IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE IQBAL HAMEEDUR REHMAN
MR. JUSTICE MAQBOOL BAQAR

CIVIL APEAL No.194 OF 2015
(Against the judgment dated 03.3.2015 passed by the Election Tribunal, Hyderabad in Election Petition No.3 of 2013)

Jam Madad Ali ... Appellant

Versus

Asghar Ali Junejo and others ... Respondents

For the appellant: Mr.Makhdoom Ali Khan, Sr.ASC
Mr.Tariq Aziz, AOR.

For respondent No.1: Dr. Farough Nasim, ASC
Mr. Mahmood A.Sheikh, AOR

Date of hearing: 12.11.2015

JUDGMENT

MAQBOOL BAQAR, J.- The appellant, through the instant appeal, has challenged the judgment dated 03.3.2015 passed by the learned Election Tribunal, Hyderabad ('the Tribunal') whereby Election Petition No.3 of 2013 preferred by respondent No.1 ('the respondent') was allowed and the respondent was declared returned candidate from PS-81, Sanghar-IV.

2. The relevant facts of the case, in brief, are that the appellant contested election from the above constituency and having received 35,548 votes won the election held on 26.6.2013. Respondent, the runner-up, received 34,175 votes. On 28.6.2013, the respondent made an application to the Returning Officer ("R.O") for a re-count in respect of thirty (30) polling stations specified therein, on the grounds that his Polling Agents were forcibly removed from various polling stations particularly from the

said thirty (30) polling stations which were situated in the areas dominated by the appellant, and that the concerned Presiding Officers ("P.O.") did not perform their duties regarding the conduct of the vote count, and no action was taken by them on the complaint of the respondent, though in terms of section 38(1) of the Representation of the Peoples Act, 1976 ("the ROPA"), the P.Os. were required to count the votes in presence of the candidate's polling agents. It was pointed out that the statements of count do not bear the signatures of the respondent's polling agents as required under section 38(13) of the ROPA. The application was dismissed by the R.O. through order dated 28.6.2013. The R.O. after counting the votes and consolidating the result declared the appellant as the returned candidate. Notification to such affect was issued by the Election Commission of Pakistan ("ECP") on 01.7.2013. On 02.7.2013 the respondent filed an application for re-count under section 39(6) ROPA before the ECP.

3. On 28.8.2013, the respondent through the afore-noted election petition challenged the result of the above election before the Tribunal and sought order, inter alia, directing the ECP to carry out a recount in respect of the said thirty (30) polling stations, on the grounds that the appellant in collusion with the officers of the ECP, the Local Administration and, the Arm Forces deputed to monitor the bye-election resorted to illegal and corrupt practices and rigged/manipulated the electoral process in his favour. It is specifically alleged that the polling agents of the respondent were removed from the polling stations and were prevented from participating in the vote count and consolidation of the result. No notice as required under section 39 of the ROPA was issued by the R.O. The provisions of the ROPA were violated by the concerned functionaries. That rejected votes were counted as valid

votes in favour of the appellant and that the votes polled at a number of polling stations were more than the votes assigned to those polling stations. The election results are infested with interpolation.

4. Through his written statement, the appellant denied the various allegations contained in the petition. Through order dated 16.9.2013, the ECP, in view of the pendency of the above election petition and at the request of the respondent disposed of the re-count application with an observation that the Tribunal shall dispose of the petition expeditiously. On 16.1.2014, the respondent filed an application before the Tribunal seeking a recount of the votes from the aforesaid thirty (30) polling stations under section 46 of the ROPA. The application was resisted by the appellant who filed a counter-affidavit thereto. By order dated 03.6.2014, the Tribunal allowed the application and ordered the recount to be conducted by the District Returning Officer ("DRO")/the District and Sessions Judge, Sanghar, along with the Returning Officer and a nominee of the ECP. After concluding the re-count, as mandated, the DRO submitted his report, which report disclosed that a large number of ballot papers/votes recovered from the envelopes of the valid votes of the appellant and the respondent, bore double seals/stamps, rendering such votes/ballot papers invalid, leading to their exclusion in the recount. It also disclosed that a good number of the polling bags and the envelopes containing votes were found to not have been properly sealed, and that a substantial number of the envelopes, containing the votes of the two candidates in various polling bags were torn. On 26.8.2014, the appellant, in view of the above observations contained in the report, made an application to the Tribunal to summon the DRO, R.O., and the Presiding Officers of

