JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

WRIT PETITION No. 824 of 2024

UMAIR WASI CHAUDHARY

VERSUS

THE ELECTION COMMISSION OF PAKISTAN *and others*

Petitioners by	:	**Mr. Imtiaz Rashid Siddiqui, Advocate.**
Respondents by	:	**Barrister Saman Mamoon, for Respondent No. 1.** **Mr. Zaigham Anees, Law Officer, Election Commission of Pakistan.** **M/s Ch. Sultan Mehmood, Muhammad Ahsan Bhoon, Ch. Muhammad Yar Gondal, Ch. Hafeez ur Rehman, Shaharyar Tariq, and Taimur Khan, Advocates for Respondent No. 3.**
Date of Hearings	:	**12.03.2024, 14.03.2024, 22.03.2024, 29.03.2024, and 03.04.2024**.

SAMAN RAFAT IMTIAZ, J.-

1. Through the instant Writ Petition, the Petitioner [Umair Wasi Chaudhary] has assailed the Order dated 07.03.2024 ("**Impugned Order**") passed by the Respondent No.1 [Election Commission of Pakistan] ("**Respondent No.1/Election Commission**") whereby the Respondent No.2 [Returning Officer, PP-100 Faisalabad-III] ("**Respondent No.2/Returning Officer**") has been directed to recount the votes of the constituency including rejected votes in the presence of the Respondent No.3 [Khan Bahadar] and other contesting candidates within three days and prepare Form-49 accordingly.

2. The brief facts as per the Memo of Petition are that the Petitioner contested the election of PP-100 Faisalabad-III which was held on 08.02.2024. The Petitioner after conclusion of the election as well as consolidation process on 10.02.2024 was declared as the Returned Candidate with 48,928 votes. The rival candidate i.e. the Respondent No. 3 obtained 44,433 votes as per the Form-47. On

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17.02.2024 the Respondent No.1/Election Commission notified the election results vide Notification No. F.2(6)/2024-Cord. The Petitioner in pursuance of the above Notification signed the rolls and also took oath as an elected Member of the Punjab Provincial Assembly on 22.02.2024. In the meantime the Respondent No.3 filed an Application before the Respondent No.1/Election Commission contending that the consolidation proceedings had been conducted in his absence. The said application was decided vide the Impugned Order whereby the Respondent No.2/Returning Officer has been directed to recount the votes of the constituency including rejected votes in the presence of the Respondent No.3 and other contesting candidates within three days and prepare Form-49 accordingly. Being aggrieved of the Impugned Order the Petitioner has preferred the instant petition.

3. Before recording the arguments of the respective parties it is important to note the following dates:

i. Election held on 08.02.2024.
ii. Form 47 issued on 09.02.2024.
iii. Notification on 09.02.2024 for consolidation proceedings to be held under Section 95 of the Election Act, 2017 on 10.02.2024 at 2:00 p.m.
iv. Final consolidated result announced on 10.02.2024.
v. The Petitioner declared successful candidate and notified as the returned candidate vide ECP Notification dated 17.02.2024 pursuant to Section 98(1) of the Election Act.
vi. The Election Tribunal under Section 140 of the Election Act notified on 20.02.2024.
vii. The Petitioner took oath as member of Provincial Assembly vide Notification dated 22.02.2024.

Petitioner's arguments

4. The learned counsel for the Petitioner submits that according to Section 95(5) of the Election Act, 2017 ("**Election Act**") the Returning Officer shall recount the ballot papers of one or more polling stations if a request or challenge in writing is made to that effect by a contesting candidate or his election agent *before the commencement of the proceedings*. He submits that there is no evidence on the record of any request or challenge made by the Respondent No.3 to the Respondent No.2/Returning Officer in writing before the commencement of the proceedings. The learned counsel for the Petitioner submits that no application was appended by the Respondent No.3 with its petition filed before the Respondent No.

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1/Election Commission and in fact the Respondent No.2/Returning Officer denied filing of any such application in its reply to the Respondent No.3's petition to the Respondent No.1/Election Commission. The learned counsel also read out the introductory paragraph of the Impugned Order and argued that it does not indicate that any request in writing was made to the Respondent No. 2/Returning Officer. He also read out the arguments recorded by the Respondent No.1/Election Commission in its interim order dated 23.02.2024 to emphasize that it too does not record that any application was made to the Respondent No.2/Returning Officer.

