

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE FAISAL ARAB
MR. JUSTICE TARIQ PARVEZ

CIVIL APPEAL NO.301 OF 2014
*(Against the judgment dated 10.1.2014
of the Election Tribunal, Sukkur passed
in E.P.No.286/2013)*

Feroze Ahmed Jamali

...Appellant(s)

VERSUS

Masroor Ahmad Khan Jatoi etc.

...Respondent(s)

For the appellant(s): Mr. Farooq H. Naek, Sr. ASC
Raja Abdul Ghafoor, AOR

For respondent No.1: Agha Faisal, ASC
Mr. Tariq Aziz, AOR

For rest of respondent(s) Ex-parte

Date of hearing: 11.01.2016

...
JUDGMENT

MIAN SAQIB NISAR, J.- This appeal under Section 67(3) of the Representation of People Act, 1976 (*Act*) assails the judgment dated 10.1.2014 passed by the learned Election Tribunal, Sukkur, whereby the Tribunal had dismissed the election petition of the appellant.

2. The facts in relation to the instant appeal are:- the appellant and respondent No.1 (*respondent*) contested the general election of PS-23, Naushahro Feroze-V, District Naushahro Feroze, Sindh. The respondent, who was declared a returned candidate by the Election Commission of Pakistan (*ECP*) vide notification dated 22.5.2013, obtained 30,674 votes whereas the appellant (*runner up*) secured 29,063 votes, with the differential between the two being 1,611 votes. The appellant challenged this election primarily on the grounds (*as transpires from the record and also apprised by the learned counsel for the appellant*) that a large number of bogus votes

were got cast by the respondent, the election was manipulated and procured by him through coercion and in connivance with the election staff; the Returning Officers and the election staff violated the provisions of Sections 33, 38 and 39 of the Act and thus the election has been materially affected which should be declared void. The election petition was contested by the respondent on merits, besides an objection was raised by him that the petition and the annexures are not verified in accordance with law and that the grounds stated therein (*petition*) are vague and general in nature. Be that as it may, the learned Tribunal framed certain issues which are reproduced as under:-

- “1. Whether the petition is not maintainable in terms of S. 54 and 55 of the Representation of Peoples Act, 1976?*
- 2. Whether Respondent No.1 Returned Candidate committed illegal and corrupt practices in the election process by way of coercive methods, manipulating bogus votes, stuffing the ballot boxes with bogus ballot papers?*
- 3. Whether the Returning Officer and other election staff had acted in violation of provisions of the Representation of Peoples Act, 1976?*
- 4. Whether the Respondent No.1 stuff the bogus votes using all foul means and the ballot papers bears bogus thumb impressions on the counter-foils and such report is called from NADRA authorities by referring thumb impressions on the counter-foils, Pictorial Electoral list?*
- 5. Whether free, fair and transparent election is not held in the constituency PS-23 Naushero-Feroze-V?*
- 6. What should the order be?”*

The parties led their evidence and after conclusion of the trial the election petition was dismissed by the learned Tribunal while holding that the same as well as the annexures were not verified in accordance

with law, that full particulars of corrupt and illegal practices were not mentioned in the petition, and that the appellant failed to establish the commission of corrupt and illegal practices. It may be pertinent to mention here that during the course of the proceedings before the learned Tribunal, the appellant had moved an application for the examination and verification of the counterfoils of 19 polling stations with the object to prove that certain votes cast were not as per the mandate of Section 33 (*supra*) and, therefore, such votes be excluded from the count. Pursuant to the above the learned Tribunal sought the verification of the counterfoils of the said polling stations from NADRA and as per its report 2,417 used counterfoils were declared as invalid, i.e. which either contained NIC numbers which were not issued by NADRA or which did not bear any NIC number whatsoever. Further, 61 used counterfoils were held to be without fingerprints/thumb impressions.

3. Learned counsel for the appellant, while referring to the verification portion of the election petition, submitted that the petition was verified in accordance with the law. Reliance in this regard is placed on the case reported as **Moulvi Abdul Qadir and others vs. Moulvi Abdul Wassay and others** (2010 SCMR 1877). He further stated that pursuant to an application filed by the respondent under Section 63(a) read with Section 55(3) of the Act the learned Tribunal had put to rest the point of verification *vide* order dated 23.8.2013 which operated as *res judicata* when the learned Tribunal earlier gave its opinion on the same issue. With respect to the allegation of non-verification of annexures, learned counsel for the appellant drew our attention to the annexures and submitted that all 146 documents were attested on oath by an Oath Commissioner and have also been signed by the appellant himself. In this respect he further stated that these annexures were exhibited documents and no such objection vis-à-vis non-verification was raised at

