

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.2978/2017
Muhammad Zakir Bandhani
Versus
Muhammad Amir Bandhani and others

Date of Hearing: 02.04.2019
Petitioner by: Mr. Arif Khan Gigyani, Advocate
Respondents by: Barrister Umair Majeed Malik for
respondent No.1

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition, the petitioner, Muhammad Zakir Bandhani, impugns the order dated 28.07.2017, passed by respondent No.12 (Election Commission of Pakistan), declaring the local body elections for the seat of Chairman, Union Council No.9 (New Goth, Sukkur) in (i) Polling Station No.1 – Government Girls Primary School (Male) and (ii) Polling Station No.2 – Government Girls Primary School (Female), to be void. Furthermore, it was directed that re-poll be conducted in the said polling stations

2. The facts essential for the disposal of this petition are that the elections for the seat of Chairman, Union Council No.9 (New Goth, Sukkur) were held on 13.04.2017. There were 8 polling stations in the said Union Council. On the election day, no complaint as to any irregularity in the election process was made by any of the candidates or their election agents. The Presiding Officers of the respective polling stations issued Form XI (statement of count) after the close of polling. As per the results in Form XI, the petitioner had emerged as the successful candidate.

3. Form XI pertaining to polling station No.1 showed that the petitioner had obtained 222 votes, whereas respondent No.1 had obtained 152 votes. As regards polling station No.2, the petitioner was shown to have obtained 106 votes, whereas respondent No.1 obtained 216 votes.

4. On 13.04.2017, the Returning Officer had also issued the unofficial results of the election according to which the petitioner

had obtained 1,076 votes, whereas respondent No.1 had obtained 888 votes in all the polling stations. This unofficial result is annexed at page 32 of the instant writ petition.

5. On 14.04.2017, respondent No.1 applied to the Returning Officer for the recount of the votes cast in Union Council No.9. The sole ground taken in the said application was that respondent No.1 had not agreed with the announcement of the election result.

6. On 15.04.2017, recount of the votes cast in the 8 polling stations was conducted. The objection was only with respect to the votes cast in polling stations No.1 and 2. The recounted votes did not tally with the result in Form XI. After the recount, the petitioner's votes in polling station No.1 came to 86 and respondent No.1's votes came to 197, whereas in polling station No.2, the petitioner's votes were 45 votes and respondent No.1's votes were 119.

7. The Presiding Officers of polling stations No.1 and 2 had also submitted their statements before the Returning Officer on 15.04.2017. As per the statement submitted by Mst. Yasmin Shah, Presiding Officer of polling station No.1, she and Mr. Salah ud Din Abbasi, Presiding Officer polling station No.2, while carrying the sealed election material from the said two polling stations in a police mobile van to the office of the Returning Officer, the air pressure in one of the tyres went low causing the van to stop. Mst. Yasmin Shah, Mr. Salah ud Din Abbasi and one constable were asked to wait on the road while the police mobile van along with the election material was sent to repair the tyre. After a while, Mst. Yasmin Shah came in a rickshaw to the office of the Returning Officer and an hour later, Mr. Salah ud Din Abbasi, Presiding Officer polling station No.2 arrived with the election material. In her statement, Mst. Yasmin Shah recorded that the election result prepared in the presence of the polling agents is absolutely correct and that she stands by the same.

8. On 15.04.2017, the Returning Officer informed the Provincial Election Commissioner that the result of the election in Union

Council No.9 had been withheld. He requested for re-polling to be conducted in polling stations No.1 and 2.

9. Vide order dated 28.07.2017, the Election Commission of Pakistan ("E.C.P.") declared the elections in polling stations No.1 and 2 to be void and directed that re-poll be conducted in the said polling stations. The said direction was issued after the E.C.P. held that *"in the absence of Presiding Officer, results of two polling stations were manipulated"* and that *"there is a big difference between the result of Form XI and the result of recounting"*. Consequently, vide notification dated 22.08.2017, the E.C.P. fixed 29.08.2017 as the date for re-polling in polling stations No.1 and 2 in Union Council No.9. The said order dated 28.07.2017 has been impugned by the petitioner in the instant writ petition.