5. The learned counsel for the Petitioner argued that the petition filed by the Respondent No. 3 before the Respondent No. 1/Election Commission on one hand stated that the Respondent No. 3's application to the Respondent No. 2/Returning Officer *was not entertained* by the Respondent No. 2/Returning Officer. On the other hand the application also stated that he requested the Respondents No. 1, 2, and 4 [District Returning Officer] to reconsolidate/tabulate but that *the request was turned down* by the Respondents. Moreover, the Respondent No. 3 submitted before the Respondent No. 1/Election Commission as recorded in the Impugned Order that an application for recount was given to the Respondent No. 2/Returning Officer on 09.02.2024 which *was not decided* by him. Leaving aside such contradictions, he highlighted that in fact, no order whereby the Respondent No. 3's application/request was turned down by the Respondent No. 2/Returning Officer is on the record. He also highlighted that the application made by the Respondent No.3 to the Respondent No.1/Election Commission in Urdu on 12.02.2024 nor the application made on 13.02.2024 in English mentions that the Respondent No.1/Election Commission is being approached because of the Respondent No.2's failure to pass any order. In such circumstances, the learned counsel argues that there was no order for the Respondent No.1/Election Commission to review under Section 8(b) of the Election Act.

6. Insofar as the power pursuant to Section 95 (6) of the Election Act is concerned the learned counsel submits that the Respondent No.1/Election Commission is empowered to direct the Returning officer to recount the Ballot Papers of *one or more Polling Stations before conclusion of the consolidation proceedings*. Whereas the Respondent No.3 approached the Respondent No.1/Election Commission under Section 95(6) of the Election Act on 13.02.2024 despite the fact that consolidation proceedings concluded on 10.2.2024. As such he argues that the petition of the Respondent No. 3 could not have been entertained

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by the Respondent No.1/Election Commission at such point in time. He also drew the Court's attention to Article 225 of the Constitution of the Islamic Republic of Pakistan, 1973 ("**Constitution**") and Section 139 of the Election Act to argue that once the returned candidate takes oath he is part of the House and no longer within the jurisdiction of the Respondent No. 1/Election Commission as such the Impugned Order passed on 07.03.2024 was beyond the jurisdiction of the Respondent No. 1/Election Commission.

7. He further submits that even otherwise the Respondent No.1/Election Commission under Section 95(6) of the Election Act can only direct recount of ballot papers *of one or more polling stations* and not the entire constituency as directed vide the Impugned Order and that too without any *prima facie* evidence or affidavit on any ground calling for such recount. He also referred to Section 95(7)(b) of the Election Act whereby in case recount is directed under Section 95(5) or Section 95(6) *ibid* the consolidation proceedings shall be completed within five days after polling date in case of elections of a Provincial Assembly. He submitted that such time period lapsed on 13.02.2024 whereas the Impugned Order of recounting was passed on 07.03.2024.

8. The learned counsel further argues that the Impugned Order records that request for recount has been made on the ground that margin of victory is very low and number of rejected votes are high whereas, no such submission was made by the Respondent No. 3 in his application to the Respondent No. 1/Election Commission. He also refers to the Impugned Order whereby the Article 218(3) of the Constitution read with Sections 4, 8(b), (c) and 95 of the Election Act have been mentioned for the purpose of directing the Respondent No. 2/Returning Officer to recount the votes of the constituency. He referred to Sections 4 and 8 of the Election Act to highlight that there is no power to call for recounting of entire constituency under such provisions. He submits that Section 9 of the Election Act empowers the Respondent No. 1/Election Commission to declare a poll void, however, circumstances in which poll is declared void are not attracted in this case nor was the petition of the Respondent No.3 filed under such sub-section and the same has not even been referred to by the Respondent No. 1/Election Commission in the Impugned Order.

9. He then argued that under Section 101 (1) of the Election Tribunal it is only the Tribunal who could have reopened the packets of Counterfoil and Certificates

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or ordered the inspection of any counted Ballot Papers at the given time. Therefore, the Impugned Order was passed in excess of the Respondent No. 1/Election Commission's powers. He also pointed out that the recount by Respondent No. 2/Returning Officer on directions given vide the Impugned Order dated 07.03.2024 was conducted on 12.03.2024 when the Respondent No.2 had already retired.

