

ELECTION COMMISSION OF PAKISTAN

MR. SIKANDAR SULTAN RAJA, CHAIRMAN
MR. SHAH MUHAMMAD JATOI, MEMBER
MR. JUSTICE (R) IKRAM ULLAH KHAN, MEMBER

CASE No. F.7 (312)/2024-Law-III (G.E)

Subject: APPLICATION UNDER ARTICLE 218(3) OF THE CONSTITUTION READ WITH SECTION 8 AND 95 OF THE ELECTIONS ACT, 2017

Zulfiqar Ahmed, Contesting Candidate from constituency NA-79, Gujranwala

.....Petitioner(s)

VERSUS

Returning Officer NA-79, Gujranwala and 4 others

.....Respondent(s)

For the Petitioner : Barrister Muhammad Umer Riaz, ASC.
For the Respondent : In person along with Barrister Haris Azmat, ASC.
Date of hearing : 26-08-2024

ORDER

Sikandar Sultan Raja, Chairman- Zulfiqar Ahmed, the Petitioner, contested the General Election 2024 for the National Assembly seat from constituency NA-79, Gujranwala. As per the official results of the Election Commission of Pakistan, the Petitioner is runner up candidate, while Mr. Ehsanullah Virk, is the Returned Candidate. Petitioner being aggrieved by the result filed the subject petition, requesting for the recount of the votes in the subject constituency.

02. The matter was initially fixed for hearing on 27th February 2024 and after hearing the preliminary arguments it was adjourned to 06.03.2024 with the directions to the Returning Officer (RO) and Returned Candidate/Respondent, Ehsanullah Virk, to submit their replies on or before the next date of hearing. On 06.03.2024 the learned counsel for the Respondent appeared and submitted his power of attorney. Report from the RO was also received which was placed on record and a copy of the report was provided to the parties. The matter was adjourned to 14.03.2024 for further proceedings. On 14.03.2024 counsel for the parties appeared, however, counsel for the Respondent sought adjournment to submit parawise comments. Request was allowed and the matter was adjourned to 28.03.2024. On 28.03.2024 reply was not submitted by the counsel for the Respondent while a copy of stay order passed by the Lahore High Court, Lahore, in Writ Petition No. 19091/2024 was produced before the Commission along with request



for adjournment. The request was allowed and the matter was adjourned to date in office with the direction to re-fix the matter after disposal of the Writ Petition mentioned above.

03. Subsequently, the Lahore High Court disposed of the Writ Petition on 24th April 2024, setting aside the proceedings pending before the Commission in the subject matter. This order was challenged by the Petitioner, Zulfiqar Ahmed, before the august Supreme Court of Pakistan through Civil Petition No. 1767/2024, titled Zulfiqar Ahmed vs. Election Commission of Pakistan and others.

04. The august Supreme Court of Pakistan allowed the Civil Petition and set aside the order passed by the Lahore High Court, Lahore, *vide* order dated 12th July 2024. After receiving the copy of the judgment from the august Supreme Court of Pakistan, the Commission re-fixed the matter and issued notices to both the candidates for appearance and further proceedings on 19th August 2024. On the said date, Barrister Gohar Ali Khan proxy counsel appeared for the Respondent and requested for adjournment which was allowed with last opportunity to argue the matter today i.e 26.08.2024.

05. Today both the counsels for the parties appeared. Counsel for the Petitioner submitted fresh power of attorney while the counsel for the Respondent Mr. Haris Azmat, ASC submitted reply of the petition which is taken on record and the copy of the reply is handed over to the counsel for the Petitioner.

06. Counsel for the Petitioner appeared and started arguments. He submitted paper book of the documents which are required for the assistance of the Commission. He stated that the Petitioner moved an application before the Returning Officer for recount of votes on 09th February 2024. He stated that the RO rejected his application summarily without giving proper reasons. He contended that the application for recount was not dealt with in accordance with law and order passed by the RO dated 10th February 2024 is against the principle of natural justice. He stated that the Petitioner or his election agents were not served with the notice for consolidation proceedings and were not allowed to participate in the said proceedings. He mentioned that the process of consolidation was completed in his absence. He further argued that under Section 95(5) of the Elections Act, 2017, the RO was required to re-count the votes as the margin of victory is less than 8000 votes for the National Assembly Constituency. He stated that the number of invalid votes was 9364/- which is higher than the margin of victory between the Returned and Runner up Candidates. The counsel for the Petitioner argued and referred paras No. 3, 9,21,24,26,27,28,29 & 32 of the judgment passed by the august Supreme Court of Pakistan dated 12.08.2024 in Civil Petitions No. 1573, 1672, 1729, 1767 & 2433 of 2024. He highlighted that the august Supreme Court of Pakistan has



