JUDGMENT SHEET

PESHAWAR HIGH COURT,  
PESHAWAR  
JUDICIAL DEPARTMENT.

Writ Petition..........................No........3324-P........of.........2017

JUDGMENT

Date of hearing: _____________ 24th August, 2017

Petitioner(s): (Mirza Javed Akhtar) by Mr. Sawar Khan, Advocate.

Respondent(s): (Khurshid Alam Khan) by Mr. Arshad Jamal Qureshi, Advocate.

SYED MUHAMMAD ATTIQUE SHAH, J.-

Through this single judgment, we propose to decide Writ Petitions No.3324-P/2017 (Mirza Javed Akhtar vs. Khurshid Alam Khan etc.) and 3233-P/2017 (Khurshid Alam Khan vs. State etc.), as common questions of law and facts are involved in these writ petitions.

2. Through Writ Petitions No.3324-P/2017 and 3233-P/2017, Mirza Javed Akhtar (hereinafter called as “the petitioner”) and Khurshid Alam Khan (hereinafter called as “the respondent”) respectively have simultaneously questioned the order dated 09.08.2017 of the learned District & Sessions Judge / Election Tribunal (hereinafter called as “the Election Tribunal”), whereby, the learned Election Tribunal while disposing of Objection Petition of the
petitioner confirmed the report of the Local Commissioner. The petitioner is aggrieved from the aforesaid order to the extent of confirming the report of Local Commissioner without summoning and examining him (the Local Commissioner) and has prayed for acceptance of his objection petition by summoning and examining the Local Commissioner whereas, the respondent is also aggrieved from that very order to the extent of not deciding his main election petition and has prayed for declaring him returned candidate by de-notifying the petitioner herein from the post of District Council Member, Union Council-08, Faqir Abad, Peshawar.

3. The learned counsel appearing on behalf of the petitioner contended that when as per Form XXVIII, number of total votes viz. validly polled plus rejected votes was 4344 (4196+148=4344) while as per Local Commissioner’s report, total votes counted were 4018, whereas the said report is totally silent with regard to difference of 326 votes; the learned Election Tribunal should not have straightaway confirmed the said report, rather instead of that, the Local Commissioner should have been summoned and examined so as to confront him with that very report and also to bring on record the true picture of recounting of ballot papers in the interest of justice. The learned counsel by concluding his arguments lastly submitted that since the impugned order dated 09.08.2017 of the learned Election Tribunal with regard
to confirmation of report of the Local Commissioner is the result of non-application of his judicial mind and non-appreciation of material available on the record; thus interference of this Court, in the present scenario, has become imperative and prayed for setting aside the impugned order dated 09.08.2017.

4. On the other hand, learned counsel appearing on behalf of respondent has rebutted the stance of petitioner and vehemently argued, that once report of the Local Commissioner came to surface and has been considered and confirmed by learned Election Tribunal vide order dated 09.08.2017, then petitioner stands nowhere and, in that circumstances, the respondent should have been declared returned / successful candidate by the learned Election Tribunal by accepting his election petition, while de-notifying the petitioner to be Member of District Council, Union Council-08, Faqir Abad; therefore, the order dated 09.08.2017 is required to be modified by giving direction to the learned Election Tribunal to decide the main lis at the earliest. The learned counsel by summing up his arguments lastly argued that filing of different frivolous applications by the petitioner is nothing but only to prolong the matter and also to detract the learned Election Tribunal from its main object to decide the main lis, therefore, his petition is liable to be dismissed.
5. We have gone through the record carefully and considered the submissions made at the bar by learned counsel for the parties.

6. The record reveals that the petitioner herein by securing 1558 votes had been declared returned candidate by the Election Commission of Pakistan on the basis of result, furnished by the Returning Officer-IV / Add. Assistant Commissioner, Peshawar(X) on Form-XXVIII, vide Notification dated 23.06.2015 in the Local Government Elections, 2015, held on 30.06.2015 for the seat of District Council, Union Council-08, Faqir Abad, Peshawar, which besides him was also contested by the respondent herein and three others viz. respondents No.2 to 4. For sake of convenience, the result / form-XXVIII is reproduced herein below:

**FORM-XXVIII**

[See Rule 41]