10. Learned counsel for the petitioner, after narrating the facts leading to the filing of the instant petition, submitted that until the issuance of Form XI, no allegation or complaint was made by any of the candidates or their agents as to any irregularity in the election process; that the Presiding Officers of polling stations No.1 and 2 stood by the election result contained in Form XI; that the petitioner could not be made to suffer for any event that may have occurred after the issuance of Form XI; that respondent No.1 had filed an application for a recount on 14.04.2017 after realizing that he had lost the election; that the unofficial result declared by the Returning Officer had shown the petitioner to be the returned candidate; that the Presiding Officers had not stopped the poll at any stage; that under Rule 39(1) of the Sindh Local Councils (Election) Rules, 2015 ("the 2015 Rules"), the Presiding Officer is required to count the votes immediately after the close of the poll in the presence of such of the contesting candidates' election agents and polling agents as may be present; that under Rule 39(9) of the said Rules, the Presiding Officer is required to prepare a statement of count in Form XI immediately after the count of votes showing therein the number of valid votes polled by each contesting candidates and the ballot papers excluded from the count; that under Rule 39(5)(a) of the said Rules, the Presiding

Officer has been authorized to recount the votes if he considers it necessary; that under Rule 39(5)(b) of the said Rules, the Presiding Officer can recount the votes on the request of a contesting candidate or an election agent, if, in his opinion, the request is not unreasonable; that neither did any of the candidates nor their agents request the Presiding Officers of polling stations No.1 and 2 to recount the votes; that the recommendation of the Returning Officer for a re-poll in polling stations No.1 and 2 was without any legal basis; that a re-poll could be ordered only if the conditions set out in Rule 29 of the said Rules were satisfied; and that the decision of the E.C.P. to order a re-poll in the two polling stations was without any lawful authority.

11. Learned counsel for the petitioner further submitted that the sanctity of the election result contained in Form XI is to be respected; that only the Election Tribunal had been empowered to order a re-poll; that the Returning Officer has not been empowered under the law to recommend re-polling at certain polling stations; and that as per the statement dated 15.05.2017 of the Returning Officer, a law and order situation had been created by a crowd of people in support of the application for recount, and that if such an application was not considered, bloodshed might have occurred. Learned counsel for the petitioner prayed for the writ petition to be allowed and for the impugned order dated 28.07.2017 passed by the E.C.P. to be set-aside.

12. On the other hand, learned counsel for respondent No.1 submitted that the order of the Returning Officer for the recount of the votes was not challenged by the petitioner; that the petitioner, in these proceedings, cannot throw a challenge to the recounting process; that the petitioner and his representatives had participated in the recounting process without any demur or reservation; that since the election material pertaining to polling stations No.1 and 2 after the issuance of Form XI had not remained in safe custody, the possibility of tampering with such material could not be eliminated; that there was a clear disparity as to the count of votes cast in polling stations No.1 and 2 between Form XI

and the result of the recount; that as per result of the recount in the said polling stations, the votes of respondent No.1 increased by virtue of which he was liable to be declared as a returned candidate; and that the recommendations of the Returning Officer and the decision of the E.C.P. to conduct a re-poll in polling stations No.1 and 2 do not suffer from any legal infirmity so as to warrant interference in the Constitutional jurisdiction of this Court. Learned counsel for respondent No.1 prayed for the writ petition to be dismissed.

13. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance.

14. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 9 above, and need not be recapitulated.

15. The vital question that needs to be determined is whether the impugned order dated 28.07.2017, passed by the E.C.P. suffers from any jurisdictional irregularity so as to warrant interference in the Constitutional jurisdiction of this Court. In essence, the E.C.P. has directed re-poll to be conducted on two out of eight polling stations in U.C. No.9.

16. The elections to the local bodies/union councils in the Province of Sindh are conducted under the provisions of the Sindh Local Government Act, 2013 ("Sindh L.G. Act") read with the 2015 Rules. As mentioned above, on 15.04.2017, the Returning Officer had conducted re-count of the votes cast in all the eight polling stations in U.C.No.9. This re-count was conducted after respondent No.1 had filed an application for the recount of the votes on the ground that he had not agreed with the announcement of the election result. The statement dated 15.05.2017 of the Returning Officer shows that a law and order situation had been created by a crowd of people outside the office of the Returning Officer seeking the application for the recount to be entertained.

17. Rule 40(4)(a) of the 2015 Rules provides that the Returning Officer may recount the ballot papers upon the request of, or challenge in writing made by, a contesting candidate or election agent, if the Returning Officer is satisfied that the request or the challenge is reasonable. Since the Returning Officer's decision to recount the votes had not been challenged by any contesting candidate, I do not feel the need to give my opinion on the legality of the Returning Officer's decision to recount the votes.

18. The Returning Officer, in his letter dated 15.04.2017 to the Provincial Election Commissioner, had requested for re-polling to be conducted on polling stations No.1 and 2. It is an admitted position that the consolidation of votes polled in the elections held on 13.04.2017 had not taken place. Furthermore, the Returning Officer had withheld the result of the elections in the said two polling stations. It was in these circumstances that the matter came before the E.C.P., which agreed with the request made by the Returning Officer to conduct a re-poll on the said two polling stations.

