

2002 S C M R 1632

[Supreme Court of Pakistan]

Present: Sh. Riaz Ahmed, C.J., Javed Iqbal and Muhammad Nawaz Abbasi, JJ

Dr. LIAQAT ALI KHAN and another---Petitioners

versus

DISTRICT RETURNING OFFICER, DISTRICT SARGODHA and 3 others---Respondents

Civil Fe ' ' n No.2664-L of 2001, decided on 25th July, 2002.

(On appeal from the judgment of Lahore High Court Lahore, dated 7-8-2001 passed in Writ Petition No. 14753 of 2001).

Muhammad Saleem v. Provincial Election Authority, Karachi PLD 1985 Kar. 135; Wahid Bux v. Election Authority 1984 CLC 1294; Pervez Iqbal v. Provincial Transport Authority 1996 CLC 182; Ittehad Cargo Service v. Syed Tasneem PLD 2001 SC 116; Kanwar Ijaz v. Irshad Ali PLD 1986 SC 483; Nasir Mahmood Mughal v. Muhammad Azam 1987 MLD 2526; Akbar Ali v. Razi-ur-Rehman PLD 1966 SC 492 and Civil Appeals Nos. 1864 and 1865 of 2001 ref.

Ihsanul, Haq Ch., Advocate Supreme Court and Abul Asim Jafri, Advocate-on-Record (absent) for Petitioners.

Sh. Zamir Hussain, Advocate Supreme Court and Ijaz Muhammad Khan, Advocate-on-Record for Respondents.

Date of hearing: 4th February, 2002.

JUDGMENT

MUHAMMAD NAWAZ ABBASI, J.---This petition under Article 185(3) of the Constitution of the Islamic Republic of Pakistan, 1973, has been preferred against the judgment dated 7-8-2001 passed by a learned Single Judge of the Lahore High Court, Lahore, in a Constitution petition. The brief facts in the background are that the petitioners contested the election for the seat of Nazim and Naib Nazim of Tehsil Sargodha in a penal in the local bodies elections held on 2nd of August, 2001. They having secured 282 votes got second position in the contest whereas the panel of Sheikh Munir Ahmed obtained 371 votes and secured first position. The panels of Tasneem Ahmed Qureshi and Dr. Zulfiqar Ali Bhatti secured 280 and 200 votes

respectively. In the count 25 ballot papers were declared invalid and 5 were found missing. However, none of the penal could get more than 50% of the total votes polled, therefore, the Returning Officer while declaring it run off election fixed 8-8-2001 the date for fresh poll. The respondents Nos.3 and 4 moved an application on 3-8-2001 to the District Returning Officer for re-counting and the District Returning Officer forwarded their application to the Returning Officer for necessary action. The Returning Officer vide order dated 4-8-2001 allowed the request of recounting of ballot papers made by the said respondents and on the same day, completed the process of re-counting. The Returning Officer declared 21 votes of the respondents Nos.3 and 4 invalid out of 280 valid votes and similarly he declared 23 votes of the petitioners invalid out of 282 votes on the ground that these ballot papers were not found correctly stamped in accordance with law by making aid rubber stamp. The result was that both panels of the petitioners and the respondents secured 259 valid votes each and the Returning Officer while invoking the provisions of Rule 41 of the Punjab Local Government Election Rules, 2000 (hereinafter to be referred to as 'the Rules') drew lot and declared respondents Nos.3 and 4 successful candidates in the run off election. The petitioners being dissatisfied with the result of re-count and drawing of lot by the Returning Officer filed a Constitutional petition in the Lahore High Court, Lahore challenging the order dated 4-8-2001 passed by the Returning Officer, relating to the recounting and drawing of lot. The writ petition was dismissed by a learned Single Judge of the High Court with the following observations:--