the said thirty (30) Polling Stations, and also sought production of all the votes casted at the above polling stations along with the relevant Form XIV, and certain correspondence between the R.O. and the concerned Deputy Commissioner and the Mukhtiarkar for securing the premises where the aforesaid election record was stored. Through order dated 21.10.2014, the Tribunal, whilst disposing of the said application, summoned only the DRO and declined to summon the other officers. The DRO appeared before the Tribunal and produced his report. He was cross-examined by the appellant as well as by the respondent. Whereafter the appellant filed an application for sending the ballot papers rejected during the recount for forensic test, so that it may be verified as to whether same or different ink and/or seals have been used for the two impression found on each of the rejected ballot paper. The Tribunal, however, dismissed the application. The appellant and so also the respondent examined only themselves, they did not produce any other witness. After hearing the parties, the Tribunal through the impugned judgment accepted the respondent's election petition and declared him as the returned candidate.

5. Mr. Makhdoom Ali Khan, the learned Sr. ASC for the appellant submitted that the impugned judgment is solely based on the re-count carried out by the DRO in pursuance of the Tribunal's order dated 03.6.2014. He submitted that in the facts and circumstances of the case, the Tribunal ought not to have exercised the power under section 46 of the ROPA for recount of the ballots, as such could have been done only on the basis of some *prima facie* evidence justifying the exercise of power under the said provision. Whereas in the present case, the application was granted prematurely, without recording any evidence justifying the recount. He submitted that to allow a recount as a matter of

course tantamounts to permitting a rowing inquiry. The learned counsel further submitted that even where the result of a recount may be founded on authentic, reliable and unadulterated material, and which result may essentially entail consequences of altering the earlier count/result, such result also be taken into consideration as being of any consequence, only where the recount has been conducted in pursuance of an order of the Tribunal which meets the criteria for such order as prescribed by this Court. He emphasized that no recount can be ordered, unless at least a prima facie case is made out on the basis of evidence recorded by the Tribunal. However, neither was/is any evidence or even any material available in this case which could have justified a recount nor the result/findings of the recount/inquiry could even otherwise be relied upon and/or made basis for the impugned judgment. Elaborating his arguments Mr. Khan submitted that the vote count in favour of the appellant has been reduced by excluding the ballot papers/votes bearing double stamps/seals, one over the appellant's election symbol and the other on that of some other contestant. However, there is admittedly no evidence to show that the second stamp was affixed at the time the polling was carried, and that it was not done after announcement of the result. He submitted that it is wholly inconceivable that double stamping on such a massive scale, would go unnoticed by the polling staff and/or the contesting candidate and/or their agents, and such ballots would be counted and secured as valid votes without a demur. Mr. Khan further submitted that in the facts and circumstances of the case heavy onus lay on the respondent to prove that in fact the double stamping occurred at the time of casting the ballot and not after the polls. He argued that proving the allegation of double stamping at the time of polling/casting

became all the more necessary for the reason that never at any stage before the recount the respondent alleged any double stamping. In fact absolutely no complaint was made either by the respondent or any of his polling or election agent regarding any double stamping and/or any other malpractice during the polling or in respect of the entire election process, till the time he made an application to the Returning Officer for the recount on 28.6.2013, even in the said application also and till the conclusion of the recount the respondent did not allege any double stamping. As to the respondent's allegation that his agents were removed from the polling stations and not allowed to participate in the vote count or the consolidation of the result, the learned counsel submitted that the same is evidently incorrect and unfounded as admittedly neither any complaint was made by anyone nor has any material been placed on record to show that any such complaint or protest in any manner was made. Mr. Khan further submitted that in order to prove that his agents were prevented from participating in the vote count and its consolidation and/or that the double stamping in fact occurred during the polling, the respondent ought to have examined the concerned Presiding Officers and should have summoned the relevant record for scrutiny, however, far from doing so, the respondent in order to prevent the Tribunal from coming to the right conclusion regarding the manipulation carried out by him and/or on his behest, even resisted the appellant's application for summoning the concerned POs and RO and also the application for seeking forensic testing of the ballot papers containing double stamps/seals. The learned counsel submitted that the appellant through his letter dated 04.7.2012 expressed his apprehension regarding such tampering/manipulation and has requested the R.O. to secure the record, however nothing was done

