IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL.
MR. JUSTICE IJAZ UL AHSAN.
MR. JUSTICE MUNIB AKHTAR.

CIVIL APPEAL NO.171 OF 2019
ON APPEAL AGAINST JUDGMENT DATED 18.12.2018 OF THE HIGH COURT OF BALOCHISTAN IN ELECTION PETITION NO.53 OF 2018.

Mir Mujib-ur-Rehman Muhammad Hassani

Appellant

Versus

Returning Officer, PB-41, Washuk & Others

Respondent

For the Appellant(s):	Sardar Muhammad Aslam, ASC. Ch. Akhtar Ali, AOR.
For the Respondent(s):	Kamran Murtaza, Sr. ASC. Syed Rifaqat Shah, AOR. *(For Respondent No.2)* M. Amjad, A.D. *(For the Election Commission of Pakistan)*
Dates of Hearing:	10.12.2019 11.12.2019

JUDGMENT

IJAZ UL AHSAN, J-. Through this judgment, we are deciding Civil Appeal No.171 of 2019 arising out of the judgment of the Honourable High Court of Balochistan, Quetta dated 18.12.2018 passed in Election Petition No.53 of 2019 (the **"Impugned Judgment"**).

2. Brief facts necessary for the decision of this *lis* are that the Appellant and Respondent Nos.2 to 15 were contesting candidates for a seat in the Provincial Assembly of Balochistan from PB-41 (Washuk), during the general elections held on 25.07.2018. The Appellant secured 12588 votes and Respondent No. 2, who attained the highest number of votes in the contest, secured 12807 votes while the remaining candidates only secured nominal amounts of votes. On 27.07.2018, the Appellant wrote to the concerned Returning Officer (Respondent No.1) for a recount of the votes cast in the entire constituency under section 95(5) and (6) of the Elections Act, 2017 (the **"Act"**). This application was rejected by Respondent No.1 on 28.07.2018, holding that:

> *"As per section 95(5) of Elections Act,2017, it is not in the domain of the R.O to recount the votes of the entire constituency, hence, the application in hand is hereby rejected."*

3. Aggrieved by the aforenoted order of Respondent No.2, the Appellant approached the Election Commission of Pakistan (**"ECP"**) and filed two petitions: the first under section 95(6) of the Act for a recount of the votes cast in the entire constituency and the second to seek inclusion/counting of votes cast in two polling stations, namely Polling Station Nos.44 and 45. Since consolidation had been completed in PB-41, the first

petition was dismissed by the ECP vide order dated 01.08.2018 with the following observation:

> "*I am directed to refer to the subject noted above, and to convey that since the consolidation has been completed in PB-41, Washuk and form-49 has been received, therefore, the applicant/petitioner may approach the appropriate forum through an election petition, if so desired.*"

4. On 04.08.2018, the Appellant filed Constitutional Petition No.1013 of 2018 before the High Court of Balochistan seeking a recount in PB-41 on the grounds that many of the rejected ballots were valid and that there had been rigging and mismanagement during the elections, whereby many of the postal ballots received by the cut-off date were also rejected on flimsy grounds. This petition was disposed of by the Balochistan High Court vide order dated 15.08.2018, with the observation that since the same matter was also fixed before the ECP, it may be decided at the earliest.

5. Finally, the ECP vide its order dated 11.09.2018, decided the matter in response to the petition filed by the Appellant seeking inclusion/recount of votes cast in Polling Station Nos.44 and 45 together with another petition filed by a candidate for the national assembly seat (NA-270) in the same area. The ECP noted the ambiguities present in the case and irregularities between the accounts and comments received from

the different Presiding Officers and the Returning Officer and ordered the votes from these polling stations to be discarded and fresh polls to be conducted in Polling Station Nos.44 and 45. Aggrieved by this order, several parties approached this Court in appeal, including the Appellant through CA No.1102 of 2018. All the appeals were dismissed through a combined order of this Court dated 01.10.2018, whereby it was held that:

