

JUDGMENT SHEET  
**IN THE LAHORE HIGH COURT**  
**MULTAN BENCH, MULTAN**  
**JUDICIAL DEPARTMENT**

**Election Appeal No.8 of 2016**

**Adnan Nazeer Alvi**

Versus

**M. Zafar Iqbal Awan & 2 others**

**J U D G M E N T**

Date of Hearing.	28-03-2017
APPELLANT BY:	Sh. Jamshed Hayat, Advocate.
RESPONDENTS BY:	Mian Abbas Ahmad, Advocate for respondent No.1

**Shahid Karim, J:-** This is an appeal under section 47 of the Punjab Local Government Act, 2013 (“Act, 2013”) against the order dated 19.04.2016 passed by the Election Tribunal D.G Khan. By the said order, the election petition filed by the respondent No.1, Muhammad Zafar Iqbal Awan was allowed and the respondent No.1 was declared as duly returned General Councilor from the constituency in question.

2. The election in dispute was the election as General Councilor from Ward No.4, Chowk Azam, Layyah. According to the consolidation statement of results of the count furnished in the Form XIII under rule 36(4) of the Punjab Local Government (Conduct of Elections) Rules, 2013

(“Rules, 2013”) by the Returning Officer the total votes polled in respect of the Ward No.4, Municipal Committee, Chowk Azam, Layyah were 1371. Adnan Nazeer Alvi, the petitioner, secured 542 votes as against 503 votes secured by Haji Muhammad Zafar Iqbal, the respondent No.1. 1337 votes were declared as valid whereas 34 were rejected and which makes the total tally of the votes cast as 1371.

3. The learned counsel for the appellant contends that the order passed by the Election Tribunal is *ultra vires* and the order of recount of the votes and the ensuing proceedings for the said recount suffered from material irregularities. Also that the Election Tribunal proceeded to recount the votes without fulfilling the conditionalities which was a *sine qua non* for a recount to be ordered and thus the act of the Election Tribunal runs counter to the mandate of the superior courts enshrined in a cluster of cases.

4. The learned counsel for the respondent No.1, on the other hand, strenuously defends the impugned order and states that the recount was ordered on valid and cogent grounds and no exception can be taken to it.

5. The election petition was couched in a strange manner of drafting and the relief claimed was also merely to the effect that a recount be ordered and in case irregularities were detected during the process of recount, that a re-balloting of Ward No.4 be directed to be done. The prayer is reproduced as under:-

بحالات بالا استدعا ہے کہ پیٹشن ہزا منظور فرماتے ہوئے دوبارہ تمام بیگز کو کھول کر گنتی کی جائے، مسترد شدہ ووٹوں کا بمطابق قانون فیصلہ کیا جائے اور بوگس ووٹوں کیلئے تقابل نشانات انگوٹھ جات سکروٹنی ہمہ قسم کی جائے اور اگر بے ضابطگی پای جائے تو وارڈ نمبر میں کرائی جائے۔

6. The provisions relating to filing of election petition and their decision are encapsulated in rules 62 to 77 of the Rules, 2013. In a nub, the election petition shall be presented to the Election Tribunal appointed by the Election Commission within 30 days of the petition in the official gazette of the names of the returned candidate. The petition shall join all contesting candidates as respondents who shall be served personally or by registered post. Rule 64 of the Rules, 2013 sheds some light on the contents of the petition to be filed before the Election Tribunal and shall contain a precise

statement of the material facts with full particulars of any corrupt or illegal practice or other illegal act alleged to have been committed. The relief claimed shall also be mentioned by the petitioner in the election petition. By sub-rule (2) of Rule 64, the petitioner may claim as relief any of the declarations which are to the following effect:-

- a) that the election of the returned candidate is void and that the petitioner or some other person has been duly elected, or*
- b) that the election as a whole is void.”*

7. It is evident, therefore, that the reliefs that can be claimed are the declarations mentioned in sub-rule (2) of Rule 64 and explicated above. Thus, the petitioner may require the election of the returned candidate to be declared void and that the petitioner or some other person to be declared as duly elected or the petitioner may seek a declaration that the election as a whole is void. Upon juxtaposing the relief claimed by the petitioner with the reliefs that may be claimed under sub-rule (2) of Rule 64, it can be seen that the relief claimed in the election petition in the instant case is diametrically opposed to the one which can be sought and granted by the Election Tribunal by way of declarations. Rule 68

delineates the procedure before the Tribunal and which the Tribunal is obliged to follow. Rule 68 says that:-