"4. I have heard the learned counsel for the petitioners at length and also perused the orders. The orders passed by the Returning Officer prima facie are reasonable and are based on sound reasonings. The basic question in this case is that the petitioner has an alternate remedy by filing an election petition before Election Tribunal under Rule 70 of the Rules framed under Punjab Local Government Elections Ordinance, 2000. The contention of the learned counsel for the petitioners that the petitioners cannot file the election petition is incorrect as the holding of election on 3-8-2001 is in continuation of elections which were held on 2-8-2001 and all the candidates who have lost the election and are not being allowed to contest the run off election can challenge the final results as well as the results of 2-8-2001 through election petition as they are the aggrieved persons. 'this Court does not want to comment on the arguments of the learned counsel for the petitioners whether the votes which were declared invalid were rightly declared so by the Returning Officer or the decision is incorrect as it will definitely affect the rights of the parties if an

election petition is subsequently filed and the Election Tribunal has to decide the same. It is now well-settled law that this Court cannot interfere in the results of an election due to the availability of alternate remedy by filing an election petition. Even if it is an interpretation of the principle of declaring of vote as valid and invalid for that purpose an exercise has to be taken and votes have to be examined after the opening of envelop and the parties can raise the objections about the authenticity of the votes in the envelop called and for that purpose, recording of evidence can be required which cannot be done in writ jurisdiction. In such-like circumstances, exhaustive remedy by filing of election petition is available to the petitioners which is more exhaustive. "

The petitioners through this petition under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, have sought leave to appeal against the order of the Lahore High Court passed in Writ Petition No. 14753 of 2001 inter alia on the following grounds:--

(a) That the provisions of rule 40 of the Rules cannot be invoked for recounting of the valid votes as the power conferred under the said rule is confined only to the extent of challenged ballot papers and in case of valid votes, subject to the satisfaction of the condition of reasonableness contained therein.

(b) That the act of Returning Officer of declaring the valid votes as has invalid in the re-count and drawing of lot for the purpose of run off election, being beyond the scope of the Results, was illegal.

(c) That only a contesting candidate can challenge the election on the grounds mentioned in rule 81 of the Rules by filing an election petition under rules 70 and 71 of the Rules and the petitioners being, not a candidate in the run off election, would have no such remedy of challenge the illegality committed by the Returning Officer except to invoke the Constitutional jurisdiction of High Court for redressal of their grievance.

The learned counsel has emphasized that under rule 40(6) of the Rules, the Returning Officer could not enlarge the scope of re-counting of the ballot papers which were declared valid and were not challenged by any candidate or agent at the count and the learned Judge in the High Court without attending the legal questions raised before him, dismissed the writ petition with the misconception that it being an election dispute could conveniently be resolved by the Election Tribunal in an election petition. The learned counsel, in nutshell, has contended that the petitioners having secured second position in the election, were

entitled to contest the run off election but the Returning Officer through an illegal and improper exercise of jurisdiction, ousted them from the contest and in support of the proposition raised in this petition, 'on, has placed reliance on the following case law:--

- (1) Muhammad Saleem v. Provincial Election Authority, Karachi (PLD 1985 Karachi 135),
- (2) Wahid Bux v. Election Authority (1984 CLC 1294),
- (3) Pervaz Iqbal v. Provincial Transport Authority (1996 CLC 182),
- (4) Ittehad Cargo Service v. Syed Tasneem (PLD 2001 SC 116),
- (5) Kanwar Ijaz v. Irshad Ali (PLD 1986 SC 483),
- (6) Nasir Mahmood Mughal v. Muhammad Azam (1987 MLD 2526) and
- (7) Akbar Ali v. Razi-ur-Rehman (PLD 1966 SC 492).

Learned counsel appearing on behalf of the respondents on the other hand, submitted that the Returning Officer in the process of counting and recounting was competent to declare any ballot paper invalid under subclauses (a), (b), (c) and (d) of sub-rule (4) of rule 39 by virtue of the powers available to him under rule 40(4) of the Rules. Learned counsel while placing reliance on an unreported judgment of this Court passed in Civil Appeals Nos. 1864 and 1865 of 2001, submitted that factual controversy relating to the validity and invalidity of votes being exclusively adjudicable by the Election Tribunal, could not be agitated before the High Court in its Constitutional jurisdiction.

