ORDER SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD

(JUDICIAL DEPARTMENT)

W.P. no.1087/2023

Raja Arif Sultan Minhas
versus
Election Commission of Pakistan (ECP) through its Chairman and others

S. No. of order/ proceedings	Date of order/Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
5	19.04.2023	M/s Qaiser Imam, Hasan Javed and Ch. Shujah Ullah Gondal, Advocates for the petitioner Mr. Ghulam Shabbir Shah, Awadh Anwar Khan and Raja Shakil Abbasi, Advocates for provisionally successful candidates Mr. Saad Hassan, Advocate for the respondent ECP Mr. Zaigham Anees, Law Officer, ECP

By this order, to be read integrally with the last order dated 11.04.2023, this writ petition is disposed of. On notice under the last order, Mr. Ghulam Shabbir Shah appeared for the (provisionally) successful candidates and submitted 6 powers of attorney, of which one is biometrically verified, which alone under the notification of this Court may be taken into account for the purposes of his formal representation, but he added that his submissions under the other 5 powers of attorney remain the same.

2 Mr. Shah contended that the election could only have been challenged through an election petition, and not by invoking section 9 of the Elections Act 2017 before the Election Commission. This proposition cannot be taken as an absolute and inflexible rule in view of section 9 conferring a new jurisdiction per *Ali Asjad Malhi* (see the last order). To entertain this submission would tantamount to the obliteration of section 9 from the statute book. To say that the petitioners could never approach the Election Commission in the first place is going too far. As noted earlier, the delay by the Election Commission in constituting Election Tribunals sits quite uncomfortably with, what Mr. Shah urged repeatedly, the settled jurisprudence that election disputes could only be challenged by an election petition to the Election Tribunals. What prevents the Election Commission from constituting Election Tribunals on or before the day of elections remained an unpalatable mystery. With the finding that the impugned order was unsustainable for the reasons stated in the order dated 11.04.2023, going by the learned counsel's arguments, the petitioners would be

left entirely without remedy. The impugned order would remain in the field, directing a recount without adverting to the coordinate statutory question: whether a repoll would be more appropriate.

3 Citing sections 219 and 229 of the Elections Act, Mr. Shah also submitted that section 9 was not applicable to Local Government elections and, therefore, the very impugned order of the Election Commission was without jurisdiction and the Commission ought not have entertained the complaint in the first place. No definite view need be expressed on this legal question, for the end result remains the same, namely, that the impugned order is to be set aside.

4 Mr. Shah then prayed that the notification announcing his clients as the returned candidates ought not be withheld pending the resolution of the dispute by the Election Tribunal. Mr. Qaiser Imam for the petitioners objected, saying that, with obvious illegality found by the Election Commission, this ought not happen. Citing *Ali Gohar Khan Mahar versus Election Commission of Pakistan through Secretary and 2 others* (2014 CLC 776), Mr. Shah urged that a losing candidate must stand aside regardless of the obvious illegalities during the conduct of the elections, that he should wait for his opponent candidate to be returned as the successful candidate, and only thereafter proceed to challenge his election before the Election Tribunal. Mr. Imam responded that the Elections Act 2017 was not in consideration before the Court in *Ali Gohar Khan*, and I tend to agree because, after *Asjad Malhi*, the law as it stood before the Elections Act 2017 may now need revisiting in some aspects. But this case is not one where these creases need to be ironed out, it being left to the Election Commission to decide whether to issue the notification of the returned candidates pending the decision of the Election Tribunal, for Mr. Shah informs that the recount in 5 out of the 6 constituencies had already taken place before the injunctive order was passed in this case, and that the recount sheets were duly signed by the candidates of *Jamat-e-Islami*, leaving only one constituency in which the recount had not taken place by the time the injunctive order was passed and, resultantly, the recount did not take place in that constituency alone. Mr. Imam had no instructions on this submission, which I therefore take to be as stated by Mr. Shah. In the circumstances, there seems no reason for this Court to continue to restrain the consolidation of results in the 5 constituencies where recount has taken place, subject of course

to the outcome of the election petition(s) the petitioners may elect to file. That leaves us with one constituency where the recount has not yet taken place.

5 In essence, Mr. Imam's contention is that, if a reasonable suspicion exists before the Election Commission that there have been instances of unfairness in the conduct of the elections, a candidate should not be returned. Implicit in this submission, on the facts and in view of the prayer for repoll sought by him in this case, is the argument that the Election Commission must in all instances of a reasonable suspicion, order a repoll only and not a recount as happened per the impugned order. This of course is not a correct submission, because the circumstances of unfairness, including its scale, will dictate whether a repoll or a recount is to be ordered. In this case, the Commission has chosen recount, and this Court has only questioned that conclusion on the limited ground that the alternative of repoll was never considered objectively by the Election Commission. By no means this Court is taking the view that a repoll was the only order the Commission ought to have made under the circumstances, but this is precisely the end point Mr. Imam wants this Court to reach. It is not shown to the Court as to why the remedy before the Election Tribunal of challenging the elections would be inadequate or why the Election Tribunal could not order a repoll, as the Tribunal will be able to go into details of factual controversy, which this Court is precluded from going into.

6 In the circumstances, I come to the same conclusion that was reached in the order dated 11.4.2023, namely, that the petitioner's prayer to the extent of setting aside the Election Commission's impugned order is granted (and the learned counsel's submissions for the provisionally successful candidates also gravitate to the same end result). The petitioners are free to file the election dispute before the Election Tribunal, which will examine all submissions including estoppel, if applicable, against the candidates who might have signed the recount papers without reservation.

7 **Disposed of**.

(Sardar Ejaz Ishaq Khan)
Judge

Asji