Election to be the village/Neighbourhood Council: Ward No.8 Faqirabad

Tehsil/Town Council: Peshawar
District Council Peshawar
Category of Seat: District

| S.No. | Name of the Contesting Candidates | Number of Valid Votes Poll
<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Mirza Javed Akhtar</td>
<td>1558</td>
</tr>
<tr>
<td>2</td>
<td>Khurshid Alam Khan</td>
<td>1101</td>
</tr>
<tr>
<td>3</td>
<td>Akhun Zada Shah</td>
<td>987</td>
</tr>
<tr>
<td>4</td>
<td>Zohib Khawas</td>
<td>296</td>
</tr>
<tr>
<td>5</td>
<td>Usman Saleem</td>
<td>254</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>4196</td>
</tr>
</tbody>
</table>
Total number of valid votes polled: 4196
Total number of rejected Votes: 148
Total number of tendered Votes: 4344

I declare that following candidates have duly been elected.

<table>
<thead>
<tr>
<th>S.No.</th>
<th>Name</th>
<th>Father Name / Husband</th>
<th>Address</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Mirza</td>
<td>Mirza</td>
<td>r/o Mughal building Moh Faqirabad No.2 Pesh</td>
</tr>
<tr>
<td></td>
<td>Javed</td>
<td>Aminullah Jan</td>
<td></td>
</tr>
<tr>
<td></td>
<td>Akhtar</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Date........................................... Returning Officer-IV
Place ......................................

Since the respondent secured only 1101 votes with difference of 457 votes from the returned candidate, as reflected above, he, on 26.06.2015, had challenged the aforesaid declaration / notification by filing election petition, under Rule 44 of the Khyber Pakhtunkhwa Local Councils (Conduct of Elections) Rules, 2014 before the Election Tribunal, Peshawar besides filing of application for re-counting of ballot papers, which were contested by the petitioner herein by submitting his written statement and written reply respectively by opposing claim of the respondent herein and also filed an application / petition under Order VII Rule 11 of CPC read with Rule 51 of Rules, 2014 for rejection / dismissal of election petition of respondent, which application was dismissed by learned Election Tribunal after hearing both the parties, vide its order dated 06.01.2016. After framing certain issues by the learned Election Tribunal, some of the witnesses i.e. six in number have been examined on behalf of the respondent. However,
later, the learned Election Tribunal with the consent and on no objection of the petitioner allowed recounting of votes by passing order dated 28.01.2017 on the application of respondent for recounting in the following manner:

"Learned counsel for the respondent Mirza Javed Akhtar from the very outset stated at the bar that he is having no objection on the recounting of the votes. Perusal of the petition reveals that the main ground beside others for seeking remedy is the number of votes mentioned as per form XV is different from result stated in forum XXVIII which might be a mathematical and digital error committed by the polling staff. In the given circumstances, the matter under dispute can be better decided by the re-counting of votes for ever, for which the Returned candidate through his counsel is also having no objection. By recounting justice will be done to both the parties.

In the light of above circumstances, the application for re-counting of votes submitted by the petitioner stands allowed, as such Mr. Muhammad Ishaq Khan, Civil Judge Peshawar is hereby appointed as local commission for recounting of votes, commission fee is fixed Rs.10,000/- (ten thousand) payable by the petitioner to him on the spot. Returning officer concerned and District Election Commissioner are directed to ensure the availability of the polling bags to the commission concerned for doing the needful. The report must be submitted within fortnight and file to come up for 16.02.2017."

The learned Local Commissioner conducted recount of the votes / ballot papers under the prescribed law / procedure in presence of the parties, wherein, the respondent has been shown with a lead of 31 votes with the following result:-
### TOTAL VALID VOTES FOR TEN POLLING STATIONS