The Returning Officer in exercise of his powers under rule 40(6) of the Rules on an application of respondents Nos. 3 and 4, moved to the District Returning Officer initiated the process of re-count and upon consolidation of result while invoking the provisions of rule 41 of the Rules; drew the lot. The perusal of the rule relating to the procedure for re-count of the valid ballot papers would show that the Returning Officer cannot exercise such power in his discretion rather it is done only in exceptional cases in which he is satisfied about the reasonableness of the ground for re-count. There is also no provision in the Rules for institution of an election petition before the issuance of notification in the official Gazette under rule 42 of the Rules and the election of a returned candidate can only be challenged through an election petition after the result is notified in the official Gazette.

The questions for determination in the present case would be firstly, as to whether the re-count in the given situation, was legally justified and the procedure provided under rule 41 of the Rules was properly invoked and, secondly, whether a candidate after losing in the run off election would still be a contesting candidate in terms of rules 70 and 71 of the Rules and can file an election petition against the returned candidate on the grounds mentioned in rule 81 of the Rules and thirdly, if such a candidate cannot successfully avail the remedy of election petition what is the remedy available to him to challenge an illegality if committed by the functionaries of Election Commission during the election.

The contention of the petitioners that an election can only be declared void on one or more grounds mentioned in rule 81 of the Rules and that the petitioners having been excluded from the contest in the run off election were no more the contesting candidates to challenge the order of Returning Officer relating to the re-count and drawing of lot through an election petition, therefore, the question of their locus standi to file an election petition against the returned candidate would, need consideration by the High Court, is not as such without force. The question of locus standi to file an election petition left undecided by the, High Court was not as such related to an election dispute, therefore, it would need determination by the High Court in exercise of its powers of judicial review under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973. There is ample law on the point that notwithstanding the availability of remedy of election petition, an order passed by the Election Authorities affecting the right of parties at an intermediate stage, will be open to the judicial scrutiny by the High Court in its Constitutional jurisdiction in the suitable cases. However, the question relating to the exclusion or inclusion of the ballot papers from the count on any ground mentioned to rule 39 read with rule 40 of the Rules ordinarily would not be gone into by the High Court in its Constitutional jurisdiction but the exercise of power under the *ibid* rules by the Election Authorities being not discretionary, if such power is used in an illegal and improper manner, the legality of such an order can be questioned by way of filing a Constitution petition to the High Court and the objection that the Returning Officer not competent to invoke the provisions of rules 39 and 40 of the Rules after declaring the result under rule 42 of the Rules being a question relating to the jurisdiction of Returning Officer would need determination by the High Court. There can be no denial to the legal position that the Returning Officer in the process of count and re-count after the examination of the ballot paper, can exclude the invalid votes which were included in the count by the Presiding Officer and similarly he can exclude the votes from count which were wrongly declared valid and prepare the consolidated statement

accordingly for declaration of result but this power is not unlimited to be exercised at his option or at the instance of one or the other party unless he is fully satisfied about the reasonableness of the challenge. In the present case, the perusal of the impugned order would show that the Returning Officer excluded 21 ballot papers of the respondents and 23 ballot papers of the petitioners in the re-count which were neither declared invalid in the first count nor were challenged in writing, therefore, it was necessary to examine the matter relating to the legality and validity of the action of Returning Officer and the exclusion of ballot papers' on the ground that same were not bearing correct mark of marking aid rubber stamp. The above remarks of the Returning Officer in general terms would not be sufficient to exclude the ballot papers declared valid' in the count by the Presiding Officer without ascertaining the intention, of the voters appearing on the ballot paper. The Returning Officer has not pointed out in the order, the defect for which the intention of the voter was not clear or the ballot papers were not bearing the stamp or the stamp was put in a manner which made the ballot paper invalid. It is settled law that if a wrong done by a public functionary to a person cannot be undone through an ordinary remedy, the extraordinary remedy of writ petition can be invoked. The perusal of rules would show that if a vote was not challenged in the prescribed manner at proper stage, it would not be challenged subsequently and presumption of correctness shall be attached with the consolidation of result prepared at the time of count. Under the rules, the election of a returned candidate can be challenged by a contesting candidate by way of an election petition before the Tribunal on any ground mentioned under rule 81 of the Rules but the said ground would not be available to Returning Officer for re-count and revise of the result We having examined the matter in the light of the Rules find that the High Court has not given due consideration to the following questions:--

(i) Whether all candidates who participated in the election would have locus standi to challenge the election of the returned candidate in case of run off election or only the candidate who contested the run off election, would be deemed to be the contesting candidate for the purpose of rules 70 and 71 of the Rules.