> "*The reasons recorded by the learned Election Commission of Pakistan for re-poll of Polling Stations No.44 and 45 with respect to PB-41 and NA-270 are absolutely apt and cogent and in accordance with the jurisdictional authority vested with it.*"

6. In accordance with ECP's order dated 11.09.2018, which was upheld by this Court, fresh polls were conducted in Polling Station Nos.44 and 45 on 07.10.2018. While no votes were cast in Polling Station No.45, after adding up the votes from Polling Station No. 44 the Appellant secured a total of 12705 votes while Respondent No.2 secured 13040 votes and again maintained his lead – this time by a margin of 335 votes. On 15.10.2018, Respondent No.2 was notified as the Returned Candidate vide Notification No.F.2(37)/2018-Cord(1). In response to this, the Appellant approached the Election Tribunal of the High Court of Balochistan through Election Petition No.53 of 2018 which was dismissed vide the Impugned Judgment against

which the Appellant has now approached this Court in the present Appeal.

7. Learned Counsel for the Appellant has extensively argued the matter. His primary contention is that under section 95(5) of the Act, it is mandatory for a Returning Officer to recount votes if a request has been made by a contesting candidate, before the commencement of consolidation proceedings, in an election where the margin of victory was less than five percent of the total votes polled or ten thousand votes, whichever was less. As such, he has argued that Respondent No.1 could not have rejected the Appellant's request for a recount in the entire constituency, given that Respondent No.2's margin of victory fell well within the threshold provided in section 95(5) of the Act, vide his order dated 28.07.2018. Consequently, he asserts that the Election Tribunal was required in law to direct recount of the votes or at least the rejected votes.

8. Learned Counsel for the Appellant has also alleged that several irregularities and unlawful practices took place during the election, including instances of the Appellant's polling agents not being allowed to witness counting, the casting of bogus votes, intimidation of voters by Respondent No.2 and his agents, etc. As a result, he contends that the Impugned Judgment be set aside, directions should be issued for

recounting of the votes, and given the alleged unlawful practices and irregularities, the election of Respondent No. 2 should be declared null and void and the Appellant be declared the Returned Candidate instead.

9. On the other hand, Learned Counsel for Respondent No. 2 has argued that there are no presumptions in favor of the Appellant in law or fact and the onus lies upon him to prove every fact that he has alleged in his pleadings as per Articles 117 to 119 of the Qanun-e-Shahadat Order, 1984. It is his contention that the Appellant during the proceedings and in his pleadings has failed to prove whether his original application for a recount before the Returning Officer was even filed before the commencement of any consolidation proceedings, as required by section 95(5) of the Act, and whether any of the illegal activities and unlawful practices alleged by the Appellant even took place in the manner described by him.

10. In any case, Learned Counsel for Respondent No.2 has argued that the Appellant did petition the High Court of Balochistan challenging the order of the Returning Officer dated 28.07.2018 (rejecting the application for a recount in the entire constituency), but the same was disposed of on 15.08.2018, with the consent of both parties and with a direction to the ECP to decide the matter. After the ECP ordered re-polls in two polling stations vide its order dated 11.09.2018, the Appellant assailed

the order before this Court and the same was upheld vide order dated 01.10.2018. As a result, Learned Counsel for Respondent No.2 asserts that the matter has attained finality and the Appellant by not pressing the matter, first before the High Court and later by not moving another application after the re-polls conducted on 07.10.2018, has abandoned his plea and cannot rely on the same at this stage.

11. Learned Counsel for Respondent No.2 has pointed out that since the earlier plea was abandoned by the Appellant, at this stage the only procedure for obtaining a recount was through the Election Tribunal under section 101 of the Act read with rules 139 and 150 of the Election Rules, 2017. However, he argues that to avail this remedy the Appellant's election petition before the Election Tribunal should have complied with the requirements set out in sections 144 and 145 of the Act, which the Appellant failed to meet. To this end, Learned Counsel for Respondent No.2 has relied on the Impugned Judgment and the requirements outlined in section 144(1)(b) of the Act to point out that the Appellant's election petition was patently deficient and non-proceedable, did not contain a precise statement of material facts, full particulars of corrupt and illegal practices, names of the parties involved with dates and venues, etc. as per mandatory requirements of the law.