<table>
<thead>
<tr>
<th>Name of candidates</th>
<th>Symbols allotted</th>
<th>PS31 (Male)</th>
<th>PS34 (Male)</th>
<th>PS35 (Female)</th>
<th>PS36 (Male)</th>
<th>PS37 (Female)</th>
<th>PS38 (Male)</th>
<th>PS39 (Female)</th>
<th>PS40 (Male)</th>
<th>PS41 (Male)</th>
<th>PS42 (Female)</th>
<th>Grand Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Khursheed Alam Khan</td>
<td>Scale</td>
<td>222</td>
<td>233</td>
<td>311</td>
<td>94</td>
<td>179</td>
<td>25</td>
<td>32</td>
<td>75</td>
<td>26</td>
<td>49</td>
<td>1246</td>
</tr>
<tr>
<td>Mirza Javaid Akhtar</td>
<td>Bat</td>
<td>75</td>
<td>108</td>
<td>68</td>
<td>223</td>
<td>140</td>
<td>93</td>
<td>126</td>
<td>114</td>
<td>177</td>
<td>91</td>
<td>1215</td>
</tr>
<tr>
<td>Zohaib Khawas</td>
<td>Pair of Bull</td>
<td>14</td>
<td>15</td>
<td>6</td>
<td>9</td>
<td>47</td>
<td>8</td>
<td>27</td>
<td>74</td>
<td>43</td>
<td>50</td>
<td>293</td>
</tr>
<tr>
<td>Usman Saleem</td>
<td>Tiger</td>
<td>15</td>
<td>24</td>
<td>20</td>
<td>15</td>
<td>33</td>
<td>6</td>
<td>36</td>
<td>61</td>
<td>12</td>
<td>33</td>
<td>255</td>
</tr>
<tr>
<td>Akhunzada Zahid Ullah Shah</td>
<td>Book</td>
<td>75</td>
<td>29</td>
<td>35</td>
<td>200</td>
<td>205</td>
<td>51</td>
<td>55</td>
<td>88</td>
<td>199</td>
<td>72</td>
<td>1009</td>
</tr>
</tbody>
</table>

After doing the needful, the learned Local Commissioner submitted his report in this regard on 10.02.2017 before the learned Election Tribunal. Not contented therewith, the petitioner filed an objection petition before the learned Election Tribunal, which was contested by the respondent by filing written reply. The learned Election Tribunal after hearing the parties dismissed the same vide order dated 09.08.2017. Being aggrieved, the petitioner as well as the respondent filed instant Writ Petitions No.3324-P & Writ Petition No.3233-P/2017.

7. No doubt, the learned Election Tribunal has got ample powers to pass an order for recounting of the ballot papers in appropriate cases as per law / procedure enunciated by the apex Court, however, at this stage, the legal question would arise that, whether the said recount is to be done by the
learned Election Tribunal by itself or it is to be done through a Local Commissioner specifically appointed by the learned Election Tribunal for that purpose and if the said recounting is done by the learned Local Commissioner, as it was done in the present case, then in that eventuality/circumstances, whether his statement is required to be recorded by the learned Election Tribunal? In order to answer the above referred legal propositions/questions, we would like to refer to the provisions of the Khyber Pakhtunkhwa Local Councils (Conduct of Elections) Rules, 2014. Chapter-VII of the Rules, ibid, provides for election disputes, whereas Rule 50 ibid pertains to procedure before the Tribunal. For sake of reference, the aforesaid Rule requires verbatim reproduction, which reads as under:-

50. Procedure before Tribunal.—(1) Subject to the provisions of the Act, and these rules, every election petition shall be tried, as nearly as may be, in accordance with the procedure for the trial of suits under the Code of Civil Procedure, 1908 (Act V of 1908):

Provided that the Tribunal may—

(a) where the election petition claims as relief a declaration that the election of the returned candidate is void on the ground that the returned candidate was not, on the nomination day, qualified for, or was disqualified from being elected as a member, decide the question of such qualification or
disqualification as preliminary issue;

(b) require the parties to file within fifteen days of the date on which the case is fixed for evidence, a list of witnesses whom they propose to produce to give evidence or to produce documents, mentioning against the name of each witness a brief of the evidence that each witness is expected to give;

(c) make a memorandum of the substance of the evidence of each witness as his examination proceeds unless it considers that there is a special reason for taking down the evidence of any witness in full;

(d) refuse to examine a witness if it considers that his evidence is not material or that he has been called on a frivolous or vexatious ground, for the purpose of delaying the proceedings or defeating the ends of justice; and

(e) refuse to issue any summons for the appearance of any witness unless, within three days following the date on which the parties are called upon to produce their evidence; any party intimates the Tribunal that it desires a witness to be summoned through the Tribunal and the Tribunal is satisfied that it is not possible or practicable for such party to produce the evidence.