maintained that after the amendment in Section 95(5) of the Elections Act, 2017, the Returning Officer is bound to recount the votes when an application or challenge in writing is made before him prior to the completion of process of consolidation. He also stated that the august Supreme Court of Pakistan observed that the case of the Petitioner falls within the ambit of Section 95(5) of the Elections Act, 2017. He further argued that the Respondent submitted written reply before the august Supreme Court of Pakistan in which he has admitted that the Petitioner is fulfilling all the requirements of recounting of votes. He while referring the judgment of the august Supreme Court of Pakistan reported in 2008 SC 779 stated that the judgment of the august Supreme Court is binding in view of the Article 189 of the Constitution. He also referred to Sections 4, 8 & 95 of the Elections Act, 2017 and stated that all the above mentioned Sections shall be read with Article 189 of the Constitution and Commission has the power to order for recounting of votes in the Constituency, in such cases. He while concluding his arguments stated that the Commission is responsible for the conduct of free fair and just elections; therefore, he requested to pass directions to the RO for re-count of votes in the Constituency and to conduct the process of consolidation in his presence.

07. The counsel for the Respondent stated that no application for recount of votes has been attached by the Petitioner with his petition. He mentioned that the application for recount of votes is attached by the Returning Officer with his report. He argued that in para No. 2 of the petition the Petitioner has mentioned that the application was dated 09.02.2024 upon which the hearing was conducted on 10.02.2024, however, the application attached by the Returning Officer and provided by the Petitioner today along with paper book is dated 10.02.2024 which establishes that application for recounting was not submitted by the Petitioner. He further argued that the number and date of the order of the Returning Officer attached by the Petitioner along with his petition and provided by the Returning Officer along with his report are different. He elaborated his arguments and stated that the order attached by the Returning Officer are with hand written number and date which is fabricated and not correct. He further argued that he has provided the photocopy of dispatch register of the office of the Returning Officer along with his reply. He while extending his arguments stated that the last serial number is 81 and there is no digit of serial number 87. Secondly he stated that it is required to ascertain that whether the application for recounting was moved before or after the process of consolidation. He referred the report of Returning Officer in which he has stated that when the Petitioner approached him the process of consolidation was in progress. He further argued that the Returning Officer has asked for the details from the Petitioner but he did not turn back to him so he dismissed the application of the Petitioner



due to non-prosecution. The counsel for the Respondent referred to the recent judgment passed by two member bench in case titled Ali Gohar Khan Vs. ECP & Others dated 21.08.2024 in CP No. 2477/2024 and stated that august Supreme Court of Pakistan has observed that when the process of consolidation has commenced the Returning Officer cannot start the process of recounting. He further argued that factual controversy is involved in the matter and the Tribunals have been appointed by the Commission, therefore, the applicant may be directed to approach the Election Tribunal for redressal of his grievances after recording pro and contra evidence.

08. The counsel for the Petitioner in rebuttal submitted that the august Supreme Court of Pakistan has passed the order after going through all the record and details of the case. He stated that the judgment is holding the field and is binding until it is set-aside. He in his support referred to para 28 and 29 of the judgment passed by the august Supreme Court of Pakistan (mentioned above) and highlighted that the august Supreme Court of Pakistan has observed that application was given by the Petitioner to the Returning Officer prior to the process of consolidation. He while rebutting the order passed by the august Supreme Court of Pakistan in Ali Gohar's case stated that the application for recount was not submitted by the Petitioner before the Returning Officer and the facts of that case are different. He referred to the judgment of august Supreme Court of Pakistan reported in 2008 SC 739 and stated that ECP has a separate jurisdiction to decide the application for recounting.