to prevent the tampering and to secure the record. In order to show that the strong room of the sub-treasury Khipro where the relevant record including the ballots papers was stored, was not a fully secured place, the learned counsel referred to the letter dated 26.7.2014, addressed by Sr.Civil Judge, Khipro, the concerned R.O., to the Deputy Commissioner, Sanghar, whereby he sought immediate repair of the ventilator of the strong room, which as noticed by the RO, at the time of storing back the relevant record after the recount, was without the necessary penal/shutter, and the cavity was blocked only by placing loose bricks therein. Mr. Khan submitted that in fact, as noted by the R.O. in presence of the parties and/or their representatives, not only a good number of ballot bags were found unsealed or improperly sealed, but a large number of envelopes containing the valid votes were either without seals or were torn. He submitted that although the respondent alleged that his polling agents were removed from the polling stations but has not even filed any authorization letter issued by him in favour of his purported polling agents and has failed to furnish any list of polling agents and that out of the two agents whose names the respondent disclosed, he filed affidavit of only one but did not produce even that single agent. In support of his contention that recount of the votes secured in an election can only be allowed by the Tribunal where evidence making out a *prima facie* case for a recount is recorded, not otherwise, relied upon following judgments:

- *KANWAR EJAZ ALI VS. IRSHAD ALI AND 2* OTHERS **(PLD 1986 SC 483)**
- *SARDAR ABDUL HAFEEZ KHAN VS. SARDAR MUHAMMAD TAHIR KHAN LONI AND 13 OTHERS* **(1999 SCMR 284)**

6. On the other hand, Mr. Farough Nasim, the learned counsel for respondent No.1 submitted that in the facts and

circumstances of the case, the order for recount as passed by the learned Tribunal was/is the only order that could have been lawfully passed on the respondent's application. He submitted that the contents of the election petition as well as the respondent's application for the recount, spelt out valid grounds which were adequately supported by relevant material. He submitted that the count and the consolidation of the election result in the absence of the respondent and his election/polling agents is clearly violative of the mandate of sub-section (1) and (2) of Section 38 of the ROPA which requires such presence and that the PO shall provide reasonable facility to the contesting candidates and their agents to observe the count. He further submitted that although in terms of sub-section 13 of Section 38 of the ROPA, the POs were required to obtain signatures of the candidates or his election/polling agent on the statement of the vote count, however not a single such statement bear any signature of the respondent or his polling/election agent which clearly show that the counting and the consolidation of the result has been conducted in their absence. Mr. Nasim further submitted that no notice of the day, time and place fixed for consolidation of the result was served on the respondent or his agents, and thus by preventing/avoiding the presence and the participation of the respondent and his agent, the polling staff in collusion with the appellant massively tampered the ballot papers and manipulated the election result as discovered during the recount which clearly revealed that invalid votes bearing double stamps were counted and secured in favour of the appellant, thus giving him an undue edge/margin over the respondent and turning his defeat into a victory against the respondent. The learned counsel submitted that it is wholly contrary to the settled principle and our jurisdictional norms to

argue that a recount can be ordered by the Tribunal only on the basis of some evidence recorded by it. He submitted that neither such is the requirement under the relevant provisions of law nor is it in consonance with the principles of equity, fair play and justice and the same also militates against the principle of reasonableness. He referred to section 38(5)(b) of the ROPA which empowers the PO to conduct recount either on his own motion or upon the request of the contesting candidate where such request is not unreasonable, and submits that reasonableness is the only criteria laid down by law for the recount. He submitted that similarly in exercise of its powers under section 46 of the ROPA, a Tribunal also can order a recount where doing so is found reasonable by the Tribunal, and as to whether it would be just, proper and reasonable to allow a recount, can be decided keeping in view as to whether adequate statement of material fact along with supporting prima facie material has been furnished. Whereas in the present case, the respondent not only furnished adequate statement of material fact in his memo of appeal as well as in his application for the recount to the RO as noted earlier, but also annexed photocopies of a bulk of the relevant statement of count (Form XVI) which purport to show that at various polling stations 100% of the votes assigned thereto were purportedly casted and counted and at some stations the counting as recorded in the said statements was more than 100% of the assigned votes. He submitted that in addition to the above, in a number of form XIV though absolutely no votes were shown/recorded in favour of any of the candidates however strangely the total count of the casted votes was recorded in hundreds. Whereas in a good number of statements of count/form XIV, interpolation/re-writing in the relevant column/relevant figure of counts of the votes is clearly

