

JUDGMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P No.1132 of 2012

Homoeopathic Dr. Faisal Saleem

Vs.

Federation of Pakistan etc.

PETITIONER BY: Mr. Amir Abdullah Abbassi, Advocates
RESPONDENTS BY: Ch. Mushtaq Hussain, Advocate for
respondent No.2.
M/s M. Arbab Alam Abbasi, & M. Islam
Sindhu, Advocates for respondent No.3
DATE OF DECISION: 16-05-2012.

SHAUKAT AZIZ SIDDIQUI; J: Petitioner invoked the constitutional jurisdiction of this court by way of filling instant writ petition with the following prayer:-

"It is, therefore, respectfully prayed that this Writ Petition may kindly be accepted and the acts of the Respondents to recounting of the votes behind the back of the successful petitioner, cancellation of the Notification dated 20.03.2012 in favour of the petitioner and declaring the Respondent No.3 as successful candidate vide Notification dated 12.04.2012 are illegal, null & void, coram non-judice, without any authority and justification, based on malafide intention and ulterior motives, having no legal effects.

The Impugned Notification No.SRO.373(I)/2012 Dated 12.04.2012 in favour of the Respondent No.3 be declared as illegal, null and void, without any authority & justification, based on malafide and is liable to be cancelled and set-aside.

Any other relief which this Honourable Court deems appropriate may also be awarded to the petitioner".

2. AND presented the facts, as under:-

The National Council for Homoeopathy (NCH) is a body corporate established under Section 3 of the UNANI, AYURVEDIC AND HOMOEOPATHIC PRACTITIONERS ACT, 1965 called as UAH ACT 1965.

3. The NCH consists of 21 members elected and nominated in accordance with Section 5 of UAH Act 1965 and the term of the office of the members is five years. The Elections of National Council for Homoeopathy were held on 13.03.2012 and the petitioner was elected as Member NCH. After elections, result of the NCH was compiled and forwarded by the respondent No.2 to the respondent No.1 in accordance with Rule-29 and 30 of Unani Ayurvedic and Homoeopathic System of Medicine Rules, 1980. Respondent No.1 also issued Notification dated 20.03.2012 and declared the petitioner as a successful candidate at Serial No.5. In pursuance of this Notification, petitioner was issued a letter dated 21.03.2012 calling upon him to attend the meeting. Petitioner came to Islamabad and made Resolution dated 30.03.2012. On 19.04.2012 when petitioner again came to Islamabad in order to attend the meeting of NCH which was scheduled to be held on 20.04.2012 where he was informed by the officials of Respondents No.1 & 2 that he has been declared unsuccessful candidate in alleged recounting. After hectic efforts, petitioner succeeded to get impugned Notification No.SRO 373 (I)/2012 dated 12.04.2012.

4. Learned counsel for petitioner argued that the acts of the respondents to recounting of the votes, cancelation of notification dated 20.03.2012 in favour of petitioner and declaring Respondent No.3 as successful candidate vide Notification dated 12.04.2012 are illegal, null & void, coroum non-judice, without authority and justification, based on malafide intention and ulterior motives, having no legal effects, interalia, on the grounds that after forwarding the result sheet and observing the

procedure under Rule 29 & 30-A , the above act of respondent No.3 is illegal and liable to be set aside, as when the elections of the NCH are held, the aggrieved party may file objection within 07 days and the Returning office is bound to decide the same within 07 days. That the alleged recounting is made without intimating the petitioner and in his absence, therefore, the alleged ex-party proceedings of the recounting of the votes are not justified and this act of respondent No.1 is against the principle of natural justice, fair play and equity. The learned counsel for petitioner further argued that once a member NCH elected under Section 5 and subsequently notified under Section 8 of UAH 1965, can only be removed/replaced in accordance with Section 13(2) of the UAH Act 1965 read with rule 15 of Unani, Ayurvedic and Homoeopathic System of Medicine Rules 1980 but in the present case procedure laid down in these provisions has been violated. That the act of the respondent Nos.1 & 2 is an attempt to convert, majority of the group, into minority, which is against the democratic mandate and if this practice is allowed to continue, this will open the gate of massive corruption and malpractice. Learned counsel in support of his contentions placed reliance on PLD 2008 SC 663, 1999 SCMR 299.