09. The Returning Officer in his report dated 02.03.2024 which was placed before the Commission on 06.03.2024 stated that the Petitioner appeared before him on 10.02.2024 and submitted an application through his election agent for re-counting of ballot papers in the entire Constituency. He further stated that the applicant was advised by him to produce copies of Form-45 and other record regarding polling stations from where he wants to re-count the votes. He mentioned in his report that due to large number of political workers of various political parties and gathering of candidates outside the office of RO, the law and order situation became worse and he consolidated the result without carrying out the process of re-counting. He also highlighted that the margin of victory between the Returned and Runner up candidate is less than 8000 votes, therefore, re-counting in the constituency may be ordered by the Commission.

10. We heard the arguments of the parties and gone through the available record including the report of the RO.



11. The Petitioner filed the subject petition under Article 218(3) of the Constitution read with Section 8 and 95 of the Elections Act, 2017 with the following prayers:-

“In view of the averments made above, it is most respectfully prayed that this Honorable Commission may graciously be pleased to accept the instant Application and may kindly set-aside the impugned order along with consolidation proceedings including Forms 47 and 49 by issuing a declaration that the same are nullity in the eyes of law for the Constituency NA-79, Gujranwala-III in the interests of justice.

It is further requested that the Notification may not be issued, in the meanwhile.

It is lastly prayed that in convenience to setting aside Form-47 and Form 49 the RO be directed to conduct the consolidation proceeding in the presence of the Applicant/ his election agent, in the interest of justice.

Any other relief which this Honorable Commission deems just, fit and appropriate, may kindly be graciously awarded to the Applicant.”

12. It is evident from the result submitted by the RO that the margin of victory between the Returned and Runner up candidate is less than 8000 votes as prescribed under Section 95(5) of the Elections Act, 2017 for the National Assembly seat for the purpose of recounting. The number of rejected votes in the constituency as per Form-47 is 9,300. Section 95 of the Elections Act, 2017 deals with procedure relating to the process of consolidation and recounting of votes. The Returning Officer under Section 95 of the Elections Act, 2017 is required to re-count the votes if a request or challenge in writing is submitted to him by a candidate. The recent amendment in respect of recounts of votes and quantum of difference of votes in Section 95 is reproduced below:-

“95. Consolidation of results.—(1) Immediately after announcement of provisional results, the Returning Officer shall give the contesting candidates and their election agents a notice in writing of the day, time and place fixed for the consolidation of the results, and, in the presence of such of the contesting candidates and election agents as may be present, consolidate in the prescribed manner the Results of the Count furnished by the Presiding Officers, including therein the postal ballots received by him before the time fixed for the 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 and—

(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;

13. Admittedly, the RO in his report stated that a request for re-count was submitted before him by the Petitioner which was not entertained by him due to adverse law and order situation, however, the request of the Petitioner is within the ambit of Section 95 of the Elections Act, 2017. It is also observed that at the time of filing of application for re-counting, the process of consolidation was not completed by the Returning Officer. The august Supreme Court of Pakistan in CP No. 1767/2024, while setting aside the order passed by the Lahore High Court, Lahore, also observed that the application was submitted which was not decided by the RO in accordance with law. The Court also observed that application submitted before the consolidation of the result and covering all the aspects of Section 95(5) of the Elections Act, 2017 requires to be decided by the RO accordingly. The august Supreme Court also observed in para-27 of the detailed order dated 12.07.2024 in above mentioned CP, that:-

“27. Returning Officer cannot surrender their powers to mob rule nor can forego their statutory duty to re-count. If this is accepted it would created a very dangerous precedent and render the law regarding re-counting meaningless by those resorting to lawlessness. This would also deprive the Candidate seeking re-count of ballot papers of this statutory right/ remedy. The rights and remedies which the law grants cannot be negated.”

14. Similarly, in para-29 of the same order the Court observed 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, 2017.”