**68. Procedure before tribunal.**– (1) *Subject to the provisions of the Act and the 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 (V of 1908):*

(2) *The tribunal may:*

(a) *where the election petition claims relief for 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 precise 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 witness.*

(3) *The tribunal may permit the evidence of any witness to be given by means of an affidavit.*

(4) *If the tribunal deems fit, it may call such witness for the purpose of examination before it.*

(5) *The tribunal may, at any time, on 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, provided that no new ground of challenge to the election is permitted to be raised.*

8. Thus an 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 (CPC). Therefore, the general procedure which has been prescribed for the Tribunal to follow is that an election petition be tried in the same manner as the trial of a suit under CPC. The procedure for recount, as will be brought forth below, is an exception to the normal procedure of the trial of election petition which is akin to the trial of suits under CPC. In all matters of decision of election petitions, therefore, the Election Tribunals are required to firstly follow the procedure under Rule 68 and any deviation therefrom must be based on intelligible criteria and with proper application of mind on the part of the Election Tribunal.

9. At first blush, it can be seen that the relief claimed in the election petition was not in consonance with the relief that could be claimed in terms of sub-rule (2) of Rule 64. This aspect ought to have been dilated upon by the Election Tribunal in the first instance and without proceeding any further. This was clearly not done and the Tribunal fell in error in failing to do so. On 17.2.2016, the Tribunal passed the following order for recount of the ballot papers. By the said order

the Tribunal ordered the opening of counterfoils and certificates and the inspection of accounted ballot papers. The order of 17.2.2016 is reproduced as under:-

*“Present: Learned counsel for the parties. Arguments heard on petitioner’s request for re-checking / re-counting of parties votes.*

*2. Both the parties put forth arguments in support of their respective contention. Petitioners’ contention is that improper counting of parties’ votes can better be determined by re-checking / re-counting their votes as there is small difference in the number of their votes. On the other hand, respondent’s contention is that as factual controversy cannot be resolved without recording parties’ evidence, therefore, first the petitioner should lead evidence to support the contention that parties’ votes were not properly counted but the contention is not shared by the court as not only that there is small difference in parties’ votes but also that recording of petitioner’s evidence, as suggested by the respondent, would be an exercise in futile – instead, petitioner’s averments in the plaint, verified on oath, may be accepted as true and correct.*

*3. In view of above position, petitioner’s request for re-checking / re-counting parties’ votes is granted, therefore, Election Bags of Ward 4, Chowk Azam (Layya) be requisitioned from the Treasury Office, Layya for 22-02-16.*

*Necessary Robkar be issued to the concerned Returning Officer.”*

10. It can be seen that the only ground which weighed with the Election Tribunal was that the difference in the votes of the two candidates was small and so the recording of the petitioner’s evidence would be an exercise in futility. The Tribunal also accepted the contents of the petition verified on oath as true and correct. All of these

grounds were, to say the least, insufficient and tendentious in arriving at the conclusion that a recount of the ballot papers ought to be ordered as a course. The order passed by the Tribunal lacks in material particulars and fails miserably to take into account the plethora of judgments of the superior courts which prescribe a special procedure and certain essential pre-conditions to exist before a recount of votes can be ordered by an Election Tribunal. Although it has been held by the superior courts that the recording of evidence is not necessary under each case and that a Tribunal may order for a recount to be held, simultaneously it has been held as a common thread running through all the judgments of the superior courts that the Election Tribunal must be *prima facie* satisfied on the basis of material produced before the Tribunal regarding the truth of the allegations made for a recount. Also the primary basis for exercising caution in such matters is to maintain secrecy of the ballots which is *sine quo non* and should not be allowed to be breached or violated on frivolity and vagueness and without defining allegations made in the petition or in the application for recount. Thus, the petitioner must

adduce material supporting the allegations justifying the request for recount. In most cases, the recount must be resorted to after some evidence has been recorded and the Tribunal has formed a *prima facie* view that there are particulars of corrupt or illegal practice which have been brought on record or that the evidence produced clearly demonstrates some illegal act which is alleged to have been committed. It will be pertinent to reproduce section 42 of the Act, 2013, which reads as under:-

