

JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

W.P No.23249 of 2024

Muhammad Atif

Versus

Election Commission of Pakistan & others

JUDGMENT

Date of Hearing.	15-05-2024
PETITIONERS BY:	Mr. Abid Hussain Khichi, Advocate.
RESPONDENTS BY:	Mr. Muhammad Shan Gul, Advocate for respondent No.3. Mr. Asad Ali Bajwa and Ch. Imtiaz Elahi, D.A.Gs. Mr. Hassan Ijaz Cheema, A.A.G. Mr. Imran Arif Ranjha, Legal Advisor for E.C.P with Haroon Kasi, Director (Law) and Bushra Rasheed Chaudhry, Deputy Director Law ECP.

Shahid Karim, J:-. This constitutional petition brings a challenge to the order dated 01.04.2024 passed by a bench of Election Commission of Pakistan (**ECP**). Respondent No.3 filed an application for recounting of votes under Section 95 of the Election Act, 2017 (“**The 2017 Act**”). This application was filed on 10.02.2024. Prior to this an application on 09.02.2024 had been filed with the Returning Officer seeking recount of votes. The Returning Officer rejected the application on grounds which are not relevant for our purposes. As adumbrated, on 10.02.2024 respondent No.3 brought an application before ECP for recount by invoking the provisions of section 95 of the 2017 Act. The facts culled out from the impugned order clearly show that the matter was fixed for hearing on 12.02.2024 and on 15.02.2024 the Returning Officer sent a detailed report which did not satisfy the bench of ECP and further investigation was sought to be made in the matter. For the

purpose, an inquiry committee was constituted to submit its report within seven days. It is pertinent to mention that the issue relates to elections to the constituency PP-133 Nankana Sahib-II. While directing constitution of an inquiry committee, the notification of returned candidate (the petitioner) was suspended till the decision of the matter. In the meantime the Final Consolidated Result (Form 49) had been sent to ECP by the Returning Officer, on 09.02.2024. Thereafter the impugned order has been passed on 01.04.2024 on the basis of report of the inquiry committee. It is made clear on the threshold that this Court is not concerned with the merits of the case before the bench of ECP and is only concerned with the legality of impugned order and whether the jurisdictional facts existed in order to clothe ECP with the power to enter upon the controversy and to render a decision. For the purpose, the interpretation of section 95(6) of the 2017 Act would be engaged which is the only provision which confers power on ECP to intervene during the process of consolidation of results. This is the holding of this Court in a recent judgment passed in Ch. Bilal Ejaz v. Election Commission of Pakistan & others (W.P No.16416 of 2024).

2. Section 95 of the 2017 Act provides that:

*"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:
Provided that presence of not more than one agent of each candidate shall be allowed.*

(2) Before consolidating the Results of the Count, the Returning Officer shall examine the ballot papers excluded from the count by the Presiding Officer and, if he finds that any such ballot paper should not have been so excluded, count it as a ballot paper cast in favour of the contesting candidate for whom the vote has been cast.

(3) The Returning Officer shall also count the ballot papers received by him by post in such manner as may be prescribed and include the votes cast in favour of each contesting candidate in the Consolidated Statement except those which he may reject on any of the grounds mentioned in section 90.

(4) The ballot papers rejected by the Returning Officer under subsection (3) shall be mentioned separately in the consolidated statement.

(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; or

(b) the number of votes excluded from the count by the Presiding Officer are equal to or more than the margin of victory:

Provided that the Returning Officer shall recount only once.

(6) The Commission may, before conclusion of the consolidation proceedings and after notice to the contesting candidates], for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations.

(7) If there is a difference between the Results of the Count received from the Presiding Officers and the results of the recount, the Returning Officer shall record the difference and details thereof:

Provided that where the Returning Officer has recounted the votes under sub-section (5) or sub-section (6), the consolidation proceedings shall be completed within—

(a) seven days after the polling day in the case of elections to the National Assembly; and

(b) five days after the polling day in the case of elections to a Provincial Assembly.

(8) The Returning Officer shall, within twenty four hours after the consolidation proceedings, send to the Commission signed copies of the Consolidated Statement of the Results of the Count and Final Consolidated Result

together with Results of the Count and the Ballot Paper Account, as received from the Presiding Officers, and shall retain copies of these documents for record.

(9) After consolidation of results, the Returning Officer shall give to such contesting candidates and their election agents 3 [and accredited observers] as are present during the consolidation proceedings a copy of the Consolidated Statement of the Results of the Count and the Final Consolidated Result sent to the Commission against proper receipt.

(10) On receipt of documents under sub-section (8), the Commission shall, within fourteen days from the date of the poll, publish the documents on its website.