5. Conversely, learned counsels for respondent Nos.2 & 3 through parawise comments and arguments advanced, took the stance that respondent No.2 being notified Returning Officer NCH, hold the fair and free elections of National Council for Homeopaty on 13.03.2012 and after compilation of result from

the polling officers, certain members including the petitioner were declared as successful. The successful candidates were to take oath in accordance with the rules and required Procedure, to be a regular member of the council. The successful candidates were to take oath in the first meeting to qualify as elected members but no formal meeting was held to administer oath, as such the notification dated 20.03.2012 cannot be termed as acted upon. On 19.03.2012 an application for recounting of votes was received from respondent No.3 besides 3 others who had also challenged the results, announced by the returning officer, on the basis of result compiled by respective Polling Officers of province of Punjab. The answering respondent No.2 on the basis of appeals for recounting of votes, under rule 30-A of Unani Ayurvedic and Homoeopathic System of Medicine Rules, allowed recounting and formal intimation was given to all the concerned. Three members from notified candidates appeared on 06.04.2012 whereas rest of the notified candidates despite contacts did not opt to join the recounting of the ballot papers. All the required bags were opened and on the basis of principles settled through rules and SOP the votes were rechecked and recounted and as a result of recounting only one appellant Nasir Ahmed Ch. Respondent No.3 succeeded. Therefore, he was declared as successful candidate. The learned counsel for respondents argued that results submitted by polling officers were compiled and announced within the stipulated time as required by law, however, the right to submit applications for recounting under rule 30-A of Unani, Ayurvedic and Homoeopathic Systems of Medicine, Rules 1980 was invoked and consequently the petitioner was disqualified on the basis of

recounting. There is no bar of recounting even after a notification of successful candidates had been issued. All the concerned were intimated through letter dated 03.04.2012 and it was open for the parties, to participate or not, in the recounting process. The returning officer was to perform his functions in accordance with law. Balloting, counting and recounting all are part of democratic process and one cannot claim benefit of a part. The ballot bags with all accessories are available and recounting be again done in presence of the petitioner, if this court directs so. The learned counsels for respondents, lastly argued that the illegal and incorrect results submitted by the Polling Officers has accordingly been corrected, therefore, writ petition is not competent as the writ petition Nos. 817, 818, 819 & 820 of 2012 on the same point have already been dismissed.

6. I have heard the learned counsels for parties and through their able assistance perused the documents including applicable Rules. In order to narrow down the controversy, I found it appropriate to provide admitted facts.

- Election against 21 seats (Members) of NCH, for a term of 05 years were held on 13.03.2012
- Against 05 seats (General) total 24 candidates, including present petitioner and Respondent No.3 were in the run.
- Total 37 Polling Stations were established all over Punjab.
- Almost 36,000 (thirty-six thousand) voters, exercised their right to vote
- Presiding Officer of each Polling Station prepared Statement of Counts, provided copy of the same to

Polling Agents and submitted before the Returning Officer

- The Returning Officer, on the basis of statements received from Presiding Officers, compiled the results, and following 05 members were declared as successful candidates:-

1. Homeo Dr. M. Irfan Wali (2466 Votes)

2. Homeo Dr. Rao Ghulam Murtaz (2448 Votes)

3. Homeo Dr. Tassadaque Hussain (2441 Votes)

4. Homeo Dr. Naeem Hafeez (2376 Votes)

5. Homeo Dr. Faisal Saleem (2234 Votes)

(Petitioner)

- Respondent No.3 obtained 2076 votes, as such difference of votes between return candidate at serial No.5 and unsuccessful candidate at serial No.6 was of **158** Votes.
- Notification No.N.F.1(1)/2012/NR & SD-Homeo/2012 dated 20.03.2012 was duly issued, showing petitioner as returned candidate
- Vide letter Ref. No.NCH/F.5-1(135th M) 2012 -17560 dated 21.03.2012, petitioner as Member NCH, was requested to attend 135th meeting, which was to be held on 30.03.2012
- Newly elected members assembled on the fixed date of meeting i.e 30.03.2012, took oath, and passed resolution
- Declaration of Oath of Petitioner was received vide diary No.56350 on the same date i.e 30.03.2012
- Proceedings of recounting were carried out subsequent to above event, that too, in absence of petitioner
- No application dated 20.03.2012, purportedly moved for re-counting has been appended with reply, to establish that it was received in the office of NCH against any diary No
- No proof to the effect that notice of the proceedings of re-counting was ever served upon petitioner
- Impugned Notification dated 12.04.2012 issued in pursuance of recounting proceedings of 06.04.2012

7. To further appreciate the controversy, I find it appropriate to provide hereinafter the stance of official

Respondent No.2 taken through report and parawise comments:-

III. That the result sheets were completed on the basis of result submitted by the presiding officers. The notification dated 20.03.2012 was a consequence thereof. However the successful candidates were to take oath in the first meeting to qualify as elected members. The petitioner had not taken oath as such the notification dated 20.03.2012 cannot be termed as acted upon.