(ii) What is the remedy provided under the law to challenge an order passed by the election functionaries during the process of election, adverse to the interest of a candidate at a stage when filing of an election petition under the rules is not possible.

We have not been able to find out proper answer to the above question in the impugned judgment and these were also not raised before this Court in Civil Appeals Nos. 1864 and 1865 of

2001 relied upon by the learned counsel for the respondents. The relevant portion dealing with the remedy of the election petition in the judgment above-referred appeal is reproduced as under:--

"19. Now the point for determination is whether the remedy of an election petition is available to the appellants/petitioners or in other words whether the grievances of the appellants/petitioners can be redressed by the Election Tribunal. The main grievance of the appellants/petitioners is that the Returning Officers in the case of the appellants and the District Returning Officer in the case of the petitioners had declared valid the votes rejected by the Presiding Officers in the face of the mandatory provisions of sub-clauses (b) and (c) of clause (iii) of rule 39 of the Rules that those ballot papers shall be excluded from the count which bear any writing or any mark other than the official mark and the mark of 'marking aid rubber stamp' or no mark of 'marking aid rubber stamp' indicating the contesting candidate for whom the elector has voted. Another grievance expressed by the petitioners is that the District Returning Officer had re-counted the votes after appellants/petitioners in the official Gazette as the returned candidates in view of sub-rule (5) of rule 42 read with rule 55 of the Rules. It was contended by the learned counsel for the appellants/petitioners that the Election Tribunal is not empowered to redress the grievances of the appellants/petitioners and even if it is presumed to be so empowered it is not invested with power to grant the relief of run off election i.e. fresh election in which the joint candidates securing the highest and the second highest number of votes shall be contestants. The result would be unsavoury as all the panels of candidates would become entitled to participate in the fresh election.

20. The contentions are misconceived. As envisaged by rule 80 of the Rules the Election Tribunal may upon the conclusion of the trial of an election petition make an order: (a) dismissing the petition, (b) declaring the election of the returned candidate to be void, (c) declaring the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected, (d) declaring the election as a whole to be void. The grounds for declaring election as a whole to be void are contained in rule 83 of the Rules which reads as under:--

'The Tribunal shall declare the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reason of--

(a) the failure of any person to comply with the provisions of the Ordinance or the Election Rules, or

(b) the prevalence of extensive corrupt or illegal practice at the election.'

21. The pith and substance of the grievances of the appellants/petitioners is that the result of the election has been materially effected on account of the failure of the Returning Officers, District Vehari and Mailsi as well as the District Returning Officer, Rahim Yar Khan to comply with the mandatory provisions of sub-clauses (b) and (c) of clause (iii) of Rule 39 of the Rules and failure of the District Returning Officer, Rahim Yar Khan to comply with the provisions of sub-rule (5) of Rule 42 read with Rule 55 of the Rules. The grievances of the appellants/petitioners thus squarely fall within the ambit of clause (a) of Rule 83 of the Rules and as such can be redressed by the Election Tribunal which in the event of declaring the election as a whole to be void can make any appropriate order, as a consequential relief, within the purview and framework of the Punjab Local Government Elections Order, 2000 and the Rules including an order.

22. In the light of what has been stated above, both the appeals and the petition are dismissed with no order as to costs."

The remedy of election petition provided under the Punjab Local Government Elections Rules, 2000 is available to a contesting candidate after issue of the notification of result of returned candidate but no such petition can be filed by a person who is not a contesting candidate in the election. The petitioners being no more contesting candidates in the run off election, would not be in a position to challenge the election of returned candidate through an election petition. Undoubtedly, the Tribunal on the basis of grounds mentioned in rule 83 of the Rules, can declare an election as a whole to be void. Under the above rule, the Tribunal can exercise power only in an election petition which is filed by a contesting candidate and the petitioners being not the contesting candidates in run off election would not be in a position to avail such remedy against returned candidate, and therefore, they had rightly invoked the Constitutional jurisdiction of High Court for redressal of their grievance. It would not be out of place to mention here that even if the statutory remedy available under the law is considered inadequate and inefficacious as the relief being claimed cannot be granted to an aggrieved person in such remedy, the writ petition can be maintained.