12. Lastly, Learned Counsel for Respondent No.2 has relied on the judgments of this Court, wherein principles concerning the recount of votes before the Election Tribunal have been laid out. He has argued that even though these principles were laid out when the old law, the Representation of the People Act, 1976 (**"ROPA"**), was in place they continue to hold field today since the legislature has not made anything mandatory on the Election Tribunal with respect to recounts in the new law (the Act). To this end, he has placed reliance on the judgments of this Court in *Jam Madad Ali v. Asghar Ali Junejo* (2016 SCMR 251), *Ch. Muhammad Ashraf Warraich v. Muhammad Nasir Cheema* (2016 SCMR 998), and *Syed Khaliq Shah v. Abdul Raheem Ziaratwal* (PLD 2017 SC 684).

13. We have heard the Learned Counsel for the parties at length and have also perused the available record. At the very outset, a distinction must be drawn between the first round of litigation – which was initiated by the Appellant after the general elections were held on 25.07.2018 and ended with the order of this court dated 01.10.2018, wherein ECP's order dated 11.09.2018 was confirmed – and the second round of litigation – which was initiated by the Appellant through an election petition filed after re-polling in Polling Station Nos.44 and 45 of PB-41 on 07.10.2018 – wherefrom this present Appeal has arisen. This distinction becomes particularly important as we look at the

pleas taken by the Appellant at various stages before several fora during this controversy.

14. It is a matter of record that the Appellant did request a recount in the entire constituency following the results of the general elections held on 25.07.2018, under section 95(5) of the Act. After his request was rejected by the Returning Officer on 28.07.2018, the Appellant approached the ECP to ask for a recount under section 95(6) of the Act and, through a separate application, to also seek inclusion/counting of the votes cast in Polling Station Nos.44 and 45. The Appellant's first application, for a recount, was dismissed by the ECP on 01.08.2019 due to the fact that consolidation proceedings had been completed in PB-41, against which the Appellant filed a constitutional petition before the High Court. The record also shows that this petition was disposed of on 15.08.2018, with the consent of both sides and with directions to the ECP, which was already considering the matters raised in the Appellant's second application, to decide the same at the earliest. Consequently, when the ECP passed its order on 11.09.2018 directing that re-polls be conducted in the two polling stations in question, the Appellant also challenged it before this Court vide CA No.1102 of 2018. This Appeal was dismissed by this Court on 01.10.2018 and the ECP's decision was confirmed, and hence attained finality.

15. As pointed out by the Learned Counsel for Respondent No.2, we note that during this course of events the Appellant of his own accord chose to not press the matter of recount, which was decided by the ECP on 01.08.2018, and hence abandoned this plea. In any case, when the matter was finally decided by the ECP on 11.09.2018, wherein it comprehensively looked at the allegations made by the Appellant and solicited explanations and comments from all concerned, the Appellant approached this Court in Appeal and the same was dismissed. At this point, the Appellant did have the avenue of Review, against the order dated 01.10.2018 of this Court, but he chose not to exercise it and hence our judgment on the matter attained finality. With this culmination of the first round of litigation initiated by the Appellant, the issues raised by the Appellant therein have now become a past and closed transaction *inter se* the parties to the *lis* and cannot now be re-agitated.