10. He argued that in similar circumstances the Lahore High Court, Bahawalpur Bench has rendered a Judgment dated 05.03.2024 in *Rana Muhammad Faraz Noon vs. Election Commission of Pakistan, etc.*, W.P. No. 1333/2024, wherein it has been held that the Respondent No.1/Election Commission has no authority or power to pass an order for recounting in terms of Section 95(6) of the Election Act when consolidation proceedings stood completed and even the notification under Section 98(1) of the Election Act declaring petitioner as returned candidate was issued. Thus the impugned order in such petition passed by the Respondent No.1/Election Commission for recounting after completion of consolidation proceedings was set aside and proceedings carried out pursuant thereto were considered to have been vitiated. In this regard the learned counsel submits that as such the notification of the Respondent No.3 dated 13.03.2024 and the oath taken by the Respondent No. 3 on 15.03.2024 stand vitiated.

11. The learned counsel for Petitioner also relies upon an order dated 07.03.2024 passed by the Respondent No. 1/Election Commission in the case of *Aliya Hamza Malik Versus The Returning Officer NA-118 Lahore*, Case No.7 (166)/2024-Law-III (GE) whereby the Respondent No.1/Election Commission dismissed the petition under Section 95 (5) of the Election Act in view of the fact that Election Tribunal has been constituted. The learned counsel for the Petitioner argues that on one hand the Respondent No.1/Election Commission dismissed the aforementioned petition on the ground that it has no jurisdiction after the constitution of the Election Tribunal and on the other hand on the same date vide Impugned Order the Respondent No.1/Election Commission not only entertained the petition of the Respondent No.3 but also passed orders for re-counting of votes notwithstanding the constitution of the Election Tribunal. For the foregoing reasons, the learned counsel submits that the Impugned Order is illegal and liable to be set aside. He relied upon *Mir Mujib-ur-Rehman Muhammad Hassani Vs. Returning Officer, PB-41 Washuk*, PLD 2020 SC 718; *Zia-ul-Hassan Lanjar Vs. Election Commission of Pakistan*, PLD 2019 Sindh 163; and *Moulana Atta-ur-Rehman Vs. Al-Hajj Sardar Umar Farooq*, PLD 2008 SC 663.

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Respondent No.1's arguments

12. The learned counsel for the Respondent No.1/Election Commission submits that the Respondent No.3 had the right to approach the Respondent No.2/Returning Officer under Section 95 (5) of the Election Act before commencement of the proceedings which in the instant case according to her was on 09.02.2024. The learned counsel for Respondent No.1/Election Commission pointed out that the Respondent No.1/Election Commission can be approached not only under Section 95 (6) of the Election Act before conclusion of the proceedings but also in case of review of an order passed by Respondent No.2/Returning Officer pursuant to Section 8 (b) of the Election Act. The learned counsel for Respondent No.1/Election Commission further submits that rejection of the Respondent No.3's application under Section 95 (5) of the Election Act is evident from the fact that the Respondent No.2/Returning Officer concluded the consolidation proceedings on 10.02.2024. Thus in such case the Respondent No.3 was entitled to approach the Respondent No.1 for review under Section 8 (b) of the Election Act on the 12.02.2024.

13. She relies upon *Aftab Shahban Mirani Vs. Muhammad Ibrahim Jatoi*, 2016 CLC 222 where under it was held that the power of the Respondent No.1 as provided under Section 103 (b) of the Representation of the People Act, 1976 ("**ROPA**") which according to her is *pari materia* to Section 8(b) of the Election Act is not time bound nor is there any provision which restrains the Respondent No.1 to exercise such power after a person is notified as a returned candidate. As such she submits that the Respondent No.1 was well within its powers under the Election Act to pass the Impugned Order pursuant to Section 8 (b) of the Election Act.

14. In respect of the argument made by the Petitioner that recount under Section 95 (5) and 95 (6) of the Election Act can be directed only for one or more polling station and not for the entire constituency the learned counsel for the Respondent No.1 argued that *one or more polling stations* allows for recount of all polling stations of the constituency without calling for a re-poll.

15. Last but not least she submitted there was no need for notification of reappointment of Respondent No.2/Returning Officer in view of Section 4 (3) of the Election Act whereby anything required to be done for carrying out the purposes of the Election Act for which no provision or no sufficient provision

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exists shall be done by such authority and in such manner as the Commission may direct.