19. The power of the E.C.P. to order a re-poll is derived from the substantive provision i.e., Rule 29(2) of the 2015 Rules. The said Rule places certain conditions which have to be satisfied before an order for a re-poll can be passed. It may be explained that Rule 29(1) of the said Rules provides that the Presiding Officer of a polling station shall stop the poll and inform the Returning Officer that he has done so if (a) the poll at the polling station is, at any time so interrupted or obstructed for reasons beyond the control of the Presiding Officer that it cannot be resumed during the polling hours or (b) any ballot box used at the polling station is unlawfully taken out of the custody of the Presiding Officer, or is accidentally or intentionally destroyed or lost, or is damaged or tampered with to such an extent that the results of the poll at the polling station cannot be ascertained. Rule 29(2) of the 2015 Rules provides that where a poll has been stopped under Rule 29(1), the Returning Officer shall immediately report the circumstances to the Election Commission through District Returning Officer and it

shall direct a fresh poll at the polling station, unless it is satisfied that the result of the election has been determined by the polling that has already taken place at that polling station taken with the results of the polling at other polling stations in the same election unit.

20. It is not disputed that at no material stage on the election day did the Presiding Officers of polling stations No.1 and 2 stop the poll either for the reason that the poll had been interrupted or obstructed or that any ballot box used at the polling station had been unlawfully taken out of the custody of the Presiding Officer at the polling station. Under Rule 29(2) of the 2015 Rules, the Election Commission can direct a fresh poll at a polling station only *“where a poll has been stopped”* under Rule 29(1). Since polling at polling stations No.1 and 2 had not been stopped by the Presiding Officers on the election day, it is my view that the essential condition for ordering a re-poll under Rule 29(2) of the 2015 Rules had not been satisfied.

21. Although after the close of the poll and the issuance of Form XI, the election material contained in the sealed bags had not remained under constant custody of the Presiding Officers until they were brought to the Returning Officer, it is an admitted position that the Presiding Officers had not stopped the poll on account of any ballot box used at the polling station being unlawfully taken out of the custody of the Presiding Officer or accidentally or intentionally destroyed or lost or damaged or tampered with. Therefore, the second condition for ordering a re-poll had also not been satisfied in the case at hand.

22. Section 71 of the Sindh L.G. Act provides that *“[s]ave as provided under this Act, the provisions of the Representation of People Act, 1976 shall be applicable to the elections and electoral process under this Act.”* Although by virtue of Section 71, the provisions of the Representation of People Act, 1976 (“R.O.P.A.”) have been made applicable to the elections and the electoral process under the Sindh L.G. Act, however, the provision of R.O.P.A. will not apply to those aspects of the elections and

electoral process for which specific provisions exist in the Sindh L.G. Act and the rules made thereunder. Since Rule 29 of the 2015 Rules is a specific provision applicable to the re-poll in polling stations, the provisions of R.O.P.A. pertaining to re-poll would not apply. This is implicit by the employment of the expression *“save as provided under this Act”*. This Court, vide judgment dated 25.04.2019, passed in election appeal No.01/2016 titled *“Chaudhary Wajid Ayub and another Vs. Malik Rizwan Ahmed and others.”*, while interpreting Section 17(3) of the Islamabad Capital Territory Local Government Act, 2015 (*“I.C.T. L.G. Act”*), which is similar in nature to Section 71 of the Sindh L.G. Act, held *inter-alia* that *“in the event of a conflict between the provisions of R.O.P.A. and the provisions of the I.C.T. L.G. Act or the Rules made thereunder, the latter shall prevail as regards the elections of the Local Governments.”* Furthermore, it was held as follows:-

“Section 17(3) of the I.C.T.-L.G. Act cannot be interpreted such that provisions of the I.C.T.-L.G. Act are overridden in their entirety by the provisions of R.O.P.A. It is only when a certain scenario or process or eventuality is not specifically provided for in the I.C.T.-L.G. Act or the 2015 Rules that the provisions of R.O.P.A. will apply “for the purpose of election” to the Local Governments by dint of Section 17(3) of the I.C.T.-L.G. Act.”

23. Section 44 of the Sindh L.G. Act provides that *“[i]n addition to the powers and functions of the Election Commission under this Act, the Election Commission shall, in relation to the elections of the Councils, exercise such other powers and perform such other functions as may be prescribed.”* Section 3(iii) of the Sindh L.G. Act provides that the term *“prescribed”* means *“prescribed by the rules”*. The 2015 Rules were made by the Government of Sindh in exercise of the powers conferred by Section 138 of the Sindh L.G. Act. It is well settled that rules have the status of subordinate and delegated legislation deriving authority and legal cover from the provisions of the statute under which they are framed. It is also well settled that rules have the same force as the provisions of the statute under which they are framed, and have to be treated as a part of the parent Act. Reference in this regard may be made to the judgments in the cases of Khawaja Ahmad Hassaan Vs.