the time they were received in evidence. Regarding the learned Tribunal's finding that there were only general allegations of corrupt and illegal practices in the election petition, learned counsel for the appellant while referring to paragraph 6 of the petition argued that the same contained specific and not general allegations. Coming to the evidence led by the appellant regarding proof of corrupt and illegal practices, learned counsel for the appellant stated that the testimony of the appellant himself and two of his polling agents, namely Abdul Latif and Moula Bux contained sufficient proof of the allegations of corrupt and illegal practices. Further, that the complaints made to the Returning Officers and Deputy Returning Officers also constituted sufficient evidence as they went un-rebutted. Learned counsel for the appellant then argued in support of the NADRA report and stated that 2,417 and 61 votes were liable to be excluded from the election result and since the total number of excluded votes (2,478) stands greater than the differential of votes secured by the respondent and appellant, thus the election result would be materially affected, thereby bringing the case within the purview of Section 70 of the Act. He stated that this aspect of the matter has been overlooked by the learned Tribunal and no reasons were given by the learned Tribunal for rejecting such report. Finally it was also argued that five different counts/results had been issued subsequent to which the appellant's application for recounting was accepted and recounting was ordered which reflected substantial differences between the number of votes in the consolidated result and the number of votes after the recount and this also brings the case within the mischief of Section 70 of the Act.

4. In order to controvert the arguments of the learned counsel for the appellant, learned counsel for the respondent submitted that the NADRA report was only to the extent of verification of thumb impressions of 19 polling stations, and there were no 'out of constituency' votes which

suggests that there was no bogus voting. With respect to 2,147 used counterfoils which had invalid NIC numbers, learned counsel submits that these are those counterfoils where the correct NIC was produced when the voter came to vote and an error was committed while writing the NIC number down on the counterfoils, and since this was due to a lapse by the election staff, the returned candidate should not be prejudiced by such error/lapse. About the verification of the election petition, learned counsel for the respondent when questioned concedes to the extent that there was no flaw in verification of specific paragraph numbers, however, to the extent that the election petition as a whole and the annexures were not verified in accordance with law, he submits that the petition should be dismissed.

5. Heard. The key questions involved in this matter are:- first, whether the petition and the annexures thereto had been verified in accordance with law, if not what is the effect thereto; secondly, whether the appellant had been able to prove illegal and corrupt practices as per the law and such positive evidence was led which has not been taken into account by the learned Tribunal; and thirdly, what is the true import of the NADRA report and what is the effect thereto and whether in the light thereof the present election has been materially affected. Before moving on, we find it expedient to reproduce the relevant provisions (*parts*) of Sections 33, 55 and 70 of the Act which read as follows:-

33. Voting procedure.—(1) *Where an elector presents himself at the polling station to vote, the Presiding Officer shall issue a ballot paper to the elector after satisfying himself about the identity of the elector and shall, for that purpose, require the elector to produce his identity card issued under the National Database and Registration Authority Ordinance, 2000 (VIII of 2000)].*

(2) *Before a ballot paper is issued to an elector—*

(a)

(b)

(c)

(cc)

(d)

(e) *the Presiding Officer shall record on the counterfoil of the ballot paper the number of the elector on the electoral roll the number of National Identity Card of the elector, stamp it with the official mark, sign it and obtain on it the thumb impression of the elector.*

(3) *A ballot paper shall not be issued to a person who—*

(a) *fails or refuses to produce his identity card issued under the National Database and Registration Authority Ordinance, 2000(VIII of 2000);*

(b)

(c)

(d)

(4)

(5)

(a)

(b)

(c)

(6)

(7)

55. Contents of petition.—(1) *Every election petition shall contain—*

(a) *A precise statement of the material facts on which the petitioner relies;*

(b) full particulars of any corrupt or illegal practice or other illegal act alleged to have been committed, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice or illegal act and the date and place of the commission of such practice or act; and

(c) the relief claimed by the petitioner.

(2) *A petitioner may claim as relief any of the following declarations, namely:—*

(a) that the election of the returned candidate is void;

(b) that the election of the returned candidate is void and that the petitioner or some other person has been duly elected; or

(c) that the election as a whole is void.

(3) *Every election petition and every schedule or annex to that petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings.*

70. Ground for declaring election as a whole void.—*The Tribunal shall declare the election as a whole to be void if it is satisfied that the result of the election has been materially affected by reason of—*

(a) the failure of any person to comply with the provisions of the Act or the rules; or

(b) the prevalence of extensive corrupt or illegal practice at the election.