IV. that on 19th March 2012 an application for recounting of votes was received from the respondent No.3 Homoeopathic Dr. Nasir Ahmed besides 3 others who had also challenged the results announced by the returning officer on the basis of result compiled by respective Polling Officers of province of Punjab. It shall not out of place to respectfully mention here that the answering respondent on the basis of appeals for recounting of votes under rule 30-A of Unani Ayurvedic and Homoeopathic system of Medicine, Rules, allowed recounting and as such formal intimation was given to all the concerned persons (copy enclosed). Mian Munawar Hussain Chad, Khalid Mehmood Ansari, Nasir Ahmed Chaudhary, appeared on 06.04.2012, whereas rest of the notified candidates, despite contacts did not joint the recounting of the ballot papers. All the required bags were opened and on the basis of principles settled through rules and SOP the votes were rechecked and recounted and as sresult of recounting only 1 appellant Nasir Ahmed Ch. Succeded. Resultantly he was declared as successful candidates.

FACTS:

3. That the contents of this Para are denied as stated. The petitioner was notified as successful on the basis of results received from polling officers. He was to become a full member after oath in the prescribed manner in the first meeting of the Council as such the notification cannot be termed as acted upon.

4. That the contents of Para No.4 are denied as stated. The answering respondent only complied the result of candidates as sent by the polling officers and forwarded to respondent No.1 as per rules 29(3) of the Unani, Ayurvedic and Homoeopathic System of Medicine,

Rules 1980. The right to recounting the cast ballot papers was however available to the runner up candidates/aggrieved candidates and the same was utilized in terms of rule 30-A supra.

5. That the contents of Para No.5 are denied as stated. The competent authority is bound to announce the result as per results sent by the polling officers under rules 29(3) of Unani, Ayurvedic and Homoeopathic systems of Medicine, Rule-1980. The answering respondent No.2 had no nexus to determine the genuineness or otherwise the results sent by the polling officers unless a petition under rule 30-A of Unani, Ayurvedic and Homoeopathic systems of Medicine, is received.

GROUND:-

b) That the contents of Para B are denied. The results submitted by polling officers were compiled and announced within the stipulated time as required by law however the right to submit applications for recounting under rules 30-A of Unani, Ayurvedic and Homoeopathic System of Medicine, Rule 1980 was invoked and consequently the petitioner was disqualified on the basis of recounting.

8. In my humble estimation, stance of Respondent No.2 is not only dubious but against the ordinary prudence as well. On one hand it has been pleaded that petitioner did not take oath, therefore, was not a member of NCH on the other hand it is said that petitioner has been "**DISQUALIFIED**" on the basis of recounting. Section 13(2) of the Unani, Ayurvedic and Homeopathic practitioners Act, 1965 provides the grounds on the basis of which any member can be disqualified, which reads as under:-

13(2) If at any time it appears to the Federal Government that any member of the Council has failed to exercise or has exceeded or abused any power conferred upon him as a member of the Council, any Committee or Examining Body appointed under sub-section (3) of section 22, may, if satisfied that such failure, excess or abuse has adversely affected the

efficient conduct of such member in achieving the objectives of this Act and after giving him an opportunity of showing cause against the action proposed to be taken, by notification in the official Gazette, disqualify him from the membership of the Council or, as the case may be, Committee or Examining Body.

9. Since much emphasis has been made on not taking of oath by petitioner, I feel it necessary to reproduce the applicable guidelines, which are named as **"Rules/instructions for conducting the Meeting of National Council for Homeopathy including Agenda of the Meeting" :-**

Rule/Instruction No.3:-

3. (a) **Oath of member:** *At the first sitting of the Council, after a general election, a member shall make oath before the Council in the form set out in the Schedule to these regulations.*

(b) A member who has not made oath at the first sitting of the Council shall make at subsequent sitting.

(c) If a member without a reasonable cause fails to make oath even at the next meeting, he shall cease to be a member and the Council will declare his seat vacant.

(d) Roll of member:- There shall be a roll of members which shall be signed in presence of the Secretary by every member after making the oath.