16. It is, however, true that section 142 of the Act, entitles the Appellant to file an election petition within forty-five days of the publication of the name of the returned candidate to challenge the election. Once Respondent No.2 was notified as the Returned Candidate on 15.10.2018, the Appellant did indeed file an election petition on 06.11.2018 before the Election Tribunal of the High Court of Balochistan, which was dismissed vide the

Impugned Judgment. However, given that the matters arising out of the earlier election had already been challenged by the Appellant and had attained finality, the Appellant cannot be allowed to now re-agitate the same matters by means of an alternative remedy that was not resorted to earlier. If this was allowed, it would go entirely contrary to the "doctrine of election" which exists to ensure that once a litigant has made the choice of pursuing a certain course of action available to him or has abandoned a certain plea/action, that he is not allowed to reopen the same matter only because he has received unfavorable results as a result of his first choice. This principle has been elaborated by this Court on various occasions. Reliance may be placed on *Trading Corporation of Pakistan v. Devan Sugar Mills Limited* (PLD 2018 SC 828), where it was explained that:

> *"The moment suitor intends to commence any legal action to enforce any right and or invoke a remedy to set right a wrong or to vindicate an injury, he has to elect and or choose from amongst host of actions or remedies available under the law. The choice to initiate and pursue one out of a host of available concurrent or co-existent proceeding/actions or remedy from a forum of competent jurisdiction vest with the suitor. Once choice is exercised and election is made then a suitor is prohibited from launching another proceeding to seek a relief or remedy contrary to what could be claimed and or achieved by adopting other proceeding/action and or remedy, which in legal parlance is recognized as doctrine of election, which doctrine is culled by the courts of law from the well-recognized principles of waiver and or abandonment*

of a known right, claim, privilege or relief as contained in Order II, rule (2) C.P.C., principles of estoppel as embodied in Article 114 of the Qanun-e-Shahadat Order 1984 and principles of res-judicata as articulated in section 11, C.P.C. and its explanations. Doctrine of election apply both to the original proceedings/action as well to defences and so also to challenge the outcome on culmination of such original proceedings/action, in the form of order or judgment/decree (for illustration it may be noted that multiple remedies are available against possible outcome in the form of an order/judgement/decree etc. emanating from proceedings of civil nature, which could be challenged/defended under Order IX, rule 13 (if proceedings are ex-parte), section 47 (objection to execution), section 114 (by way of review of an order), section 115 (revision), under Order XXI, rules 99 to 103 C.P.C. and section 96 C.P.C. (appeal against the order/judgment) etc. Though there is no bar to concurrently invoke more than one remedy at the same time against an ex-parte order/judgment. However, once election or choice from amongst two or more available remedy is made and exhausted, judgment debtor cannot ordinarily be permitted subsequently to venture into other concurrently or coexisting available remedies."

17. While, as a result of the discussion above, we do not think that the question of recounting in the entire constituency of PB-41, Washuk, is a live issue in the present Appeal, an important question has been raised concerning the interpretation of section 95(5) of the Act, which we would like to address at this juncture. It has been argued by the Learned Counsel for the Appellant that section 95(5) of the Act mandates a Returning

Officer to conduct a recount if he has been requested in writing by a contesting candidate to do so, provided that the threshold of the margin of victory provided in section 95(5) is met. For ease of reference, section 95(5) of the Act is reproduced below:

> *"(5) Before commencement of the consolidation proceedings, the Returning Officer shall recount the ballot papers of one or more polling stations if a request or challenge in writing is made by a contesting candidate or his election agent and the margin of victory is less than five percent of the total votes polled in the constituency or ten thousand votes, whichever is less, or the Returning Officer considers such request as not unreasonable:*
> *Provided that the recount shall be made by the Returning Officer only once.*"