(2) The Tribunal may permit the evidence of any witness to be given by means of an affidavit.

(3) Subject to the provisions of Act, and these rules, the Qanoon-e-Shahadat Order, 1984, shall apply for the trial of an election petition.
(4) The Tribunal may, at any time, upon such terms and on payment of such costs as it may direct, allow a petition to be amended in such a manner as may, in its opinion, be necessary for ensuring a fair and effective trial and for determining the real questions in controversy, but no new ground of challenge to the election is permitted to be raised.

Whereas, Rule 52 ibid. pertains to power of Tribunal, which also requires reproduction and reads as under:-

52. Power of Tribunal.—The Tribunal shall have all the powers of civil court trying a suit under the Code of Civil Procedure, 1908 (Act V of 1908) and shall be deemed to be civil court within the meaning of sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act V of 1898).

8. From perusal of above referred provisions of Rule 50 ibid., it has abundantly clear that principles of Code of Civil Procedure (Act V of 1908) are applicable to the proceedings of the Tribunal, therefore, the Tribunal can appoint a local commission in appropriate case in terms of Order XXVI, Rule 9 of CPC for the purpose of recounting of votes. For the sake of convenience, Rule 9 is reproduced herein below:-

9. Commissions to make local investigations.—In any suit in which the Court deems a local investigation to be requisite or
proper for the purpose of elucidating any matter in dispute, or of ascertaining the market-value of any property, or the amount or any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court:

Provided that, where the [Provincial Government] has made rules as to the persons to whom such commission shall be issued, the Court shall be bound by such rules.

9. After appointment of Local Commissioner and conduct of commission proceedings, the Local Commissioner submits his report under Rules 10(1) of Order XXVI, whereas under Rule 10(2), the local commissioner can be examined before the Court. For facility of reference, Provisions of Rule 10(2) of Order XXVI, CPC are also reproduced herein below:

10(2) The report of the Commissioner and the evidence taken by him (but not the evidence without the report) shall be evidence in the suit and shall form part of the record; but the Court or, with the permission of the Court, any of the parties to the suit may examine the Commissioner personally in open Court touching any of the matters referred to him or mentioned in his report, or as to his report, or as to the manner in which he has made the investigation.
From the provisions of above referred Rule 10(2) of Order XXVI, CPC, it has become crystal clear that local commissioner can be called for examination in respect of any matter mentioned in his report on the application/objection of any of the parties to the lis.

10. Now coming to the facts of present case. The report of Local Commissioner was objected to by the petitioner by submitting his objection petition. The relevant portion of the same is reproduced herein below for sake of reference:-

C. That the seal of many bags i.e. polling station No.83, 85, 87 & 92 were not intact and form XXV was also not available in bags, these facts were brought into the notice of the local commissioner, the local commissioner assured the objector / Respondent No.1 that he will bring these facts in commission Report but to the utter surprise of the objector, these facts are missing / not mentioned in the commission Report, hence the commission Report is not maintainable in its present form.

Moreover, the Local Commissioner in his report himself stated that "All the polling bags were sealed including result envelopes but seal of the result envelopes of PS.90 were not intact". He further states that "The said bag in the presence of candidates and above named officials was de-sealed whereas
seal of the result envelopes recovered from the said bag were not intact”. When so, it was obligatory upon the learned Election Tribunal to call the Local Commissioner for recording his statement and cross-examination by the parties in the larger interest of justice in terms of Rule 10(2) of Order XXVI, CPC.

11. The above referred proposition came up for hearing before the apex Court in case titled Muhammad Asim Kurd alias Gailoo vs. Nawabzada Mir Lashkari Khan Raisani & 11 others (1998 SCMR 1597), wherein, it has been held in the following manner:-