The petitioners as per results prepared by the Presiding Officer, secured second position in the election and accordingly

Returning Officer having declared the result in terms of rule 42 of the Rules nominated the petitioners as successful candidates for run off election, later on the application of the respondents Nos.3 and 4, he proceeded for the re-count of votes and by declaring the valid ballot papers as invalid revised the result. In the process of re-counting in exercise of power under rule 40 read with rule 39 of the Rules, the Returning Officer if finds that a ballot paper was or was not suffering from the defect to be included or excluded from the count, he can include or exclude such ballot paper from the count but this power cannot be exercised after declaration of result under rule 42 of the Rules. The relevant rules relating to the count and re-count and consolidation of result, are reproduced hereunder:--

"Rule 39. Proceedings at the close of the poll.--(1) The Presiding Officer shall 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.

(2) The Presiding Officer shall give such of the contesting candidates, election agents and. polling agents as may be present, reasonable facility of observing the count and give them such information with respect thereto as can be given consistent with the orderly conduct of the count and the discharge of his duties in connection therewith.

(3) No person other than the Presiding Officer and Polling Officer, any other person on duty in connection with the poll, the contesting candidates, their election agents and polling agents shall be present at the count.

(4) The Presiding Officer shall --

(i) open the used ballot box or ballot boxes and count the entire lot of ballot papers taken out therefrom;

(ii) open the used packet labelled "challenged ballot papers" and include the ballot papers therein in the count;

(iii) count the votes cast in favour of each contesting candidate excluding from the count the ballot papers which bear--

(a) no official mark;

(b) any writing or any mark other than the official mark and the 'marking aid rubber stamp' or to such piece of paper or any object of any kind has been attached;

(c) no mark of 'marking aid rubber stamp' indicating the contesting candidates for whom the elector has voted, or

(d) any mark from which it is not clear for whom the elector has voted:

Provided that a ballot paper shall be deemed to have been marked in favour of a candidate if the whole or more than half of the area of the mark of 'marking aid rubber stamp' appears clearly within the space containing the symbol of that candidate;

(e) and where the mark of 'marking aid rubber stamp' is divided equally between two such spaces, the ballot paper shall be deemed to be invalid.

(5) The Presiding Officer may re-count the votes --

(i) of his own motion if he considers it necessary; or

(ii) upon the request of a contesting candidate or an election agent present, if, in his opinion, the request is not unreasonable.

(6) The valid ballot papers cast in favour of each contesting candidate shall be put in separate packets and each such packet shall be sealed and shall contain a certificate as to the number of ballot paper put in it and shall also indicate the nature of the contents thereof, specifying the name and symbol of the contesting candidate to whom the packet relates.

(7) The ballot papers excluded from the count shall be put in a separate packet indicating thereon the total number of ballot papers contained therein.

(8) The packets mentioned in sub-rules (6) and (7) shall be put in a principal packet which shall be sealed by the Presiding Officer.

(9) The Presiding Officer shall, immediately after the count, prepare a statement of the count in Form XIII showing therein the number of valid votes polled by each contesting candidate and the ballot papers excluded from the count.

(10) The Presiding Officer shall also prepare in Form XIV a ballot paper account showing separately--

(i) the number of ballot papers entrusted to him;

(ii) the number of ballot papers taken out of the ballot box or boxes and counted;

(iii) the number of tendered ballot papers;

(iv) the number of challenged ballot papers;

(v) the number of spoilt ballot papers; and

(vi) the number of unissued ballot papers

(11) The Presiding Officer shall if so requested by any candidate or election agent or polling agent present, give to him a certified copy of the statement of the count and the ballot paper account.

