of 266 polling stations. He emphasized that it is mandatory for the RO to check/verify the rejected votes during the consolidation which has been done by the RO at around 100 polling stations when the proceedings were stayed by the Hon'ble High Court. In support of his arguments he placed reliance upon PLD 2020 SC 718 and prayed for rejection of the application filed by the petitioner.

6. Arguments on either side heard at length and available record perused.

7. It is a matter of record and admitted fact that the petitioner Mr. Muhammad Shabbir Ahmed submitted an application on 18-07-2022 to the Returning Officer for recounting of total votes polled in the constituency which was rejected by the RO on 19-07-2022 and was challenged by the petitioner in writ petition no. 2094 of 2022 before the Hon'ble Lahore High Court, Rawalpindi bench. The Hon'ble Lahore High Court while deciding the matter directed that the writ petition be treated as an application under section 95(6) of the Act and further directed the Commission to decide the application after giving opportunity of hearing to the petitioner. The petitioner's Counsel during his arguments in the writ petition contended before the Honourable High Court that he has moved an application for recounting before the Commission which is not being entertained. The Commission went through the memorandum of the writ petition filed by the petitioner before the hon'ble Lahore High Court Rawalpindi bench, with reference to Para 11 of the writ petition, whereby, it has been alleged by the petitioner that:





***"that respondent no. 1 is empowered by Section 95(6) of the Act to direct respondent no.4 for recount of ballot papers of one or more polling stations, before the conclusion of consolidation proceedings. Consequently, an application of recount was made before respondent no. 1 to issue directions to respondent no. 4."***

8. The matter was inquired and record of R&I branch of this secretariat was checked and it revealed that the petitioner mis-stated the facts before the hon'ble Lahore High Court, Rawalpindi bench as the application was moved at 3.50 PM on 20-07-2022 with diary no. 2485 and the same was withdrawn by him after 10 minutes which is evident from diary no. 2487 by Syed Tasjeel Shah Advocate on behalf of petitioner. In this regard, Mr. Saleem Ahmed Junior Assistant from R & I branch of this secretariat has also submitted his handwritten statement which is made part of the record. The issue was confronted to the petitioner and the counsels present before us on behalf of petitioner who admitted that after getting stay order from the hon'ble Lahore High Court, the application was withdrawn by them. The petitioner submitted another application for recounting of votes at 21 polling stations on 20-07-2022 which was rejected by the RO and the fact has been concealed by the petitioner from the hon'ble Lahore High Court as well as from the Commission. The petitioner has concealed the material facts from the Lahore High Court and the Commission with malafide intentions which surfaced on the record during perusal of the record.

9. Admittedly it is the independent mandate of the Commission under section 95(6) of the Act to order the RO for recount before the conclusion of consolidation proceedings for reasons to be recorded at one or more polling stations. The petitioner admittedly has withdrawn the application for recounting and at present no separate application is pending. Section 95 (5) or (6) is reproduced for easy reference:

***"95. Consolidation of results.***

(1) .....

(2) .....



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

*(6) The Commission may, before conclusion of the consolidation proceedings, for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations."*

10 The petitioner in his application for recounting and in writ petition before hon'ble High Court and on media channels stated that due to break down of RTS (Result Transmission System), he lost the lead, which is also clarified to the petitioner that RTS was not used in the by-elections held on 17-07-2022 even no internet connected system was used in the said elections. The only system which was used was RMS (Result Management System) for tabulation and compilation of election results as mentioned in section 13 of the Elections Act, 2017. This system (RMS) has no link with internet and there is no probability of break down in it. According to the server logs, the RMS was up and running and progressive results were also shown live (Real time basis) in the office of Provincial Election Commissioner, Returning Officer as well as in the control and media room of ECP Secretariat Islamabad. Hence it is no ground for praying for recounting of votes by the petitioner on this account.