Respondent No.3's arguments

16. The learned counsel for the Respondent No.3 began by explaining that a copy of his application dated 09-02-2024 to the Respondent No. 2/Returning Officer was submitted during the arguments before the Respondent No.1/Election Commission. However, there is no record of such submission. During the course of arguments, the Respondent No.3 gave a copy of such application to this Court as well as to the learned counsel for the Petitioner. He submitted that such application bears the receiving by the Respondent No.2/Returning Officer on 09.02.2024 and the factum of filing of such application on the 09.02.2024 is admitted by the Respondent No.2/Returning Officer in its report/parawise comments filed by the Respondent No.2/Returning Officer to this petition. He argued that the receiving date and the confirmation by the Respondent No.2/Returning Officer before this Court leave no doubt that such application was in fact made notwithstanding the fact that it was not produced heretofore. Even otherwise he argued that the same would constitute a disputed question of fact which cannot be adjudicated upon in exercise of Constitutional jurisdiction of this Court and the Petitioner would be better off approaching the Election Tribunal who is empowered to record evidence in case of denial.

17. Next he argues that under Section 95 (6) of the Election Act, the Respondent No.3 could also approach the Respondent No.1/Election Commission before conclusion of the consolidation proceedings. According to the dates provided by the learned counsel for the Petitioner consolidation proceedings were held and concluded on 10.02.2024. However, he conceded that he is not sure if the conclusion of the proceedings was notified on the 10.02.2024 or 11.02.2024. Be that as it may, the learned counsel for the Petitioner conceded that for the sake of argument it may be assumed that the notification was issued on 11.02.2024 in which case too, the Respondent No.3's purported application to the Respondent No. 1/Election Commission on 13.02.2024 was too late.

18. The learned counsel for the Respondent No.3 submits that he filed the application before the Respondent No. 1/Election Commission on 12.03.2024

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which was taken up on the 13.02.2024. He argued that even if the said application was time barred under Section 95 (6) of the Election Act the same was nevertheless maintainable as a review application under Section 8 (b) of the Election Act. The learned counsel for the Respondent No. 3 concedes that there was no written order passed by the Respondent No. 2/Returning Officer in respect of the Respondent No. 3's application but submits that the Respondent No. 2/Returning Officer's failure to pass an order was the reason why the Respondent No. 1/Election Commission was approached. In this regard he was asked as to which order Respondent No.3 sought to be reviewed under Section 8 (b) of the Election Act when admittedly no order has been passed by the Respondent No.2/Returning Officer on the application submitted by Respondent No. 3. He submitted that the fact that Respondent No.2/Returning Officer did not pass an order in respect of Respondent No.3's application would be deemed to be a rejection which rejection could be reviewed by the Respondent No.1 under Section 8 (b) of the Election Act. The learned counsel was asked as to whether any time period has been provided in law for the Respondent No.2/Retuning Officer to pass an order in respect of an application made before it under Section 95 (5) of the Election Act to which the learned counsel conceded that no such time period has been provided.

19. While explaining the Respondent No.1's decision in the *Aliya Hamza Malik* case the learned counsel for the Respondent No.3 submits that in such case the petition made by the petitioner was under Section 95 (5) of the Election Act and not under Section 8 (b) of the Election Act seeking a review of an order passed by the Respondent No.2/Returning Officer as no application had been made to Respondent No.2 by such petitioner. In respect of the case of *Abdul Rehman Kanju Versus Rana Muhammad Faraz Noon, etc.*, ICA No.29 of 2024/B WP he submitted that a stay order had been passed by the Lahore High Court (Bahawalpur Bench) despite which the respondent had proceeded hence, the said judgment whereas in the instant case no stay order was passed nor violated.

20. I have heard the learned counsels for the parties and have also perused the available record.

21. The facts as recorded herein above leave no doubt in my mind that the petition filed by the Respondent No.3 before the Respondent No.1/Election Commission on 12.02.2024 was after conclusion of the consolidation proceedings

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and as such beyond the scope of Section 95(6) of the Election Act and as such could not have been entertained thereunder.