(12) The Presiding Officer shall seal in separate packets--

(i) the unissued ballot papers;

(ii) the spoilt ballot papers;

(iii) the tendered ballot papers; .

(iv) the challenged ballot papers;

(v) the marked copies of the electoral rolls;

(vi) the counterfoils of the used ballot papers;

(vii) the tendered votes' list;

(viii) the challenged votes' list; and

(ix) such other papers as the Returning Officer may direct.

(13) The Presiding Officer shall obtain on each statement and packet prepared under this rule the signature of such of the contesting candidates or their election agents or polling agents as may desire to sign it.

(14) A person entitled to sign a packet of statement under sub-rule (13), may, if he so desires, also affix his seal on it.

(15) After the close of the proceedings under the foregoing sub-rules the Presiding Officer shall, in compliance with such instructions as may be given by the Returning Officer in this behalf, cause the packets the statement of the count and the ballot paper account prepared by him to be sent to the Returning Officer together with such other records as the Returning Officer may direct.

Rule 40. Consolidation of result.---(1) The Returning Officer shall consolidate in Form XV the results of counts furnished by the Presiding Officer.

(2) The Returning Officer shall give the contesting candidates and the election agents a notice in writing the day, time and place for the consolidation of the results.

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

(4) The Returning Officer shall include the votes cast in favour of each contesting candidate in the consolidation statement except those which he may reject on any of the grounds mentioned in clause (iii), sub-rule (4) of rule 39.

(5) The ballot papers rejected by the Returning Officer under sub rule (4) shall be shown separately in the consolidated statement

(6) The Returning Officer shall not re-count the valid ballot papers in respect 'of and polling station unless--

(i) the count by the Presiding Officer is challenged in writing by a contesting candidate or his election agent and the Returning Officer is satisfied about the reasonableness of the challenge; or

(ii) he is directed to do so by the Chief Election Commissioner or the District Returning Officer

Rule 41. Equality of votes.---(1) Where, after consolidation of the results of the count under rule 40, except for the offices of Zila Nazims and Naib Zila Nazims as joint candidates securing highest votes but not securing majority of total votes of members of Union Councils, it is found that there is equality of votes between two or more contesting candidates and the addition of one vote for one such candidate and the addition of one vote for one such candidate would entitle him to be declared elected, the Returning Officer shall forthwith draw a lot in respect of such candidates, and the candidate on whom the lot falls shall be deemed to have received the highest number of votes, entitling him to be declared elected.

(2) The lot shall be drawn in the presence of such of the contesting candidates and their election agents as may be present.

(3) The Returning Officer shall keep a record of a proceedings in writing, and obtain thereon the signatures of such candidates and election agents as have be witnesses to the proceedings.

Rule 42. Declaration of results.---(1) Save as provided in subrule (4) of rule 39 the Returning Officer shall, after consolidation of results under rule 40, or after the drawal of the lot under rule 41, declare by public notice, the names of such contesting candidate, or candidates in case of multi member wards as have or are deemed to have received the highest number of votes.

(2) The public notice shall contain the name of and the total number of votes received by each contesting candidate.

(3) The Returning Officer shall, immediately after publication of notice under sub-rule (1), submit to the District Returning Officer, a return of the election in Form XVI together with a copy of the consolidated statement.

(4) In case of election of Nazim and Naib Nazim if the joint candidates of a Zila Council securing highest votes fail to secure majority of the total votes of the members of Union Councils in the district the names of joint candidates securing the highest and the second highest votes shall be sent to the Chief Election Commissioner, immediately after the consolidation of results in Form XVI.

(5) The District Returning Officer shall arrange to have names of the returned candidates of an electoral ward in a council published in the official Gazette."

Under the rules the Returning Officer before declaration of result as provided under rule 42 of the Rules, has to examine the ballot papers excluded from the count by the Presiding Officer and if he finds that any ballot paper was wrongly excluded, will count it in favour of the candidate for whom it has been cast. The Returning Officer can also reject a vote on any ground mentioned under clause (iii) of sub-rule (4) of rule 39 of the Punjab Local Government Elections Rules, 2000 but under sub-rule (6) of rule 40 of the Rules, the Returning Officer has no power to re-count ballot papers which were declared valid by the Presiding Officer unless it was challenged in writing by a contesting candidate or his election agent and Returning Officer finds himself satisfied about the reasonableness of the challenge or if he is directed for re-count by the Chief Election Commissioner or by the District Returning Officer as the case may be.