**“42. Ground for declaring election of returned candidate void.–** (1) *The Election Tribunal shall declare the election of the returned candidate to be void if it is satisfied that–*

- (a) the nomination of the returned candidate was invalid; or*
- (b) the returned candidate was not, on the nomination day, qualified for or was disqualified from, being elected as a member; or*
- (c) the election of the returned candidate has been procured or induced by any corrupt or illegal practice; or*
- (d) corrupt or illegal practice has been committed by the returned candidate or his election agent or by any other person with the connivance of the candidate or his election agent.*

(2) *The election of a returned candidate shall not be declared void if the Election Tribunal is satisfied that any corrupt or illegal practice was committed without the consent or connivance of that candidate or his election agent and that the candidate and the election agent took all reasonable precaution to prevent its commission.*

11. Thus, the law makes it very clear that the Election Tribunal shall declare the election of the returned candidate to be void if it is satisfied that

the election of the returned candidate has been procured or induced by any corrupt or illegal practice or that the corrupt or illegal practice has been committed by the returned candidate or the election agent or by any other person with the connivance of the candidate.

12. We are here only confined to this allegation as the respondent No.1/ election petitioner has not relied upon any other allegation for seeking disqualification of the appellant.

13. Further by sub-section (2) it has specifically been enjoined upon the Election Tribunal that the election of a returned candidate shall not be declared void if the Tribunal is satisfied that any corrupt or illegal practice was committed without the consent or connivance of that candidate or his election agent. The intention of the legislation is very clear that makes it evident from a reading of section 42 that the election of returned candidate is not to be declared void on flimsy and fantastic grounds as also that care should be taken in its holding by the Election Tribunal that the corrupt or illegal practice was not committed by the returned candidate and if it were so held, the Election Tribunal shall not declare the election of the

returned candidate to be void. This will have to be read with rule 58 of the Rules, 2013 relating to the order for production of documents and opening of packets of counterfoils. It will suffice to refer to a judgment of the Supreme Court of Pakistan reported as Jam Madad Ali v. Asghar Ali Junejo and others (2016 SCMR 251) which takes into account the entire array of the case law on the subject and encapsulates the principles derived from the case law in the following words:-

*“9. The purpose of a recount in an election dispute is to verify and determine the authenticity and truthfulness of the allegations on the basis whereof the election result is challenged, however, in order to secure the sanctity of the election result and with a view not to encourage the losing candidates to attempt to frustrate the will of the people as expressed through the election and also in order to avoid creating an incentive for the losing candidates to in any way, indulge in post poll tampering or manipulation of the election record, a conscious effort is to be made that it is only in the circumstances which clearly justify, rather demand a recount, that the recount is allowed. As to what should be the criteria or the essential pre-requisites for satisfying the conscience of the Court for permitting a recount, perusal of the case law laying down our jurisprudential principles in this regard, would show that the minimum criteria is that there should be specific allegation of tampering, manipulation and maneuvering in very clear terms along with the necessary details and prima facie material supporting such allegations. It should also be kept in mind that secrecy of the ballot should not be violated on the basis of frivolous, vague and totally unfounded allegations and that the primary object should be to do full justice in the matter. The learned Tribunal should also be*

*mindful that the discretion to exercise power of recount may not be exploited for a roving inquiry to fish out material for reversing the election or for declaring it void and thus it should be seen that as to whether in view of the statement of material fact, and the material placed before the Tribunal the request is fair and reasonable or not.”*

14. These observations are based on earlier precedents of the Supreme Court of Pakistan of which reference may only be made to Sardar Abdul Hafeez Khan v. Sardar Muhammad Tahir Khan Loni and 13 others (1999 SCMR 284) and the following observations with regard to the recount of votes:-