22. Nevertheless the Respondent No.1 does indeed have the power to review an order passed by an officer under the Election Act or its Rules to ensure fair election pursuant to Section 8 (b) *ibid*. The Petitioner argued that no application was made by the Respondent No.3 before the Respondent No.2/Returning Officer nor the Respondent No.2/Returning Officer passed any order that could be reviewed by the Respondent No.1 under Section 8 (b) of the Election Act.

23. As far as the allegation of no application having been filed by the Respondent No.3 is concerned an application bearing receipt dated 9.2.2024 by the Respondent No.2/Returning Officer was submitted before this Court during the course of the arguments. The Respondent No.2/Returning Officer has confirmed that such application was filed by the Respondent No. 3 on 9.2.2024 by way of its comments filed in the instant petition. The learned counsel for the Petitioner argued that on the contrary the Respondent No.2/Returning Officer denied that any such application was made to it by the Respondent No. 3 in its comments/report filed before the Respondent No. 1/Election Commission.

24. Review of the report / parawise comments filed on behalf of Respondent No.2/Returning Officer before the Respondent No.1/Election Commission in response to the Respondent No.3's petition to the Respondent No.1/Election Commission shows an evasive reply to the paragraph wherein it was alleged that an application was moved by the Respondent No.3 before the Respondent No.2/Returning Officer but was not entertained. The response submitted by the Respondent No.2/Returning Officer to the Respondent No.1/Election Commission neither categorically denies that an application was moved before RespondentNo.1/Election Commission by the Respondent No.3 nor accepts the same. It simply states that the provisional result on Form-47 has been issued on the basis of Form 45 prepared by the concerned Presiding Officers of each polling station. In the absence of such specific denial by the Respondent No. 2/Returning Officer in its report / comments filed in response to the Respondent No.3's petition before the Respondent No.1/Election Commission the allegation made by the Respondent No.3 that an application was made to the Respondent No.2/Returning Officer would be taken to be admitted pursuant to Order VIII, Rule 5, CPC. Even otherwise perusal of such report/comments leaves one with a distinct impression

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that filing of the application by the Respondent No.3 before the Respondent No.2/Returning Officer is not denied. In my opinion, if no such application had been filed the Respondent No.2/Returning Officer would have categorically denied the allegation made by the Respondent No.3 in this regard rather than making the assertions made vide its report/comments. Even otherwise, whether or not an application was filed by the Respondent No.3 before the Respondent No.2/Returning Officer is at best a disputed question of fact which cannot be adjudicated upon in exercise of constitutional jurisdiction.

25. In any event, it is an admitted fact that no order was passed by the Respondent No.2/Returning Officer in writing in respect of the Respondent No. 3' application filed for recount pursuant to Section 95(5) of the Election Act. Had there been a written order passed by the Respondent No.2/Returning Officer rejecting the Respondent No.3's application there would be little room to argue that the Respondent No.1/Election Commission could not review such order of the Respondent No.2/Returning Officer in exercise of its powers under Section 8 (b) of the Election Act. However, in the peculiar circumstances of this case admittedly no such order was passed by the Respondent No. 2/Returning Officer.

26. Be that as it may, there is considerable force in the argument made by the learned counsel for the Respondent No.1/Election Commission that the fact that the Respondent No.2/Returning Officer proceeded to conclude the consolidation proceedings and to issue the final consolidation list on the 10.02.2024 without passing any order on the Respondent No.3's application dated 09.02.2024 or recounting the votes is tantamount to rejection in which case the Respondent No.3 was entitled to approach the Respondent No.1/Election Commission for review of such rejection pursuant to Section 8(b) of the Election Act.

27. Superior courts have leaned toward a liberal construction of election laws so that material prejudice may be avoided[1]. The Petitioner has not denied that the margin of victory between the Petitioner and the Respondent No.3 was less than 5% of the total votes polled in the concerned constituency which satisfies the condition stipulated in Section 95(5)(a) of the Election Act for the Respondent No.2 to recount the ballot papers of one of more polling stations upon request. In such case a liberal construction of the law is warranted to hold that the Respondent No. 2's failure to recount the ballot papers or to pass an order in respect of the

[1] *Maulvi Abdul Ghani Vs. Election Tribunal, Balochistan*, 19991 SCMR 1.

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Respondent No. 3's application despite such application meeting the prescribed threshold amounted to a rejection of such application.