10. Respondent No.2 has placed no record/proof even, which may give presumption that NCH called upon the elected members, to take oath in any called/summoned meeting. And in case of absence, petitioner was ever, served with, any show cause, before non-seating him.

11. The reasoning advanced and stance taken by Respondent No.2 is totally besides the law, principles of natural justice and dictum laid down by the superior courts of the country. It is amazing to note that in order to oust the petitioner, procer alien to law has been adopted, which is nothing but rarity

sham. It is well settled law, with the mandate of the authoritative pronouncements of Hon'ble Supreme Court that once notification of the success of the success of any candidate is issued, Returning Officer cease to hold any authority to alter the results. In the case of Nawab Khan, reported as 1999 SCMR 299 the august Supreme Court has held as under:

"Election Tribunal through ex-parte proceedings re-counted the votes behind the back of successful candidates (whose success had been duly notified) holding that votes secured by defeated candidates were more than the votes secured by successful candidates and in consequence, the notification of the success of th defeated candidates was published in the official Gazette by the Election Authorities ----Validity----Ex-parte recounting of votes, held, was not justified in the circumstances----Principles.

Similarly, in the case of Moulana Atta-ur-Rehamn, reported as PLD 2008 SC 663, following principle has been enunciated:

"S.39(6)----Consolidation of results---Order of re-count of votes was passed by Returning officer in violation of the principle of audi alteram parterm, in as much as he did not issue any notice to the candidate (unofficially) declared as elected nor provided him any opportunity of hearing before passing the order of re-count---Effect-----order of the Returning Officer was not sustainable in law, in circumstances-- --No order could be passed at the back of a party, particularly against a person who may be affected by such an order or which deprived him of his vested right or interest---- Ex-parte proceedings of recounting the votes behind the back of a candidate whose success had been unofficially announced were not justified----Petition for leave to appeal was converted into appeal by Supreme Court and order of Returning Officer for rechecking/recount of ballot papers, including the proceedings of rechecking/recount were set aside and Returning Officer was directed to transmit the consolidated statement of result (Form XVI) to the Election Commission of Pakistan for formal announcement of result of election."

Similar view has been reiterated by the learned Division Bench of Lahore High Court, in the cases of Mehdi Abbass Khan

and Chauhdary Pervaiz Akhtar, reported as 2007 CLC 1330 and PLD 2006 Lah. 29.

In the case of Ghani-ur-Rehman, reported as 1997 CLC 1092 the Honourable Division Bench of Peshawar High Court, while dealing with the issue subsequent to issuance of notification, enunciated following principle;

S.s. 39(6)(b) & 103-AA. "Election Commission could not exercise jurisdiction after publication of Notification in official Gazettee with regard to election showing therein returned candidates, for issuing direction for recounting of votes under S.39(6) (b) of the Act----Such power, however, could be exercised under S.103-AA of the Act with conditions and reliefs mentioned therein---Jurisdiction of Election Commission to interfere with such matter would arise only where it was, ex-facie, found on facts that grave illegality or violation of law or rules governing electoral process, including count of votes had occurred---Violation of such nature would invoke jurisdiction of Election Commission before Gazette Notification of successful candidates but no thereafter----Election Commission after Gazettee Notification of successful candidates would become functus officio---Election Commission having ordered recount of votes of entire constituency after Gazettee Notification of successful candidates, order passed by it was void ab initio, without lawful authority and of no legal effect and, therefore, was set aside in circumstances.

12. The will of electorate cannot be frustrated in the manner, respondent No.2 did. Difference of **158 votes** could not have been covered, except manipulations, with the ballot papers in the custody of Respondents, therefore, emphasis on recounting again seems ridiculous.

13. In this view of the matter, instant petition is allowed by declaring that jurisdiction exercised by the Respondent No.2 in disqualifying the petitioner and declaring Respondent No.3 as returned candidate is arbitrary, illegal, unprecedented, perverse,

alien to law, against the principles of natural justice, malafide and coram-non-judice. Resultantly, impugned notification No.SRO.373(I)/2012 Dated 12.04.2012 is set aside with a consequence of restoration of Notification No.F.1(1)/2012/NR&SD-Homoeo/2012, dated 20.03.2012.

(SHAUKAT AZIZ SIDDIQUI)
JUDGE

Approved for Reporting.

"Waqar Ahmed"

Blue slip addnl.

Uploaded By : Engr. Umer Rasheed Dar