3. The true construction of section 95 has been brought forth in *Ch. Bilal Ejaz* in the following terms:

"12. Section 95 relates to consolidation of results and confers powers on the Returning Officer to do so immediately after announcement of provisional results. While doing so and before commencement of consolidation proceedings sub-section (5) confers upon the Returning Officer the power to order recount of ballot papers of one or more polling stations if a request or challenge in writing is made to that effect by a contesting candidate. This is the power which was exercised by the Returning Officer while passing the order dated 10.02.2024. Sub-section (6) is crucial in the present context and confers a power on ECP to direct the Returning Officer to recount the ballot papers before conclusion of consolidation proceedings. The intention, in my opinion, is clear and unequivocal. Firstly, a specific provision exists in the 2017 Act conferring powers on ECP to order the recount of ballot papers. Second and more importantly it has to be done before conclusion of the consolidation proceedings. If this power is not exercised by ECP within the contours mentioned in sub-section (6) of section 95, it cannot thereafter proceed to exercise such power on the misplaced notion that it can do so by invoking provisions of section 8 of the 2017 Act. In such matters, therefore, ECP is constrained by section 95(6) and cannot exceed the jurisdiction so conferred. In the impugned order, although ECP refers to the provisions of section 95(5) but ignored sub-section (6) of section 95 which relates to the powers of ECP. ECP went wrong and committed an error by stating in paragraph 14 of the impugned order that notwithstanding the provisions of section 95 (6) of the 2017 Act, the Commission may exercise "its inherent power to rectify any injustice committed during course of election". This view is a violation of law and must be discountenanced. It cannot be sustained in view of the holding of the superior courts in different cases. It was unfortunate, in my opinion, for ECP while passing the impugned order to ignore the judgments of the superior courts in this regard and in particular the judgment by the Supreme Court of Pakistan in Zulfiqar Ali Bhatti.

4. From the paragraph which has been set out above it is clear that the holding of this Court was that the recount of ballot papers and the power to be exercised by ECP has to be done before conclusion of the consolidation proceedings. Further that if the exercise of power is not completed as contemplated by sub-section (6) of section 95, ECP cannot thereafter proceed to exercise such power on the misplaced notion that it can do so by invoking the provisions of section 8 of the 2017 Act or any other provision in law or the Constitution. The clear mandate of the judgment in *Ch. Bilal Ejaz* was that there are no inherent powers inhering in ECP to rectify a purported injustice committed during course of election and its powers are circumscribed by the provisions of section 95(6) of the 2017 Act. This is the distilled essence of the decision made in *Ch. Bilal Ejaz*.

5. The facts have been narrated above in order to lend actuality to the analysis. It is evident that ECP proceeded to exercise its powers under Section 95(6) in contravention of clear intent reflected in the said provision by the legislature. The crucial words are “**before conclusion of the consolidation proceedings**”. The consolidation proceedings are required to be concluded by the Returning Officer within five days after the polling day in the case of elections to a Provincial Assembly. This is the cutoff date prescribed by law for the consolidation proceedings to be completed and this includes the processes under sub-sections (5) or (6). Sub-section (5) relates to the power of Returning Officer to recount the ballot papers and sub-section (6) of course relates to the powers of ECP to order recount of votes by

directing the Returning Officer to do so. There is no contention that the Returning Officer had rejected the application for recount of votes. It was thereafter left to be decided by ECP whether to direct the Returning Officer to recount the votes or not. ECP on its part delayed the matter and initiated inquiries into the entire process of election which, in my opinion, was not the mandate of sub-section (6) of section 95 of the 2017 Act. When an application was made to ECP it merely had to see whether the Returning Officer had proceeded in accordance with law while refusing recount of votes under the powers conferred by sub-section (5) of section 95 and no more. In any case, it could only have done so prior to completion of the consolidation proceedings on 09.02.2024 by the Returning Officer.

6. Learned counsel for the respondent No.3 as also ECP stated that the Returning Officer acted with undue haste while completing the consolidation proceedings. This gives rise to issue of administrative nature regarding which ECP can take cognizance but this will not upend consolidation proceedings and grant license to order recount of votes in contravention of subsection (6) of section 95. While issuing an order for setting up of an inquiry committee ECP suspended the notification to be issued in favour of the petitioner. It is indeed unclear whether ECP could have passed an interim order of this nature as this would be tantamount to suspending the statutory provisions of sub-section (10) of section 95 and section 98 which cannot be countenanced. In a nub, these provisions require that “on receipt of Final Consolidated Result....the Commission

shall, within fourteen days from the date of the poll, publish in the official gazette the name of the contesting candidate who has received the highest number of votes and stands elected". Thus it does not hinge on the whims of ECP but the crucial document is the Final Consolidated Result upon which the ECP has no discretion left in the matter. There is no doubt that the Returning Officer could have awaited the period prescribed for consolidation proceedings to be completed and given in proviso to sub-section (7) of section 95 but that is for ECP to instruct the Returning Officers and indeed some time must be given to ECP to exercise its powers in terms of sub-section (6). The provision for further time in this regard can only be done by an amendment in the law regarding which this Court is not empowered to issue a direction and is for the legislature to look into.

7. Learned counsel for respondent No.3 relied upon case law to argue that this Court cannot interfere at this stage while the election tribunals have been set up. Suffice to say that this aspect was ignored by ECP by prolonging the proceedings unduly as it can be seen that the hearing was conducted in the matter on 12.3.2024 and the impugned order was passed thereafter on 01.04.2024. Moreover, the challenge in this petition is to an order passed by ECP whose sufficiency in law has to be seen by this Court in the present petition. The case law relied upon is not relevant to the facts of the present case and need not be discussed.

8. In view of the above, this petition is allowed and the impugned order passed by ECP is set aside. Consequently,

the notification issued on 09.04.2024 notifying the respondent No.3 as returned candidate is also set aside.

**(SHAHID KARIM)
JUDGE**

Approved for reporting.

JUDGE

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Rafaqat Ali