15. The Election Commission of Pakistan is the Constitutional body constituted under Article 218(2) of the Constitution charged with the duty to organize and conduct the elections honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against. The Commission under Section 4 of the Elections Act, 2017 is empowered to pass orders which are necessary for doing complete justice in the matters pending before it. Moreover, Section 8 of the Elections Act, 2017 describes the powers of the Commission to review the orders passed by any officer under this Act or the Rules and to issue such instructions, exercise such powers and make such consequential orders as may in its opinion, be necessary for ensuring that elections are conducted honestly, justly, fairly and in accordance with provisions of this Act and Rules. In the subject matter the margin of victory is less than five percent of the total votes polled in the constituency and less than Eight thousand votes as described in Section 95 (5) of the Elections Act, 2017. The august Supreme Court of Pakistan in case reported in PLD 2012 SC 681 has held that:-

40. *A bare reading of Article 218(3) makes it clear that the Election Commission is charged with the duty to 'organize' and 'conduct the election'. The language of the Article implies that the Election Commission is responsible not only for conducting the election itself, but also for making all necessary arrangements for the said purpose, prior to the Election Day. By conferring such responsibility on the Election Commission, the Constitution ensures that all activities both prior, on and subsequent to Election Day, that are carried out in anticipation thereof, adhere to standards of justness and fairness, are honest, in accordance with law and free from corrupt practices. This Court in Election Commission of Pakistan v. Javaid Hashmi and others (PLD 1989 SC 396), observed that "(g)enerally speaking election is a process which starts with the issuance of the election programme and consists of the various links and stages in that behalf, as for example, filing of nomination papers, their scrutiny, the hearing of objections and the holding of actual polls. If any of these links is challenged it really (is) tantamount to challenging the said process of election". It interpreted that the phrase 'conduct the election' as having "wide import" and including all stages involved in the election process. These observations subject all election related activities that take place between the commencement and the end of the election process to the jurisdiction conferred on the Election Commission under Article 218(3). The Election Commission therefore has to test all election related activities that are carried out in the relevant period, both individually and collectively, against the standards enumerated therein.*

41. *The Election Commission may also exercise its powers in anticipation of an ill that may have the effect of rendering the election unfair. In the case titled as In Re: Petition filed by Syed Qaim Ali Shah Jellani (PLD 1991 Jour. 41) the Elections Commission exercised its powers under Article 218(3) pre-emptively, by making all necessary arrangements to ensure that a certain class of people would be allowed to vote. This case implies that where a violation of the standards mentioned in Article 218(3) has not as yet taken place, the Election Commission is legally empowered under Article 218(3) to exercise its powers pre-emptively in order to avoid a violation of these standards. Furthermore, Mst. Qamar Sultana v. Public at Large (1989 MLD 360) and In*



Re: Complaint of Malpractices in Constituency No. NA-57, Sargodha-V (supra) both reinforce the argument that the Election Commission is fully empowered by Article 218(3) to make 'such orders as may in its opinion be necessary for ensuring that the election is fair, honest etc'. These decisions recognize that the Election Commission enjoys broad powers not only to take pre-emptive action but also to pass any and all orders necessary to ensure that the standards of 'honesty, justness and fairness' mentioned in Article 218(3) are met.

16. Furthermore, it is stated that the august Supreme Court of Pakistan has allowed recounting of votes in three constituencies i.e NA-81, NA-133 & NA-154 after going through the details, facts and record through a single order dated 12.08.2024. The subject matter was also decided in the same order in which the august Supreme Court of Pakistan has decided all the points raised by the counsel for the Respondent during his arguments. Furthermore, in addition to above mentioned reproduced paras-27 and 29, the august Supreme Court of Pakistan in para-9, 21, 24, 28 and 32 has categorically upheld that all the requirements of Section 95 have been fulfilled by the Petitioner and the Returning Officer was bound to recount the ballot papers. It is also observed by the august Supreme Court of Pakistan in para 32:-

"That the Commission was 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 mala fide."

17. Now, therefore, the Commission in exercise of powers under Article 218 (3) of the Constitution read with Section 4, 8 (b) & (c) and 95 of the Elections Act, 2017 directs the Returning Officer to recount the votes of the constituency including rejected votes in presence of the petitioner and other contesting candidates within two days and submit the report along with revised Form-49 in this respect before the Commission. Thereafter, office is directed to issue the Notification of the returned candidate accordingly.

Sikandar Sultan Raja
Chairman

Shah Muhammad Jatoi
Member

Justice (R) Ikram Ullah Khan
Member

Announced on: 27.08.2024