8. We have gone through various decisions of the Election Tribunal cited by Sardar Muhammad Latif Khan Khosa, on the question of re-counting of votes referred to in paragraph 7 above. Suffice it to say that the Election Tribunal can order re-count of votes in appropriate cases and on satisfaction of requisite conditions. Guidance may be sought from the case of Haji Muhammad Asghar v. Malik Shah Muhammad awan (supra). The case of Mian Ejaz Shafi (supra), strongly relied upon by the learned counsel for the petitioner, does not advance his case, inasmuch as, paragraph 6 of the aforesaid judgment reveals that the appellant therein challenged the order of the Election Tribunal regarding recounting of votes before this Court through C.A.No.425 of 1994, which was dismissed on 7-6-1994 on the
ground that the appeal against the interim order passed by the Election Tribunal, was not competent. In the instant case also, the final order is yet to be passed by the Tribunal seized of the Election Petition filed by respondent No.1 against the petitioner. Admittedly, appeal against the final order of the Tribunal lies before this Court. **The petitioner shall also be at liberty to file objections to the report of the Commission on recounting of votes. Clearly, if such objections are raised the same shall be considered by the Tribunal justly, fairly and in accordance with law, after providing an opportunity of being heard to the parties and allowing them to lead evidence in support of their respective contentions, if so desired, before final disposal of the Election Petition.**

12. The above view was further followed and affirmed by the Hon’ble Supreme Court of Pakistan in case titled **Mir Saleem Ahmed Khosa vs. Election Commission of Pakistan & others (PLD 2011 SC 310)**, wherein, it has been held in the following term:-

8. Having argued the case at some length and in view of the fact that the election petition is pending for the last more than two years, both the learned counsel on court query / suggestion, agreed that these petitions be disposed of in terms as follow:-
(i) the order of recount passed by the Election Tribunal dated 12-11-2010 is modified and it is directed that while carrying out the exercise in terms of the afore-referred order, the Commission (appointed under the said order) shall ensure that it proceeds strictly in terms of section 46(1) of Representation of the People Act, 1976 and in particular, the proviso attached to it which mandates as follows:—

"Provided that in making and carrying into effect an order for the inspection of counted ballot papers, care shall be taken that no vote shall be disclosed until it has been held by the Tribunal to be invalid."

(ii) both the parties shall be allowed to raise objection qua the report of recount and may lead evidence. The Tribunal shall consider the report, the evidence led and the relevant law while deciding all the issues framed in the main petition along with C.M.A.No.1685 of 2010.

9. As the election petition is pending for the last more than two years and almost half of the terms of the Assembly is over, we are persuaded to direct the Election Tribunal to
decide the election petition within 30 days of
the receipt of this order. Both the petitions are
converted into appeals and partly allowed in
terms noted above.

13. In the present case, the learned Election Tribunal
instead of straightaway confirming the report of the Local
Commissioner should have summoned and examined him by
providing an opportunity to both the parties to cross-examine
him, as both the parties have the right to raise objections on
the said report of the learned local Election Commissioner.
Therefore, in the present facts and circumstances of the case,
order of the learned Election Tribunal dated 09.08.2017 with
regard to confirmation of the learned Local Commissioner’s
report without examining him is not justifiable and seems to
be not passed in accordance with law, which is the result of
non-application of judicial mind and non-appreciation of
material available on record of the case, therefore the same is
liable to be interfered with by this Court and in this regard, we
have no hesitation in our mind to remit the case to the learned
Election Tribunal by accepting this writ petition i.e. Writ
Petition No.3324-P/2017.

14. For the reasons discussed above, we admit and
allow Writ Petition No.3324-P/2017, titled “Mirza Javed
Akhtar vs. Khurshid Alam Khan”, and set aside the impugned
order dated 09.08.2017 of the learned Election Tribunal and
send the case back to it with the direction to first summon and examine the Local Commissioner by providing an opportunity to both the parties to cross-examine him in light of his report and thereafter decide the objection petition of the petitioner in accordance with law, which shall be deemed to be pending before it and after that decide the main election petition of the respondent, pending since 26.06.2015 as early as possible but not later than three months. Parties are directed to approach the learned Election Tribunal for doing the needful and to appear there on 13.09.2017. Writ petition No.3233-P/2017, titled “Khurshid Alam Khan vs. Mirza Javed Akhtar & others”, in the present circumstances, seems to have served out its purpose is no more required to be kept pending as the directions, asked for, have been given to the learned Election Tribunal, it is thus, disposed of being infructuous.

Announced,
24. 08. 2017

JUDGE

JUDGE

(Fayaz)