18. From a plain reading of the provision, it is quite clear that the Returning Officer is empowered to recount the ballot papers of "*one or more polling stations*" only before consolidation proceedings have commenced. Furthermore, it is also clear that such a recount can only be triggered on the written request of a contesting candidate (or his election agent) in an election where the margin of victory was less than five percent of the total votes polled or ten thousand votes, whichever was less. However, once the words *"or the Returning Officer considers such request as not unreasonable"* at the end of the sentence are read along with the remaining conditions it becomes clear that 'such' an application for a recount must be considered reasonable by the Returning Officer in addition to meeting the other pre-conditions imposed by the provision. To our mind, this is the correct reading of

section 95(5) of the Act based on the linguistic construction of the sentence, which makes it abundantly clear that the last part of the sentence (concerning reasonableness) is to be read conjunctively with the remaining conditions imposed on an application for a recount to qualify. With this interpretation in mind, therefore, in order for the Returning Officer to order a recount under section 95(5) of the Act, (i) a written application must be made by a contesting candidate or his election agent before the commencement of consolidation proceedings, (ii) the application must be in relation to an election where the margin of victory was less than five percent of the total votes polled in the constituency or ten thousand votes, whichever was less, and (iii) the Returning Officer must consider such a request to be reasonable (or not unreasonable as the law states). Once all these conditions have been met, only then will a Returning Officer order a recount in "*one or more polling stations*".

19. It is important to note, however, that a similar provision existed in the old law, section 39(6) of ROPA that preceded section 95(5) of the Act, as well. Section 39(6) of ROPA stated that:

> *"(6) The Returning Officer may recount the ballot papers-*
> *(a) upon the request of, or challenge in writing made by, a contesting candidate or his election agent, if the Returning Officer is satisfied that the request or the challenge is reasonable; or*

> *(b) if so directed by the Commission, in which case the recount shall be held in such manner and at such place as may be directed by the Commission."*

From a bare reading of this provision, it is obvious that in the new law (section 95(5) of the Act) the legislature has sought to limit the situations in which applications for a recount before the Returning Officer can be made in the first place. The intention behind this quite clearly is to limit the number of frivolous applications for a recount made by losing candidates in constituencies around the country and to ensure that recounts are entertained by Returning Officers only in those constituencies where the margin of victory is small enough to justify a recount, and an objective and tentative assessment is made by the Returning Officers on the basis of material placed before them to the effect that *prima facie* there are grounds justifying a recount and the request for such recount is not wholly unreasonable. However, if an election does not meet the numerical threshold provided in section 95(5) of the Act, the law in section 95(6) of the Act, still provides for the ECP to order a Returning Officer directly to conduct a recount, if it deems the circumstances to be grave enough to warrant such a recount.

20. In any case, however, the law does not provide a criterion based upon which a Returning Officer may decide whether a particular application is not unreasonable. The exercise of recounting ballot papers for any number of polling

stations is a tedious and time/resource-consuming task and it cannot be taken up indiscriminately, carelessly, without due application of mind and a tentative assessment of the material available on record, and in cases where only vague and general allegations and insinuations have been made. This exercise, which can potentially take months to complete, can arguably lead to the constituency remaining unrepresented for long periods of time, defeating the very purpose of the law and the concept of democratic representation. To this end, we are clear in our minds that even if a request has been made by a contesting candidate in an election where the threshold set by section 95(5) is met, but the request itself does not specify any cogent reasons for the request along with identifying specific polling stations where the recount is being requested and giving credible materials/information, it would stand to reason that the Returning Officer should have the option/discretion to reject such a request. If this was not the case, we would have the absurd situation where at the request of an aggrieved candidate recounting takes place even at polling stations where the candidate in question has won or that without any allegation of rigging, corrupt and unlawful practices, and particulars based on which malpractices and rigging is being alleged, a candidate could still claim a recount by way of a record change and a fishing expedition simply showing that the margin of victory was less than five percent of the total votes polled in the constituency

or ten thousand votes, whichever is less. If that were so, the phrase "*or the Returning Officer considers such request as not unreasonable*" would become redundant. It is settled law that no redundancy can be attributed to the legislature.