The Returning Officer before consolidation of result issued notice to the contesting candidates for 4-8-2001 under rule 40 of the Rules and on the same day he undertook the exercise of re-count. The objection of the petitioners was that Returning Officer after consolidation and announcement of the result

proceeded to invoke the provisions of rule 40 and revised the result. The perusal of order would not show as to whether the re-counting was done before the consolidation of result or after its declaration. The Returning Officer after declaration of result, under rule 42 of the Rules becomes functus officio and is not competent to re-open the process of re counting in exercise of his power under rule 40 read with 39 of the Rules. Thus the essential question relating to the manner of exercise of jurisdiction by the Returning Officer and the locus standi of the petitioners to avail the remedy of election petition would need determination.

The next question related to the drawing of lot under rule 41 of the Rules in case of equality of votes. It is provided under section 148 of the Punjab Local Government Ordinance, 2000, that election of members of Union Council including Union Nazim and Naib ' Jnion Nazim will be held on the basis of adult franchise and separate electorates whereas the electoral college for the election of Zila Nazim, Naib Zila Nazim, Tehsil Nazim, Naib Tehsil Nazim, Town Nazim and Naib Town Nazim is the members of Union Council Under section 144 of the Ordinance, Union Nazim and Naib Union Nazim in a panel securing highest number of votes are declared elected but the Zila, Tehsil and Town Nazims and Naib Nazims securing more than 50% of the total votes of the members of the Union Council will be declared elected. In the Tehsil and Town, if the Nazim and Naib Nazim fail to secure more than 50 % of the total votes of the members of the Union Council in the respective Tehsil or town, fresh election is held in which joint candidates securing the highest and second highest number of votes in the first election shall be the contestants and the joint candidates securing the highest number of votes in the fresh election will be declared elected. In case of Zila Nazim and Naib Zila Nazim, in such situation matter shall be referred to the Chief Election Commissioner.

Under rule 41 of Punjab Local Government Elections Rules, 2000 except for the office of Zila and Naib Zila Nazim, in case of equality of votes between the two or more contesting candidates in the election for the seat of Nazim and Naib Nazim Tehsil and Town Council, the Returning Officer shall draw a lot and the candidates successful in lot shall be deemed to have received the highest number of votes entitling him to be declared elected. The method of drawing of lot under rule 41 of the Rules is only applicable for declaring a candidate to be elected as Nazim and Naib Nazim of Tehsil Council and Town Council but this rule is not applicable in case of equality of votes between the two or more candidates in the run off election to declare anyone of them successful candidate to contest the fresh election. The expression "entitling him to be declared elected" used in the above rule connotes that only in case of equality of

votes between the two or more candidates in the election if a candidate by addition of one vote can be declared elected, the lot shall be drawn. In the present case, Sheikh Munir Ahmed, who is not respondent in the present petition, having obtained 371 votes secured first position but for want of securing majority of total votes, he could not be declared elected and in consequence thereto, it was declared a run off election and petitioners as per initial result were the second candidate for contest in the fresh election. The Returning Officer while undertaking the exercise of re-counting revised the result according to which the petitioners and respondents Nos.3 and 4 were declared to have obtained equal votes and in consequence thereto for the contest of fresh election, the Returning Officer proceeded to draw a lot between them. The method of drawing lot as envisaged in rule 41 of the Rules has not been made applicable for declaring a candidate successful, in the run off election to contest the fresh election.

For the foregoing reasons, while converting this petition into appeal, we allow the same and hold that appellant Dr. Liaqat was validly declared as a runner up/returned candidate by the Presiding Officer; set aside the judgment of the High Court impugned herein and declare the order dated 4-8-2001 of the Returning Officer as illegal and set it aside as well. The case is sent back to the concerned District Returning Officer for disposal in accordance with law. There shall be no order as to costs.

Appeal allowed.