Government of Punjab and others (2005 SCMR 186) and Ubedullah Khan Vs. Muhammad Ayoob (2003 YLR 1555). Since Rule 29(2) of the 2015 Rules specifically empowers the E.C.P. to order a re-poll in polling stations, but only where the conditions set out in Rule 29(1)(a) and (b) are satisfied, a re-poll could not have been ordered by the E.C.P. without advertent to the question as to whether the Presiding Officer of polling stations No.1 and 2 had stopped the polls either due to the interruption or obstruction of the poll or due to the ballot boxes being unlawfully taken out of the custody of the Returning Officer or accidentally or intentionally destroyed or lost or damaged or tampered with.

24. Be that as it may, in the context of the Punjab Local Government Act, 2013, of late, the Hon'ble Supreme Court in the case of Ameer Haider Sangha Vs. Sumaira Malik (2018 SCMR 1166) held that E.C.P. did have the jurisdiction and power to order a re-poll before it had issued a notification declaring the winning candidate. In this regard, paragraph 10 of the said report is reproduced herein below:-

"10. Article 222 of the Constitution enables the concerned legislature to make laws in respect of election matters, however, this Article concludes by stipulating that, "no law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission." Therefore, we need to examine the powers of the Election Commission. The Election Commission is required to hold local government elections (Articles 140A and 219(d) of the Constitution) and to organize and conduct them by making "such arrangements as are necessary to ensure that elections are conducted honestly, justly, fairly and in accordance with law, and that corrupt practices are guarded against" (Article 218(3) of the Constitution). The powers of the Election Commission which are mentioned in the Constitution neither stipulate nor require nor are dependant on the legislature granting, amongst others, specific powers to the Election Commission to order a re-poll. Section 103AA of the Representation of the People Act, (which is applicable in respect of elections to the National Assembly and the Provincial Assemblies) grants the Election Commission the specific power to order a repoll. Much has been made of the fact that such specific power has not been given to the Election Commission by the Act. However, from this it cannot be inferred that the Election Commission does not have such power, particularly when the Constitution gives the Election Commission general and wide powers to conduct elections (as noted above). The Act does grant the Election Commission the power to order a re-poll, not in such specific terms as mentioned in the said section 103AA, but by

exercising general powers granted by the Act and the Rules which bring about the same result."

25. Under Rule 40(1) of the 2015 Rules, the Returning Officer is required to give the contesting candidates and their election agents a notice in writing of the day, time and place for the consolidation of the results, and, in the presence of the contesting candidates, and election agents as who may be present, consolidate in the prescribed manner, the results of the count furnished by the Presiding Officers. Rule 40(2) of the 2015 Rules provides that the consolidation proceedings shall be held without any avoidable delay as soon as possible after the polling day.

26. It is an admitted position that in the case at hand, the consolidation of results has not taken place. Only the unofficial result was issued by the Returning Officer on 13.04.2017. This unofficial result cannot be termed as the consolidation of results.

Section 46(1) of the Sindh L.G. Act provides that an election to an office of a Council shall not be called in question except by an election petition. Additionally, Rule 60(1) of the 2015 Rules provides that no election shall be called in question except by an election petition made by a candidate or panel for that election. More importantly, Rule 60(2) of the 2015 Rules provides *inter-alia* that an election petition shall be presented to the Tribunal within forty five days of the publication of the names of the returned candidates in the official Gazette. Since in the case at hand, neither has the consolidation of results taken place nor has the name of the returned candidate been published in the official Gazette, the question of taking the dispute which is the subject matter of the instant petition to the Tribunal by filing an election petition under Chapter VII of the 2015 Rules did not arise.

27. The petitioner had acquiesced to the recount of votes and had participated in that process without any demur or reservation. At least no objection on the part of the petitioner to the recount of votes on the record. The recount of votes of polling stations No.1 and 2, produced a result which is not in conformity or consistent with the result of polls in the said polling stations contained in

Forms XI. This disparity created a doubt in the mind of the Returning Officer as to the legality of the process of the election in the said polling stations. Consequently, he requested the E.C.P. to conduct a re-poll in the said polling stations. I am of the view that given the disparity in the result of the recount and the result contained in Forms XI pertaining to polling stations No.1 and 2 the only way forward for the E.C.P. was to have ordered a re-poll in the said polling stations. Therefore, the E.C.P. was justified in ordering a re-poll at the two polling stations. This is moreso since the dispute could not have been agitated before the Election Tribunal through an election petition, because the consolidation of the results had not taken place and the name of the returned candidate had not been published in the official Gazette.

28. In view of the above, I do not find any merit in this petition, which is accordingly dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 13/05 2019

(JUDGE)

*Qamar Khan**