21. We therefore hold that the provisions of section 95(5) can only be triggered after all the pre-conditions therein have been met and the contents of the request itself lend credence to the need for a recount. To ensure this, the Returning Officer must exercise his discretion and ascertain the reasonableness of the request and decide whether recounting is to take place in "one or more" polling stations, or not at all. A reasonable request, therefore, must at least contain a narrative of the events that gave rise to the request in the first place, the details along with credible material/information regarding events that may have caused the contesting candidate to demand the recount together with the names and details of any individuals alleged to be involved, and the specific polling stations at which the recount is being requested. Once all the aforenoted conditions have been met, then the Returning Officer must apply his mind to the facts and circumstances of the individual case and decide if, and in how many polling stations, a recount is warranted.

22. It is clear and obvious from the record available before us, that after re-polls were conducted, according to ECP's

order dated 11.09.2018 and the order of this Court confirming the same on 01.10.2018, the Appellant filed Election Petition No.53 of 2018 before the Election Tribunal of the High Court of Balochistan. In this election petition, the Appellant has again objected to the rejection of his initial request to recount ballot papers in the entire constituency and has made vague generalized and unsubstantiated allegations regarding several irregularities, malpractices, and unlawful activities during the entire election. As we have discussed above, since the matters brought up by the Appellant with respect to the recount and ancillary unlawful and illegal activities alleged by him had already been litigated before, they could not be reopened and re-examined. However, as far as the Appellant's contentions with respect to the re-polling that took place in Polling Station Nos.44 and 45 of PB-41, and the many allegations leveled by him on the conduct of these re-polls, we are inclined to agree with the view taken by the learned Election Tribunal of the High Court of Balochistan in the Impugned Judgment.

23. The record shows that the allegations and insinuations made by the Appellant in his election petition were deficient in many respects. Section 144 of the Act provides for the contents of an election petition, the documents that must be attached with it, and the relief that can be claimed by the Appellant. In this respect, it is clear that the Appellant is

required to provide the full particulars of any corrupt or illegal practices alleged by him to have taken place, the names and other details of the individuals he believes to be responsible for such practices, and the date and place of the commission of such practices or acts together with documentary evidence in support of such allegations. The Appellant has abysmally failed to provide these details. While the record shows that the Appellant did annex sixteen affidavits-in-evidence in support of his application, perusal of these affidavits *ex facie* shows that they are all identical and a duplicate of allegations made and details provided by the Appellant in every one of them. As a result, the Appellant's election petition is rendered entirely deficient by virtue of section 144 of the Act.

24. The Appellant's request for recounting and verification of the votes cast in the re-polls conducted on 07.10.2018 in Polling Station Nos.44 and 45 of PB-41 is similarly deficient. The record shows that no objections were raised during the re-polls by the Appellant or his election agents while the polling took place. The Appellant has alleged that bogus votes were cast by supporters of Respondent No.2 during the re-polls. However, no objections against the casting of such votes have been found on the record. This is especially problematic given that section 86 of the Act explicitly provides for challenges to be

made by candidates in such situations at the time of the occurrence.

25. The record also shows that following the re-polls conducted on 07.10.2018, the Appellant filed a petition for recounting of votes before the ECP on 10.10.2018. However, this petition was withdrawn by the Appellant of his own accord during the pendency of his election petition which was dismissed via the Impugned Judgment. In these circumstances, while it is true that the learned Election Tribunal of the High Court of Balochistan did have the right to exercise its power to order a recount and/or verification of the votes in question we are not surprised that it chose to not exercise such discretion, given the many obvious and glaring deficiencies in the petition filed by the Appellant and the allegations made by him.

26. In these circumstances, we hold that the learned Election Tribunal of the High Court of Balochistan, in the Impugned Judgment, has acted well within its powers and has exercised its discretion and authority fairly and correctly in coming to its conclusions. Based on these reasons and in view of the aforementioned findings and analysis of the relevant provisions, we find no reason to interfere with the Impugned Judgment. Consequently, this Civil Appeal No.171 of 2019 is dismissed, with costs.