visible. He submitted that in the face of such material refusal of recount would have been wholly illegal, unjust and unfair and the Tribunal was thus not left with any choice but to order recount. In order to substantiate his above allegation regarding the anomalies, discrepancies and interpolation reflected in the statement of count/form XIV, the learned counsel referred to copies of various such forms. In support of his contentions that recording of evidence justifying the recount is not always essentially required by the Tribunal to order recount. Mr. Nasim referred to and relied upon following cases:-

- *MEHR KHALIQ YAR KHAN VS. CH. GHAYAS AHMAD MELA AND OTHERS* **(2011 CLC 1515)**
- *T.A. AHAMMED KABEER VS. A.A.AZEEZ AND OTHERS* **(AIR 2003 SC 2271)**
- *BHABHI VS. SHEO GOVIND AND OTHERS* **(AIR 1975 SC 2117)**

7. Heard the learned counsel for the parties and perused the record with their assistance.

8. The basic questions involved in this case are, *firstly* as to whether the order dated 03.6.2014 passed by the learned Tribunal for recount of the votes was lawful, appropriate and justified in the facts and circumstances of the case and *secondly*, as to whether the report submitted by the DRO in pursuance of the above order furnished adequate/lawful basis for declaring the appellant's election as void and for declaring the respondent as the returned candidate in place of the appellant.

9. The purpose of a recount in an election dispute 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 to frustrate the will of the people as expressed through the election and also in order to avoid creating an incentive for the loosing

candidates to in any way, indulge in post poll tampering or manipulation of the election record, a conscious effort is to be made that it is only in the circumstances which clearly justify, rather demand a recount, that the recount is allowed. As to what should be the criteria or the essential pre-requisites for satisfying the conscience of the Court for permitting a recount, perusal of the case law laying down our jurisprudential principles in this regard, would show that the minimum criteria is that there should be specific allegation of tampering, manipulation and maneuvering in very clear terms along with the necessary details and *prima facie* material supporting such allegations. It should also be kept in mind that secrecy of the ballot should not be violated on the basis of frivolous, vague and totally unfounded allegations and that the primary object should be to do full justice in the matter. The learned Tribunal should also be mindful that the discretion to exercise power of recount may not be exploited for a roving inquiry to fish out material for reversing the election or for declaring it void and thus it should be seen that as to whether in view of the statement of material fact, and the material placed before the Tribunal the request is fair and reasonable or not.

10. We have perused the judgments relied upon by the learned counsel for the parties have noted that in the case of Kanwar Ejaz *(supra)* the only ground urged before this Court was that the difference of votes between the successful candidate and the runner-up (appellant) was of just 707 votes whereas the allegation of the appellant that his polling agents were not allowed to sit at the polling stations and one sided votes were casted in favour of the winning candidate in their absence, was rejected by the Tribunal and the Tribunal also held that no corrupt practice was established against the respondent and that the allegations

contained in the application for recount were found to be vague. It also seems that the order rejecting the application for recount was also founded in the fact that though evidence was adduced before the Tribunal however the appellant could not establish any allegation made in support of his request for recount. This court thus expressed agreement with the observations of the election Tribunal that the request for recount was not reasonable and upheld its rejection.

11. In the case of Sardar Abdul Hafeez Khan *(supra),* this Court, whilst observing that section 46 of the ROPA confers an inclusive and wide discretion on an Election Tribunal to order opening of packets of counterfoils and certificates or the inspection of any counted ballot papers, held that Tribunal should have some basis for taking such recourse to its exclusive and essentially discretionary power under the said provisions, opening the way to a recount. Thus, it would be for the petitioner in the election petition to lead initial evidence for the Tribunal to take resort to power under the said provision. It is only then that the Tribunal may summon the relevant record and examine the corresponding official witnesses at the petitioner's behest, unless, of course, the Tribunal is acting Suo Motu in the midst of the petition, something which does not appear to be precluded.