*“What, therefore, emerges is that the Tribunal should have some basis for taking recourse to its exclusive and essentially discretionary powers under section 46(l), opening the way to a recount. Thus, it would be for a petitioner in an election petition to lead the initial evidence for the Tribunal to take resort to the powers under discussion. It is only then that the Tribunal may summon the relevant record and examine the corresponding official witnesses at the petitioner's behest, unless, of course, the Tribunal is acting suo motu in the midst of the petition, something which does not appear to be precluded. In the instant case, however, the ordinary procedure seems to have been reversed largely because none of the respondents objected to the summoning of the official witnesses and sending for the record. Indeed the election bags were opened without any demur. The procedure adopted, accordingly, may thus have been regularized. Once, however, the counterfoils of the ballot papers, the relevant certificates and the ballot papers cast have been opened, the concomitant care, which the statute requires to be observed, is that a counterfoil is not to be shown to the contestants in the election petition unless the matching vote has been invalidated. In other*

*words, while the Tribunal is free to itself examine and compare the counterfoils with the ballot papers actually cast the secrecy of ballot can be maintained only if the contesting parties initially are not made privy to the comparison of the counterfoils with the ballot papers because such would instantaneously identify an elector and expose the secrecy of the ballot. We have no doubt that the Tribunal must have been mindful of this mandatory requirement and it was only after it found specific votes to be invalid that the parties were made privy to the conclusion. Another aspect of the matter is that a recount may not always be an absolute or fool proof answer...”*

*“What, therefore, has to be ensured, once powers under section 46(1) and (2) of the Act come to be exercised, is that the jurisdiction is not over-stretched, that there is a prima facie case for a recount, that recount, if allowed, takes place scrupulously, without detracting from secrecy of the ballot and, finally that it can never be ignored that during the passage of time following upon the election and the recount a number of things may happen, having potential to throw up a picture that does not, in fact, correspond with the electoral process but depicts something of a later origin. To put it differently, the power, though broad and extensive, is to be used sparingly and with circumspection, the only object being to ensure a fair and lawful result of the electoral exercise. Nothing short of that would serve the object of the legislation.”*

15. These principles have been reiterated in another recent judgment of the Supreme Court of Pakistan reported as Ch. Muhammad Ashraf Warraich and another v. Muhammad Nasir Cheema and others (2016 SCMR 998), in which it was observed that:-

*“...It may be observed that the Election Tribunals are bestowed power to inspect and examine the ballot papers of all sorts i.e. polled, rejected, or spoiled etc. Such powers could not*

*be invoked by any party to the election Petition on mere ipse dixit nor, could be exercised by the Election Tribunal on its own whims and fancy and or mechanically. Party seeking such recourse or inspection and examination of counted ballot papers has to demonstrate and show to the satisfaction of the Election Tribunal that there had been improper, reception, refusal, or rejection of votes had affected the outcome of the election materially. Election Tribunal, enjoys elaborate and extensive authority to carry out the exercise of examination of polled ballot either himself or, through commission and may order inspection and or to recount of the ballot papers, however, same are to be exercised with circumspection and care by application of mind on the strength of tangible and material evidence, prima facie establishing that there had been wrong inclusion or exclusion of the ballot paper in the course of ballot count that had direct and material bearing on the final outcome of the result of the election.”*

16. Thus, the rule that resonates clearly in the precedents, cited above, is that recount must be permitted by the Tribunal within the well settled parameters of exercising jurisdiction in this regard. In the instant matter, clearly and without equivocation the order for recount has been passed without regard to the parameters settled and vouched by respectable authority of the superior courts and the criteria laid down is conspicuously absent while making the said order by the Tribunal. The said order is clearly *ultra vires* the powers of the Election Tribunal.

17. It is not in doubt that the Election Tribunal set up in terms of the Act, 2013 read with the Rules, 2013, has the power to order the recount of ballot papers which is found in Rule 58 of the rules, which is to the following effect:-

**58. Order for production of documents.**— (1) A tribunal may order the opening of packets of counterfoils and certificates or the inspection of any accounted ballot papers.

(2) An order under sub-rule (1) may be made subject to such conditions as to persons, time, place and mode of inspection, production of documents and opening of packets as the tribunal making the order may think expedient.

(3) Where an order is made under sub-rule (1) the production by the Returning Officer of any document in such manner as may be directed by the order shall be conclusive evidence that the document relates to the election specified in the order, and any endorsement or any packet of ballot papers so produced shall be prima facie evidence that the ballot papers are according to the endorsement made thereon.

(4) The production from proper custody of a ballot paper purporting to have been used at an election, and of a counterfoil having a number, shall be prima facie evidence that the voter whose vote was given by that ballot paper was the voter whose National Identity Card number was written on the counterfoil.