28. The Petitioner's argument that the Respondent No. 1/Election Commission could not have passed the Impugned Order on 07.03.2024 given that the Election Tribunal had been constituted on 20.02.2024 has already been addressed in *Aftab Shahban Mirani Vs. Muhammad Ibrahim Jatoi*, 2016 CLC 222 as follows:

> *"Examining the controversy in this perspective, we do not see any reason to disagree with the contention of Mr. Naek that* ***Section 103-AA does not envisage recounting of votes but at the same time it cannot be ignored that Section 103-B empowers the Election Commission to review any order of the Returning Officer including rejection of ballot papers.*** *Perusal of Section 39 of the Act, 1976 reflects that it details the consolidation process of the election results, and Section 6(a) thereof empowers the Returning Officer to recount the ballot papers upon the request of or on challenge in writing made by a contesting candidate or his polling agent, if the returning officer is satisfied that the request or challenge is reasonable. Likewise, Clause (b) of subsection (6) provides for recounting if so directed by the Commission, meaning thereby that recounting before consolidation of result could be undertaken by the Returning Officer while exercising powers under section 39(6)(a) or on the direction of the Election Commission as provided under section 39(6)(b).* ***Against the order of Returning Officer under Section 39(6)(a) remedy by way of review before the Election Commission has been provided by Section 103(b) of Act, 1976 by laying down that the Commission may review an order passed by an officer under Act of 1976 or the rules including rejection of a ballot paper, therefore, to say that the Commission has no power to direct recounting or to review an order of the returning officer directing recounting of rejected votes or otherwise does not appear to be in consonance with law.***
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> ***Coming to the second limb of Mr. Naek argument that once the Petitioner was notified as returned candidate the Election Commission had no power to direct recounting of the rejected votes by exercising powers under Section 103(b) of Act 1976. In our opinion this view would render Section 103 B which empowers the Election Commission to review an order passed by an officer under the ROPA Act or the Rules including rejection of ballot papers as redundant. On the other hand, Section 103B of the Act 1976 neither contains a bar vis-a-vis time period nor any provision could be pointed out which restricts the Election Commission from exercising its power under Section 103B of the Act 1976 after a person is notified as returned candidate.*** *The suggestive interpretation of Mr. Naek as already observed would in fact render the provision of Section 103B of the Act 1976 as a redundant. For instance in the instant case the request of the Respondent for recounting the rejected votes was declined by the returning officer on 07.05.2014, whereafter reconciliation process was completed and the Petitioner was notified as returned candidate on 09.05.2014 and it cannot be assumed that such remedy is to be exercised in one day which would render the remedy as illusory. Additionally even if the remedy would have been availed before the petitioner could be notified as returned candidate, the proceedings under Section 103-B would have taken place after the petitioner would have been notified as returned candidate. Moreover, the time limit provided under Section 103 AA(2) is only for the purposes of Section 103 AA(1) restricting the time limit within which the Election Commission could address grave illegalities or violation of provision of Act 1976 within 60 days after a person is notified as returned candidate and not where power under Section 103(b) are exercised by the Commission.*
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> ***At the most while applying rule of prudence one could apply the time limit of 60 days provided under Section 103AA(2) to the Election Commission of Pakistan for ensuring corrective measures as a timeframe for exercising powers under Section 103-B as well.*** *In the instant case petitioner was notified as returned candidate on 09.05.2014, whereas the impugned order directing recounting of rejected votes was*

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directed on 20.06.2014 well within the time limits of 60 days.

In view of what has been discussed above, we find that this petition being meritless and, therefore, dismiss the same." [Emphasis added].

29. *Aftab Shahban Mirani (Supra)* was passed by the Sindh High Court at Karachi prior to the promulgation of the Election Act. Nevertheless Sections 103 and 103 (AA) of ROPA are *pari materia* to the provisions of Section 8 (b) and Section 9 of the Election Act respectively. Therefore the judgment provides useful guidance in the matter at hand as the same argument was raised in such case too i.e. that the Respondent No.1/Election Commission had become *functus officio* upon constitution of Election Tribunal. The judgment holds that such a view would render Section 103(b) of ROPA (*pari materia* to Section 8 (b) of the Election Act) redundant. The Court explained that the remedy under the aforementioned provision of law would be rendered illusory given the short period of time involved between the time when a petition may be made to the Respondent No.1/Election Commission for review of an order rejecting an application for recount and the constitution of the Election Tribunal.