It can thus be seen that recording of evidence is not essentially required by a Tribunal to pass an order for a recount as the Tribunal may on its own also order a recount.

12. In the case of Sahibzada Muhammad Nazeer Sultan v. Saima Akhtar Bharwana and others (PLD 2007 Lhr 141) referred to in the case of Mehr Khaliq Yar Khan *(supra)* the learned Lahore High Court laid down that the power to order recount is to be exercised by the Tribunal on the basis of some material prima facie

establishing illegalities and irregularities in the count of the polled votes and further that such power of the Tribunal is quite exclusive which it is to be exercised sparingly after satisfaction of the material/evidence that there had been wrong inclusion and exclusion of the ballot papers in the count.

13. In the case of Bhabi *(supra)*, the Supreme Court of India laid down the following criteria for permitting a recount in an election matter:-

> "*15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative before a Court can grant inspection, or for that matter sample inspection, of the ballot papers:*
>
> *(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;*
>
> *(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;*
>
> *(3) The Court must be prima facie satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;*
>
> *(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;*
>
> *(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void;*"

14. The present case, however, does not meet the criteria as prescribed through the afore discussed pronouncement. *Firstly*, neither the memo of the election petition, nor the application for recount contain any specific allegation of tampering and/or manipulation against the appellant, nor any *prima facie* material supporting the allegations justifying the request for recount was furnished. The memo only contained generalized allegations of illegal and corrupt practices and rigging/manipulation of the electoral process. There is also a vague allegation that the polling

agents of the respondent were removed from the thirty (30) polling stations for which recount was requested, however, there again no details were spelt out. As can been seen from the order for the recount, the learned Tribunal was persuaded to pass the order on the basis of the statement of count/form XIV, in respect of four polling stations. The two such statements/forms which pertain to polling station Nos.6 and 16, respectively, showed that 100% of the votes assigned to the said two polling stations were polled at the said stations, inasmuch as the number of votes mentioned in the column provided for the number of votes assigned to the polling station at the top of the statements showed 543 and 1337 votes respectively, whereas the said figures were in fact the count of the votes casted at the said two polling stations, however, it was due to sheer inadvertence that the P.Os. inserted the above figure in the column for the votes assigned to the said two polling stations. Such is evident from the fact that the same figures are mentioned as of the votes casted in the relevant column at the bottom of the statements. Furthermore, as evident from the gazetted list of polling stations the number of votes assigned to the said two polling stations were in fact 1041 and 1977 votes respectively and not 543 and 1337 as mistakenly mentioned by the P.O. The total number of votes at the polling station in question were, thus far higher than the number of votes cast and the Presiding Officers had simply committed a clerical error by recording the number of votes cast as the number of votes assigned to the polling station. Similarly, in respect of the other two polling stations being, Polling Station No.18 and 115, where the learned Tribunal presumed casting of votes in excess of the registered votes, it did not examine the gazetted list of polling stations through which it could have easily been confirmed that there was no excess casting at all. In PS

No. 18, the Presiding Officer recorded the total number of votes assigned to the polling station as 437 which in accordance with gazetted list of polling stations should have been 807 and the total number of votes polled by the contesting candidates, including the challenged vote was 437. He then added the total number of doubtful votes 17, excluded from the count to the total number of votes polled including the challenged votes, and recorded the aggregate of 454 as the “Number of votes polled”. Since this figure now included the excluded votes, the number of polled votes exceeded the figure recorded as the total votes assigned to this polling station. However, a glance at the Form XIV would clearly show that this is nothing more than a clerical mistake. The Presiding Officer added the valid and invalid votes, the sum of which exceeded the figure he had recorded as the total votes assigned to the polling station, which was itself an incorrect figure since the total number of votes registered at this polling station was much higher than figure mentioned in Form XIV. The same clerical mistake was made by the Presiding Officer of Ps No. 115 though it was made only on the second sheet of Form XIV, yet the Tribunal missed the first sheet of Form XIV on which the correct numbers were recorded. The issue could have been easily resolved by referring to the gazetted list of polling stations which clearly established that the total number of votes assigned to PS No. 18 and 115 were 807 and 1167 respectively, which far exceeded the number of votes cast.

