

In the name of almighty Allah who has unlimited jurisdiction over and beyond the universe.

BEFORE THE ELECTION TRIBUNAL OF LOWER ORAKZAI

Election Petition No. 5/22 of 2022

Date of institution: 17-05-2022

Date of decision: 30.01.2023

Razim Ali Shah son of Syed Akbar Shah resident of Qaum Bar
Muhammad Khel, Tehsil Lower, District Orakzai.

.....(**Petitioner**)

...Versus...

1. Election Commission of Pakistan.
2. Tahir Hussain son of Meer Abdullah Jan, Qaum Bar Muhammad Khel, Tehsil Lower, District Orakzai.
3. Aqis Khan for seat of General Councilor, Village Council No. 16, Dargai Tehsil Lower, District Orakzai.
4. Gulshaid Ali for seat of General Councilor, Village Council No. 16, Dargai Tehsil Lower, District Orakzai.
5. Malak Sayed Siraj Hussain, Village Mahoora seat of General Councilor, Village Council No. 16, Dargai Tehsil Lower, District Orakzai.
6. Shahzad Ali for seat of General Councilor, Village Council No. 16, Dargai Tehsil Lower, District Orakzai.
7. Syed Ajeem ul Hassan, Village Janu Daag for seat of General Councilor, Village Council No. 16, Dargai Tehsil Lower, District Orakzai.

.....(**Respondents**)

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Election Petition under Rule-54 of The Khyber Pakhtunkhwa Local Councils (Conduct of elections) Rules, 2021.

JUDGMENT

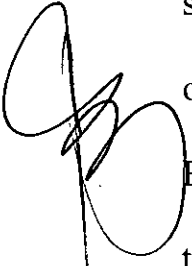
Election petition has been instituted with the stance that petitioner contested election of local bodies held on 31st of March, 2022 against the seat of General Councilor in village Counsel No. 16 Dargai, Tehsil Lower, District Orakzai; which is consisting upon three polling stations. The Presiding

SAYED FAZAL WADOOD

Addl. District & Sessions Judge
Orakzai at Hangu

Officers of all the three polling stations have announced the result by declaring the petitioner as top of the list with 307 votes and was thus nominated Chairman of Village Council. Respondent No. 2 namely Syed Tahir Hussain (contesting respondent hereinafter) being second in the line with 300 votes polled in his favor, has moved an application for recounting before the Returning Officer (Respondent No.1) which was allowed. Petitioner again was successful by highest votes scored and thus received greetings for being qualified as Chairman of the Village Council-16, Dargai. Recounting of all votes polled has been done by Returning Officer for the 3rd time; that too, without notice and thus contesting respondent was declared as highest scorer with 14 votes above the petitioner which is based on mala fide. This necessitated presentation of application vide Diary No. 1805 dated 06-04-2022 before the District Returning Officer but has not been acted upon the petition and petitioner was obliged to file instant election petition before tribunal. It has been prayed that appropriate relief may be granted to the petitioner for doing justice.

2. Respondents have been issued notices for appearance. Attendance was procured. Respondent No. 1 contested in reply that consolidation of results was carried out by him in the presence of all candidates. The respondent No. 2 has presented application for recount within the same day of consolidation and was approved due to the fact that margin of victory was less than 5 percent. He denied the allegation of mala practices and termed the proceedings well in accordance with law. Second set of respondent (Syed Tahir Hussain) stated in reply that the Presiding Officers have counted votes in the absence of his polling agents; therefore, petition for recounting was presented to the Returning Officer on the next day. The Returning Officer has issued notices to all the candidates and votes have been recounted without objection;


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wherein, contesting respondent has got 295 votes against the 281 votes polled in favor of petitioner.

3. The material propositions of fact and law asserted by one party and denied by other have separately been put into following issues:

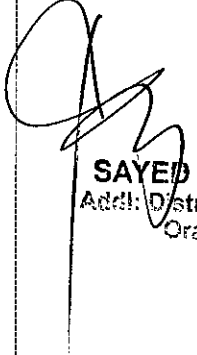
- i. Whether petitioner has got cause of action?
- ii. Whether the votes polled in combined polling stations of Government Primary School, Khamal, Government High School Suliman Khel and Government Primary School Dargai, Orakzai have wrongly been counted?
- iii. Whether petitioner is entitled for relief prayed for?
- iv. What shall be the operating part of the Judgement?

4. Opportunity of leading evidence was provided to the parties. Syed Anab Hussain was examined as PW-1, Syed Shah Muhammad as PW-2, the petitioner himself was examined as PW-3, Raziq Ali as PW-4, Syed Javid Hussain as PW-5, Syed Sajjad Hussain Sherazi as PW-6, Irfan Ullah as PW-7, Aksar Ali as PW-8. Affidavits of the witnesses; copies of CNICs and other documents have been exhibited from Ex.PW-2/1 to Ex.PW-7/2. On turn, contesting respondent Syed Tahir Hussain was examined as DW-1, Syed Ahmed Jan as DW-2 who exhibited affidavit as Ex.PW-2/1. Syed Noor Syed was examined as DW-3 who exhibited affidavit as Ex.DW-3/1 and thus evidence was closed.