(5) Save as provided in this rule, no person shall be allowed to inspect any rejected or counted ballot paper.

18. The said rule is *in pari materia* with section 46 of the Representation of the Peoples Act, 1976 and the judgments and provisions with regard thereto will apply and can be cited as precedents for the proposition to be addressed on the issue under the Act, 2013. The first impression that one gathers from a reading of Rule 58, reproduced above, is that the sanctity of the vote is at once

breached and violated when the proceedings are set in motion for the recount of ballot papers. The production from proper custody of a ballot paper shall be *prima facie* evidence that the voter whose vote was given by that ballot paper was the voter whose national identity card number was written on the counterfoil. Thus, the voter is exposed as soon as the documents are produced and the bags are opened by the order of the Election Tribunal. This is the primary reason why the courts have jealously guided the opening of the bags of counterfoils and certificates or the inspection of accounted ballot papers. This has succinctly and eruditely been brought forth in the case of *Jam Madad Ali* referred to above. The Supreme Court of Pakistan proceeded to analyse the entire process of recount and took pains to refer to the material which was before the Election Tribunal upon opening of the bags and inspection of ballot papers. This was precisely done because the Election Tribunal had already undertaken the exercise and thus the Supreme Court of Pakistan was left with no option but to analyse and inspect as a supervisory jurisdiction the effect of the recount done by the Tribunal. However, by way of

conclusion, the Supreme Court of Pakistan held as under:-

*“...such has been held in respect of a recount permitted by the Court within the well settled parameters of exercising jurisdiction in this regard. Whereas as discussed above in the first place the order of recount is not founded on the above criteria and secondly, the result thereof also does not show that the double stamping revealed thereby occurred at the time of casting and not after the result was announced.”*

19. From the record of the Election Tribunal the entire process of recount was undertaken by the Presiding Officer of the Tribunal which has been recorded in respect of the male polling station and the female polling station separately. The most conspicuous and glaring mistake that has crept in that process is regarding the votes purportedly cast in favour of the respondent No.1 in the female polling station of Veterinary Hospital, Chowk Azam. Quite interestingly, the proceedings of the recount of votes by the Tribunal mentions that the total votes cast at the said polling station in favour of the respondent No.1 were 286 of which 227 were found to be valid votes whereas in respect of 55 votes, the position was summarized in the said proceedings with regard to each category of votes and the objections with regard thereto. However, according to Form XIII, submitted by the

Returning Officer, the total number of valid ballot papers cast in favour of the respondent No.1 was 246. Thus, there is a difference of 40 ballot papers and which makes a substantial difference in the entire process of recount undertaken by the Election Tribunal. Further at the time of opening of packets of the ballot papers in respect of the female polling station, a specific objection was taken by the appellant that the seal of the packet was tampered and the packet was torn. No satisfactory reply was put forth by the Returning Officer and the Presiding Officer of the Tribunal did not return a clear finding as to the objection taken by the appellant herein. Once again, with regard to female polling booth, the Tribunal held only 181 votes as valid out of 223 votes cast in favour of appellant. It was observed that:-

۱۔ ۳۵ ووٹ تا ایسے ہیں جن پر کونسل سائل کو اعتراض ہے کہ بوجہ نشان انگوٹھا دیگر نشان روشنائی یہ ووٹ قابل اخراج ہیں۔ کونسل مسؤل علیہ بیانی ہیں کہ یہ نشان محض اتفافیہ ہیں جو نظر انداز کرتے ہوئے بحق مسؤل علیہ شمار کیے جائیں یہ ووٹ - ووٹ کی پشت پر مہر اور اس کے دستخط دونوں ثبت نہ ہیں جو قابل اخراج ہیں۔

20. It can be seen that the Tribunal has not given any finding on the objection so raised as to

whether it was sustainable or not. This has not been done either while taking down the recount proceedings or while rendering the final decision. Also the Returning Officer had rejected a total number of 32 ballot papers cumulatively with regard to four candidates who were contesting the election for Ward No.4 whereas in the estimation of the Election Tribunal, 59 ballot papers were found to be invalid in respect of the female polling station alone. Also in paragraph 4 of the order passed by the Election Tribunal it is mentioned that the disputed votes were 66 in number. This again is a fallacy on the part of the Election Tribunal as according to the proceedings of the recount, 59 votes were declared as disputed in respect of the respondent No.1 for the female polling station whereas 27 ballot papers were declared as disputed in respect of the male polling station and the addition of 59 into 27 makes the disputed votes as 86 and not 66. It can also be seen from the order of the Tribunal that the Tribunal did not come to the conclusion that it did after it was held that the entire election was brought about as a result of corrupt or illegal practice and merely on the basis of technicalities

were the disputed votes counted in favour of the respondent No.1. This also shows that prior to the order of recount, there was no material before the Tribunal that corrupt and illegal practice had marred the result of the election to Ward No.4.