15. Mr. Farough Nasim, the learned counsel for the respondent, in his endevour to show that there was adequate material available before the learned Tribunal justifying the recount, took us to various statements of counts/form XIV, which broadly falls in four categories. The first are the statements

wherein the number of votes assigned and the number of votes casted, as recorded, are even. The second category is of the statements where the number of votes casted has been recorded in excess of votes mentioned as votes assigned. Third is the category where no votes have been shown to have been secured by any of the candidate mentioned therein but the number of votes mentioned in the column for the total votes secured are in hundreds and in the forth category, there are certain overwriting/ interpolations.

16. So far as the first two categories which purportedly show that 100% and more than 100% of the votes assigned have been casted, the said misconception has already been dealt with in the foregoing paragraphs which leave not doubt that it was by way of a sheer mistake that the figure of the number of vote casted were also shown as the number of the votes assigned although in fact the votes assigned to the said polling stations were far larger than the votes casted. As regards the third category of the statements, as rightly pointed out by Mr. Makhdoom Ali Khan, the learned counsel for the appellant, we have noted that these infact are the second pages/sheet of the statement/form XIV which does not contain the names of all the contesting candidates, and the names of the remaining candidates are mentioned at the first page/sheet of the relevant statement/form, which candidate in fact secured certain numbers of votes as mentioned in the relevant column at the first page/sheet, total whereof has also been mentioned in that page/sheet which total has been brought over to the second page/sheet i.e. the page/sheet in question, showing the total number of votes polled at that particular polling station and therefore, it is wrong to say that hundreds of votes have been shown as casted/polled at the polling station where absolutely no

vote was casted. A close scrutiny of the last category of the statements clearly show that corrections there have been made in the figure of the total count as the same did not tally with the actual correct totaling of the votes recorded as casted in favour of various candidates in the relevant columns, as the corrected figures are found in consonance with the number of votes shown as secured by the various candidates in the relevant columns.

17. From the foregoing analysis, it is now abundantly clear that the material placed before and relied upon for the recount order in fact did not provide a slightest justification for the recount.

18. Now coming to the question as to whether the report submitted by the DRO in pursuance of the recount order justified passing of the impugned judgment. It may be noted that at no point in time from the polling day and up to the recount, the respondent alleged any double stamping. It is wholly inconceivable that the ballots infested with double stamping would not have been noticed by any of the polling staff or the various candidates and their agents and that such ballot papers could be counted and secured in favour of a candidate without a demur. There is no evidence in support of the allegation that the respondent's agents were removed from the polling stations or were prevented from observing the counting of the ballots or the consolidation of the result. There is absolutely no proof at all, of the respondent making any complaint of the removal of his agents. The respondent far from examining the concerned P.Os., and/or any other witness, to prove his allegation and to demonstrate that the ballots excluded in the recount on account of double stamping were in fact so stamped at the time of polling and not afterwards, even resisted the appellant's application for summoning the P.Os., and also

opposed the application for putting the said ballot papers to forensic test to verify the type of ink and the seal used for the two stamps affixed on the ballot papers and as to when each of the two stamps were affixed. As regards Mr. Farough Nasim's submission that no notice as required in terms of section 39 of the ROPA was served on the respondent or his agents and that none of the statements of count/form XIV contains signature of the respondent or his agent. It may be noted that that such is of no consequence neither has the respondent made any specific allegation of any manipulation in the consolidation of the result nor does the DRO report reflects anything pertaining to the consolidation and in terms of section 38(13) of the ROPA, the P.O. is required to obtain signature only from such candidates or agents who may be present at the relevant time. Since it is the case of the respondent that none of his agent was available at the time of the counting and/or consolidation, there was no question that the relevant statement does not contain their signatures. The ballot bags and the envelopes containing the ballot papers infested with double stamping, were either unsealed or were not properly sealed and many of the envelopes were also found to be torn. More intriguingly, the envelopes containing the appellant's votes found torn far out numbered such envelopes of the respondent. The respondent did not produce any of his polling or election agents to prove his allegation of their removal from the polling station. He did not even produce a list of his agents or any letter of their appointment. The respondent filed affidavit only of one of his two polling agents whose names he disclosed but did not produce even the said polling agent. The appellant, before the commencement of the recounting has through letter dated 04.7.2013, expressed his apprehension that the relevant election record may be tampered