5. In light of the pleadings, evidence and professional assistance rendered by counsel representing parties, the issues have finally been determined in following terms:

6. **Issue No. I:** - Whether petitioner has got cause of action?

Cause of action means the whole of the material facts if which traversed, it would be necessary for petitioner to prove in order to get favorable judgement



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from the Court. On this given criteria, the issue of cause of action does not exist as every proposition is required to be put into separate issue. However, if cause of action is taken in the meaning of locus standi, its determination would be that the petitioner has appeared in contest of local body election and thus he has right to call in question the proceedings.

7. **Issue No. II:-** Whether the votes polled in combined polling stations of Government Primary School, Khamal, Government High School Suliman Khel and Government Primary School Dargai, Orakzai have wrongly been counted?

He who assert must prove is the general principle articulated in Article 117 of the Qanoon-e-Shahadat Order, 1984. Assistant Presiding Officer of Polling Station GPS Dargai exhibited result Form No. 17 as Ex.2/5 and testified that petitioner has secured 18 votes on his station of duty and he owned the document to be true. PW-5 is Senior Assistant Presiding Officer of Polling Station Khamal produced Form-17 as Ex.PW-2/3 by stating that petitioner has got 250 votes; whereas, the contesting respondent has got 115 votes in such station. This fact was further confirmed by the Presiding Officer in his statement recorded as PW-6. Presiding Officer of Polling Station GPS Dargai was examined as PW-8 who produced Form-17 Ex.PW-2/5 confirming that petitioner has got 18 votes and contesting respondent has got 39 votes in his duty Polling Station. On total count of votes, the petitioner has secured 307 votes and contesting respondent has secured 300 votes and thus petitioner was found qualified for the slot of Chairmanship. Contesting respondent has categorically admitted this fact in his statement recorded as DW-2. The PW-



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7 is the statement of Returning Officer where he stated that he had changed the result of Form-17 on the basis of consolidation of result which was conducted due course of law and was legal requirement. The change in result

was due to count of valid and invalid votes. He also confirmed the recount of votes on the same day after consolidation of result i.e 2nd April, 2022. Oral and documentary evidence had proved the fact that the petitioner has secured highest votes during poll and the result was changed in recounting. It is not ignorable to mention here that the mandate of the law for a Returning Officer is consolidation of results for inserting the same in Form-19 which is called Provisional Consolidated Statement of Results of the Count and when such Form-19 has been signed, the Returning Officer cease to be office bearer on the score of functus officio. Accepting application for recounting after consolidation was thus illegal for being beyond the mandate of law and returning Officer has conducted this exercise as functus officio. When it has been established that the proceedings were not backed by law, the presence of the candidates and their absence make no difference at all. In circumstances, it can safely be concluded that the votes polled in captioned polling station have wrongly been counted.

8. **Issue No. iii:-** Whether petitioner is entitled for relief prayed for?

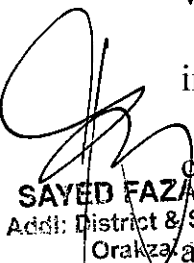
Discussion over issue No. ii leads the Court to hold that petitioner is entitled for the relief prayed for.

9. **Issue No. iv:-** What shall be the operating part of the Judgement?

For what has been discussed above, this Election Tribunal holds the view that counting of votes in the Local Council VC-No.16 Dargai Orakzai was wrong and resultantly declared void. Election petition in hand stands allowed.

10. The District Election Commissioner Orakzai is directed to examine the votes of Local Council VC-No. 16 Dargai Orakzai, in accordance with law including assessment of valid, invalid, spoiled, rejected and excluded from the

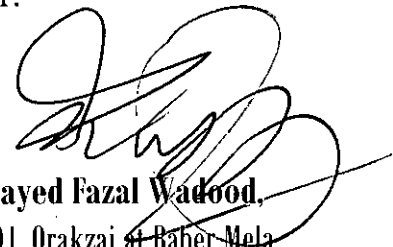
count votes after issuing notice to both the petitioner and Respondent No. 2 and thereby issue fresh result on completion. The Assistant Director


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LG&RDD, District Orakzai is directed to remain associated during recount of votes so that expected amendments in the consolidated statement of results of the count or any other document shall be ensured.

11. File of this Court be consigned to District Record Room, Orakzai after completion and compilation within the span allowed for.

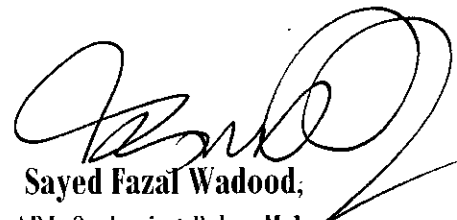
Announced in the open Court
30.01.2023



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela
Election Tribunal, Lower Orakzai

CERTIFICATE.

Certified that this Judgement consists of six (06) pages; each of which has been signed by the undersigned after making necessary corrections therein and read over.



Sayed Fazal Wadood,
ADJ, Orakzai at Baber Mela
Election Tribunal, Lower Orakzai