JUDGE

JUDGE

JUDGE

ISLAMABAD, THE
11th of December 2019.
APPROVED FOR REPORTING
*MUA/**

Munib Akhtar, J.- I have had the advantage of reading in draft the judgment proposed to be delivered by my learned brother, Ijaz ul Ahsan, J., which has the concurrence of my learned brother, Umar Ata Bandial, J. While I am generally in agreement with the proposed judgment and certainly in accord with the view that the appeal fails, I am, with respect, unable to agree with the interpretation placed on s. 95(5) of the Elections Act, 2017 ("2017 Act") (paras 17-21 of the majority judgment). While perhaps those observations may be *obiter* inasmuch as it is expressly noted in para 17 that "the question of recounting in the entire constituency… is [not] a live issue in the present Appeal", since a detailed analysis of the statutory provisions has been undertaken, I have also ventured to express my views on the same.

2. Section 95(5) had its counterpart in s. 39(6) of the predecessor legislation, the Representation of People Act, 1976 ("1976 Act") which has also been considered in the majority judgment. Subsection (6) of s. 95 is also of some relevance. For convenience these are again reproduced below (emphasis supplied):

Section 95:	**Section 39**:
(5) Before commencement of the consolidation proceedings, the Returning Officer shall recount the ballot papers of one or more polling stations if a request or challenge in writing is made by a contesting candidate or his election agent and the margin of victory is less than five percent of the total votes polled in the constituency or ten thousand votes, whichever is less, **or** the Returning Officer considers such request as not unreasonable: Provided that the recount shall be made by the Returning Officer only once. (6) The Commission may, before	(6) The Returning Officer may recount the ballot papers— (a) upon the request of, or challenge in writing made by, a contesting candidate or his election agent, if the Returning Officer is satisfied that the request or the challenge is reasonable; or (b) if so directed by the Commission, in which case the recount shall be held in such manner and at such place as may be directed by the Commission.

conclusion of the consolidation proceedings, for reasons to be recorded, direct the Returning Officer to recount the ballot papers of one or more polling stations.	

3. In essence, the majority have concluded that the word "or", where appearing in s. 95(5) as emphasized above, is to be conjunctively. Thus, according to the majority view the subsection contemplates that a recount is to take place only if both the conditions, i.e., "the margin of victory is less than five percent of the total votes polled in the constituency or ten thousand votes, whichever is less" and "the Returning Officer considers such request as not unreasonable" are fulfilled and applicable together (see para 18). (The other conditions also mentioned in the subsection are, for present purposes, unexceptionable.) With respect, I am unable to agree. In my view, the word "or" is to be given its natural meaning and read disjunctively. In other words, the subsection contemplates two separate and distinct conditions, and a recount is permissible if either one of them is met.

4. It is of course well settled that in appropriate circumstances the word "or" can be read as "and" and vice versa. However, in my respectful view s. 95(5) requires no such exercise and does not call for any such conclusion. The reason is that the first and second conditions are qualitatively distinct, inasmuch as the first contains no element of discretion with the Returning Officer, while the second one does (though in rather limited circumstances, as explained below). The first condition becomes applicable simply on an affirmative answer to an arithmetical question: is the margin of victory the lesser of (a) ten thousand votes or (b) less than five percent of the total votes polled in the constituency? The first number is of course an absolute: 10,000 votes. The second is a matter of calculation, of adding up the total votes cast and calculating five percent thereof. That too yields a specific number. The margin of victory (which is itself a specific number) is then to be compared with these two numbers. If it is less than either one of

them the first condition is fulfilled. Thus, there is no discretion at all with the Returning Officer. Insofar as the second condition is concerned, there is an element of discretion: the Returning Officer must be satisfied that the request is not unreasonable. Only then is the condition applicable. In my view, with respect, to yoke these conditions together is to misread, and hence misapply, the legislative intent.