21. From the preceding paragraphs, it is evident that the order of recount suffered from illegality and was in contravention of the principles laid down by the superior courts. Secondly, the process of recount was also tainted and suffered from procedural impropriety and gross irregularity in the recount of the ballot papers and which made the entire process as *ultra vires*. More importantly, the decision rendered by the Election Tribunal was not contemplated by the prayer clause made in the election petition itself. As stated above, the respondent No.1 in his election petition had merely required a re-poll to be held and there was no prayer that the election of the petitioner be declared as void and that the respondent or some other person be duly elected. At best, the prayer can be said to be covered by rule 64 (2) of the Rules, 2013 which is to the effect that the election as a whole be declared as void. The Election Tribunal, therefore, traveled beyond the prayer

made and the relief claimed in the election petition.

22. That the relief granted by Election Tribunal is indefensible, is also evident from the rule laid down by the Supreme Court of Pakistan in a number of judgments and lastly in *Ch. Muhammad Ashraf Warraich* in the following manner:-

*“30. Now adverting to merits of C.A 1169/2014 filed by the Election Petitioner, seeking his declaration as duly elected in place of returned candidate, since de-seated. It is not necessary that whenever the election of a returned candidate is declared “wholly void”, the Election Petitioner, as a matter of right could be declared elected. No doubt Section 67 (1)(c) read with section 69 of RoPA, do empower the learned Election Tribunal to declare the election Petitioner or any of the contesting candidate to be declared as elected in event, the election of the returned candidate is annulled, that the Election Petitioner and or any of the Respondent has so prayed and secondly in cases where the Election “Tribunal is satisfied” that the election Petitioner or such other contesting candidate was “entitled” to be declared elected. Thus it is clear that swapping of Election Petitioner and or any other contesting candidate is neither automatic nor a natural corollary to the invalidation of election of returned candidate, but is subject to two qualifying conditionalities as noted herein...”*

23. It is evident, therefore, that the relief with regard to declaring the election petition as returned candidate does not automatically follow from the declaration of the election as void and is circumscribed by two conditions namely that the election petitioner has specifically prayed for such

relief to be granted and secondly that the Election Tribunal must be satisfied that the election petitioner is entitled to be declared as elected. The Election Tribunal in this case did not have in mind the rule enunciated by the Supreme Court of Pakistan and fell in error in granting the relief that was ultimately granted by way of the decision impugned herein. In this regard a reference to section 43 of the Act, 2013 will also be in order which says that:-

*“43. Ground for declaring a person other than a returned candidate elected.— The Election Tribunal shall declare the election of the returned candidate to be void and the petitioner or any other contesting candidate to have been duly elected, if it is so claimed by the petitioner or any of the respondents and the Election Tribunal is satisfied that the petitioner or such contesting candidate was entitled to be declared elected.”*

24. Quite clearly section 43 of the Act, 2013 encapsulates the two conditions which have been referred to by the Supreme Court of Pakistan in the context of RoPA 1976. The learned counsel for the respondent No.1 stated that the matter be remanded to the Election Tribunal for decision afresh. However, I am not inclined to take this course as firstly, the only prayer made in the election petition was that a recount be held and

secondly the packets of counterfoils and certificates have already been opened and the inspection of the ballot papers has taken place. The sanctity of the ballot papers has already been breached and it is not possible to hold that the ballot papers would be in safe and proper custody so as to permit the recount of the votes to be held afresh.

25. In view of the above, this petition is allowed and the decision of the Election Tribunal is hereby set aside.

(*SHAHID KARIM*)  
*JUDGE*

*Announced in open Court on 03.04.2017*

*Approved for reporting.*

JUDGE

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*Rafaqat Ali*