30. In the instant case the petition to the Respondent No.1/Election Commission was made on the 12.02.2024 whereas the Petitioner was notified as returned candidate on 17.02.2024 which was even prior to the constitution of the Election Tribunal that took place on 20.02.2024. The question that arises is whether upon constitution of the Election Tribunal on 20.02.2024 the Respondent No.1/Election Commission should have laid its hands off the petition moved by the Respondent No.3 and refrained from passing any order pursuant to Section 8 (b) of the Election Act. In this regard the Sindh High Court *Aftab Shahban Mirani (Supra)* held that although the 60 days period provided in Section 9 (3) of the Election Act for exercise of powers by the Commission does not apply where the powers are exercised by the commission under Section 8 (b) *ibid* the same could be applied while applying the rule of prudence. Thus, even then the Impugned Order was passed on 07.03.2024 would be within the requisite time period.

31. I am also fortified in my view by the judgment of the Supreme Court passed in *Let. Gen. (R) Salahuddin Tirmizi Vs. Election Commission of Pakistan*, PLD 2008 SC 735 wherein it was held that Sections 103 and 103 (AA) of ROPA (*pari materia* to Sections 8 (b) and 9 of the Election Act) are entirely independent of Section 52 *ibid* (which is *pari materia* to Section 139 of the Election Act). It was held that the Respondent No.1/Election Commission *before or after* issuance of

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notification of result of election may exercise jurisdiction to entertain a complaint on the grounds mentioned in the said provisions of ROPA and may continue to exercise the power within 60 days after official announcement of result of election. Whereas an election petition can be filed within 45 days of the publication of notification of result and petitioner can take all the grounds which were taken in the application under Section 103 (AA) of ROPA before the Election Commission. The Supreme Court thus concluded that jurisdiction of Respondent No. 1/Election Commission to some extent is concurrent with the Tribunal without any conflict. In light of such pronouncement which is binding upon me there is no merit in the Petitioner's argument that the Respondent No.1/Election Commission was not empowered to pass the Impugned Order on 7.3.2024.

32. The case law relied upon by the Petitioner's counsel is distinguishable from the facts of the instant case. In the case of *Rana Muhammad Faraz Noon (Supra)* there was no dispute that the candidate who secured the second highest vote never approached the returning officer under Section 95 (5) of the Election Act. Undisputedly the candidate in such case had approached the respondent No.1 pursuant to Section 95 (6) of the Election Act albeit after conclusion of consolidation proceedings. It was in such circumstances that the Lahore High Court, Bahawalpur Bench held that the Respondent No.1/Election Commission had no authority or power to pass an order for recount in terms of Section 95 (6) of the Election Act when consolidation proceedings stood completed. Whereas in the instant case the issue is not regarding direction of recount by the Respondent No. l in exercise of powers conferred under Section 95 (6) of the Election Act rather the directions were given pursuant to Section 8 (b) *ibid*. Similarly, in the case of *Aliya Hamza Malik* the petitioner had approached the Respondent No.1/Election Commission under Section 95 (6) of the Election Act after conclusion of consolidation proceedings therefore the Respondent No.1/Election Commission rightly refused to entertain such petition. In such case too there was no application made to the returning officer under Section 95 (5) and therefore there is no order passed by the returning officer refusing recount for the Respondent No.1/Election Commission to review under Section 8 (b) of the Election Act. Likewise in *Moulana Atta-ur-Rehman (Supra)* the returning officer passed order of recount after he had already become *functus officio* upon consolidation of the result as the petitioner therein have been declared as returned candidate.

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33. Thus in my opinion the Petitioner has failed to point out any illegality or infirmity or jurisdictional defect in the Impugned Order which has resulted in miscarriage of justice that would warrant interference by this Court in exercise of Constitutional jurisdiction. It is also not out of place to mention that recount has taken place since the filing of the instant writ petition. The Petitioner has invoked the equitable jurisdiction of this Court but has not pointed out any error in the result of such recount whereby the Respondent No. 3 has been declared the successful candidate nor has the Petitioner instituted any legal proceedings before any other forum to challenge the same.

34. In view of the foregoing, the instant petition is **dismissed**.

(SAMAN RAFAT IMTIAZ)
JUDGE

Announced in open Court on this 5th day of April, 2024.

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Approved for Reporting
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