with and requested that the same be secured, but in vain. From the letter dated 26.7.2014 written by R.O., the Sr.Civil Judge, Khipro, it can be seen that the so called strong room where the relevant record was stored was not a secured place. It may also be noted that a period of more than one year has elapsed between the polling/election and the recount. In the circumstances, it cannot be said that the double stamping took place at the time of casting of ballots and not after the result was announced and there is a great probability that the second stamp on the ballot papers may have been affixed during the period after the election and the recount.

19. We have already held the order of the Tribunal for the recount of the votes to be illegal and since the very foundation of the basis for the impugned judgment have been demolished, the impugned judgment has been rendered illegal on that count alone. However, in view of the fact that it could not be proved that the ballot casted in favour of the appellant were in fact infested with double stamping at the time they were so casted and particularly in view of the fact that the respondent did not make any effort to prove that such was the case and has in fact resisted the appellant's efforts to bring forth the truth about the controversy and more so for the reason that the ballot papers were not found well secured and the ballot bags and envelopes containing the same were found unsealed and torn, the respondent can not be allowed to be benefited by the said double stamping and the same cannot provide a valid ground for de-notifying the appellant and declaring the respondent as the returned candidate.

20. In the case of Abdul Hafeez Khan *(supra)*, this Court while dealing with the situation like in the hand has held as follows:-

> *"Three cases from this jurisdiction have contextual relevance. Such are Ejaz Shafi v. Ali Ashraf Shah, PLD 1995 SC 43; Ejaz Shafi v. Ali Ashraf Shah, 1996 SCMR 605 and Iftikhar Hussain v. Ijaz Ahmad Cheema, 1996 SCMR 943. The first two of these cases involved a recount pertaining to the same election and the same constituency. Initially, the recount having taken place by an agency other than the Tribunal, the case was remanded by this Court for the Tribunal to undertake that exercise but when that happened and the proposed recount did take place, a number of votes, on account of duplicate markings, were rejected and the election result was reversed. On a repeat appeal to this Court it was found that the double markings hand, probably, occurred after the election had taken place and not at the time the poll was being undertaken. As a result, such discrepancies were discarded and the original result maintained. In the third case, the power of the Tribunal to undertake an examination of interpolations in the election record was recognized. What, therefore, has to be ensured, once powers under section 46(l) and (2) of the Act come to be exercised, is that the jurisdiction is not over-stretched, that there is a prima facie case for a recount, that recount, if allowed, takes place scrupulously, without detracting from secrecy of the ballot and, finally that it can never be ignored that during the passage of time following upon the election and the recount a number of things may happen, having potential to throw up a picture that does not, in fact, correspond with the electoral process but depicts something of a later origin. To put it differently, the power, though broad and extensive, is to be used sparingly and with circumspection, the only object being to ensure a fair and lawful result of the electoral exercise. Nothing short of that would serve the object of the legislation."*

21. Mr. Farough Nasim, learned counsel in support of his contention that during the course of recount it is revealed that a number of appellant's votes were infested with double stamps, entailing their rejection and exclusion from recount, which cannot be ignored and held inconsequential merely for the reason that such specific allegation was either not pleaded earlier or was not evident from the material placed before the Tribunal for seeking the recount, relied upon the case of T.A. Ahammed Kabeer *(supra)*. Indeed, in the said judgment it has been observed that the Court

cannot shut it eyes on the result of recount on the ground that the result of recount is at variance with the pleading, however, such has been held in respect of a recount permitted by the Court within the well settled parameters of exercising jurisdiction in this regard. Whereas as discussed above in the first place the order of recount is not founded on the above criteria and secondly, the result thereof also does not show that the double stamping revealed thereby occurred at the time of casting and not after the result was announced.

22. It was in view of the foregoing that through short order dated 12.11.2015, we allowed the appeal and set-aside the impugned judgment holding the appellant to be the returned candidate.

Judge

Judge

Judge

Islamabad the
12th November 2015
(Aamir Sh.)

'APPROVED FOR REPORTING'