11. The Balochistan high court in case titled as Mir Mujib-ur-Rehman Muhammad Hassani Versus RO PB-41, Washuk and 16 other reported in 2019 MLD 1415, held that no one could claim recounting of votes as a matter of right and party has to show that there is prima facie illegalities, corrupt practices and illegal acts during the process of elections. Inspection or recounting of ballot papers could not be granted to support vague pleas made by the petitioner. The operative paras of the judgment are reproduced as follows:

*"It may be stated that the purpose of a recount/inspection 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 loosing candidates to attempt and to frustrate the will of the people, a conscious effort is to be made that it is only in the circumstances, which clearly justify, rather demand a recount/inspection, the recount is allowed. Undoubtedly, the Tribunal while seized of the election petition is vested with the power to order recount, however, such power is to be exercised on the basis of some material*





*prima facie establishing illegalities, corrupt practices and illegal acts during the process of election. A party is not entitled to claim recount of votes as a matter of right and it is to be shown that there had been improper reception, refusal or rejection of votes, corrupt practices and illegal acts."*

12. The August Supreme Court in another case titled Syed Khaliq Shah Versus Abdul Raheem Ziaratwala and others reported in PLD 2017 SC 684, held that

*"On the basis of unreliable oral evidence which is unsubstantiated by any credible independent evidence and the absence of documentary evidence, it would be unjust and unfair to unseat a Returned Candidate and disenfranchise the entire constituency."*

13. The august Supreme Court in another case titled Mir Mujib-ur-Rehman Muhammad Hassani Versus RO PB-41, Washuk and 16 other reported as PLD 2020 SC 718

*"It is important to note, however, that a similar provision existed in the old law, section 39(6) of ROPA that preceded section 95(5) of the Act, as well. Section 39(6) of ROPA stated that:*

*"(6) The Returning Officer may recount the ballot papers-*

*(a) upon the request of, or challenge in writing made by, a contesting candidate or his election agent, if the Returning Officer is satisfied that the request or the challenge is reasonable; or*

*(b) if so directed by the Commission, in which case the recount shall be held in such manner and at such place as may be directed by the Commission."*


*From a bare reading of this provision, it is obvious that in the new law (section 95(5) of the Act) the legislature has sought to limit the situations in which applications for a recount before the Returning Officer can be made in the first place. The intention behind this quite clearly is to limit the number of frivolous applications for a recount made by losing candidates in constituencies around the country and to ensure that recounts are entertained by Returning Officers only in those constituencies where the margin of victory is small enough to justify a recount, and an objective and tentative assessment is made by the Returning Officers on the basis of material placed before them to the effect that*




*prima facie* there are grounds justifying a recount and the request for such recount is not wholly unreasonable. 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."

14. In the light of the above observations of the apex court, the ECP in the exercise of powers under section 95(6) of the Act may order the Returning Officer directly to conduct recount, if it deems the circumstances to be grave enough to warrant such a recount. The petitioner has not approached the RO, the DRO, the Provincial Election Commission or the ECP Secretariat with any complaint of illegalities or irregularities during the election process on the poll day. The office of RO, DRO and ECP secretariat are not far away. The petitioner has also failed to point out any snatching of ballot boxes, misuse of authority by the presiding officers or the returning officers or any other grave illegality or irregularity on the poll day. The petitioner has raised general allegations which are not sufficient to attract recounting. It has been held by the superior courts in a number of judgments that a candidate seeking recounting has to prove the illegalities and irregularities through material evidence.

The resume of our above discussion leads us to the conclusion that the petitioner has not been able to establish cogent reasons for his request for recounting nor has given any credible material/information of rigging, irregularities and illegalities, hence the request for recounting is hereby rejected.

  
SIKANDAR SULTAN RAJA


Chairman

  
SHAH MIRZA MMAD JATOI

Member

  
NISAR AHMED DURRANI

Member

  
BABAR HASSAN BHARWANA

Member

  
JUSTICE (R) IKRAMULLAH KHAN

Member