5. One result of the view that finds favor with the majority is that the word "shall" appearing in s. 95(5) must necessarily be read as "may". In my view, the legislature (which of course was only too well aware of the previous state of the law) has deliberately departed from the discretion that had earlier vested in the Returning Officer under s. 39(6). The "shall" used in s. 95(5) must therefore be given its intended mandatory effect. This emerges clearly if the relevant "or" is read disjunctively. In the first condition, as soon as the arithmetical exercise is concluded, and the relevant question answered in the affirmative, the recount must take place if such an application is moved. It emerges also, in my view, in respect of the second condition, though perhaps less obviously. Before considering this aspect, I may note that the subsection speaks of a "challenge" or a "request" being made to the Returning Officer. This dual usage also lends support to the view that I take. Inasmuch as the second condition has an element of discretion, there is a "request" to the Returning Officer, and indeed the second condition specifically repeats this word. On the other hand, the word "challenge" is certainly appropriate for the first condition. The arithmetical calculations can be carried out by anyone and on such basis the applicant can throw out a peremptory "challenge" to the count. If the two conditions are rolled into one then there can only be a "request", and the word "challenge" is rendered redundant.

6. As I understand it the majority judgment essentially finds no difference between the requirement previously to be found in s. 39(6)(a) that the Returning Officer could, in his discretion, allow a

recount if he found the request to be "reasonable", and the requirement now contained in the second condition of s. 95(5), that the Returning Officer find the request to be "not unreasonable". If so, I am, with respect, unable to agree. While at first sight such an equation may seem to exist, the actual position is materially different. Under the 1976 Act, the onus lay on the applicant to show that his request was reasonable. Furthermore, even if, in law, it was, the use of the word "may" meant that the Returning Officer still retained discretion to nonetheless refuse a recount. Under the present law, the applicant must obviously, if he seeks recourse to the second condition, set out the reasons for seeking a recount. An application in terms of the second condition without any reasons would be liable to dismissed out of hand. However, if reasons are given then the onus lies on the Returning Officer (or the other contesting candidates) to first show that the request in unreasonable. It is here that the Returning Officer has discretion. If he concludes that the request is unreasonable, then the onus would shift on the applicant to show that this is not so. And if, in law, the applicant is correct, then the Returning Officer would have no further discretion; the word "shall" ensures that the recount must be ordered. Here, an interesting latent ambiguity in s. 39(6) may be noted. The word "may" as used therein had, at least at first sight, appeared to control both clauses (a) and (b). But that would have meant that even if the Election Commission had ordered a recount the Returning Officer could have refused to do so. Obviously, such a conclusion would have been completely untenable. Thus, under the previous law the word "may" would have had to be read as such for the first clause, but as "shall" for the second. The present law obviates any such difficulty by putting the power of the Election Commission in a separate subsection.

7. The majority judgment also sets out in some detail the legislative policy that would result in the interpretation that finds favor with it. Again, with respect, I am unable to agree. In my view, to the extent that the legislative policy can at all be ascertained from the provisions, it points in the opposite direction. By

altogether removing the Returning Officer's discretion in a situation where the first condition applies, and restricting it to within a narrow ambit in relation to the second (as explained above) the policy of the law appears to be to allow recounts to take place at the earliest stage. This is so to limit, if not altogether foreclose (that would, perhaps, be hoping too much), such challenges at a later stage, whether by way of an election petition under Article 225 (i.e., in terms of the relevant election law) or constitutional petitions in the High Courts or even this Court. The democratic principle is of course that once the people have spoken all other voices must fall silent. However, elections are, more often than not, strongly contested. Sometimes, after the heat and especially in the immediate aftermath of the contest, a losing candidate is unable to acknowledge that he has indeed lost, should respect the verdict of the people and wait for the next election cycle. By allowing for recounts in terms as now contained in s. 95(5), the policy of the 2017 Act appears to be to allow for the "cooling off" to take place at an early stage. If as a consequence a little more time is required or taken to officially finalize matters, the law clearly regards that as time well spent.

8. Subject to the foregoing, I also hold that the appeal fails and stands dismissed.

Judge