6. For resolving the first question it may be stated that the learned Tribunal has non-suited the appellant on the reasoning that he has not specifically mentioned as to which paragraphs of the election petition are verified upon his own knowledge and which are upon information received and believed to be true, suffice it to say that this Court in the case reported as **Sardarzada Zafar Abbas and others vs. Syed Hassan, Murtaza and others** (PLD 2005 SC 600) has held such

objection to not be very material. Although the Court in **Zafar Abbas** (*supra*) held that the validity of the verification shall depend on the facts of each case, but in the instant matter we do not find the so-called lapse indicated by the learned Tribunal to be of any material consequence, warranting dismissal of the election petition on this ground simpliciter. The case of **Zafar Abbas** (*supra*) has been endorsed in **Moulvi Abdul Qadir** (*supra*) and reliance by the learned counsel upon the latter in this regard is rightly placed and his case/plea quite aptly falls within the ratio of the law laid down therein. Besides we have examined the verification part of the election petition and we find that it complies with the provisions of Order VI Rule 15 of the Code of Civil Procedure, 1908 (*CPC*) in letter and spirit. The reasons of the learned Tribunal and the argument of the respondent that it does not mention the date, day and place of the verification or the proper identification of the appellant, suffice it to say that at the bottom of the petition (*in the verification portion*), though not in typed form the date has been clearly written by hand. There is another stamp of the Oath Commissioner appearing on the left of the verification portion of the election petition which mentions the date as 26.6.2013 (*albeit also written by hand*). With respect to attestation, the Oath Commissioner in clear and unequivocal terms has stamped '*on S.A. before me*' (*i.e. on solemn affirmation before me*), which clearly indicates that the appellant was duly present before the Oath Commissioner at the time of attestation and was administered oath. It is also spelt out from the Oath Commissioner's stamp that the election petition was attested at Sukkur. As regards identification of the appellant, he has been duly identified by Mukesh Kumar, Advocate who has mentioned of knowing the appellant personally; thus we are of the candid view that in light of the law laid down by this Court in **Lt.-Col. (Rtd.) Ghazanfar Abbas Shah vs. Mehr**

Khalid Mehmood Sargana and others (2015 SCMR 1585) there is no defect in the verification.

7. Now coming to the annexures, we have examined all the documents which were appended by the appellant along with the election petition and they comprise of the notification of the ECP dated 22.5.2013, statements of count, various provisional results, applications for recounting of votes and complaints made by the appellant regarding anomalies in the election process. Suffice it to say that these are not the documents propounding and setting out any independent or additional substantial grounds for challenging the election or furnishing at least better particulars of the allegations in the petition so as to give such documents a status of independent and substantial grounds of the petition itself challenging the election on the basis thereof (*emphasis supplied*) which can be said to be the **annexures** requiring verification in terms of the law laid down by this Court in the case reported as **S. M. Ayub vs. (1) Syed Yusaf Shah, (2) Major Tilla Khan Sadozai and (3) Election Tribunal, West Pakistan, Lahore (PLD 1967 SC 486)** the relevant paragraph of which is reproduced below:-

“...By “schedule or annex” mentioned in subsection (3) of section 59 of the Act, is apparently meant such a schedule and annexure as either makes additional allegations of a substantive character against the opposite-party, or at least furnishes better particulars of the allegations made in the petition, so as to give them the status of substantive grounds of the petition itself. The documents under consideration in the instant case, however, are not of that character and, in our opinion, they should not be understood to fall within the meaning of “schedule or annex”, mentioned in paragraph 10 of the petition and not as substantive grounds or expansion of those grounds. We are, consequently, disposed to hold that the Tribunal was right in finding that the failure of the petitioner to append his signatures or the verification, required for schedules and annexures to the petition, was not fatal to the prosecution, of the petition.”

Thus only those annexures require verification which fall within the category mentioned above, but we find that this is not the situation in the instant matter.

An additional aspect of this issue is that the respondent through an application sought summary disposal of the election petition filed by the appellant and *vide* order dated 23.8.2013 the learned Tribunal dismissed this application holding that the election petition and the annexures were duly verified. In this regard, the relevant part of the said order is reproduced below:-

“Perusal of the memo of Petition transpires that specific allegations of illegal and corrupt practices are leveled in the Petition at relevant Polling Stations on the day of election and the Petition is duly signed by the Petitioner Feroze Jamali and same is attested as on S.A. before me by Mumtaz Ali Soomro Oath Commissioner Sukkur on 26-06-2013. Perusal of the annexures filed with the Petitioner also transpire that same are duly signed by Petitioner Feroze Jamali and attested and verified by Mumtaz Ali Soomro Oath Commissioner Sukkur as such the provisions of Sec: 55 (3) of the Representation of People Act, 1976 are duly complied with and I do not filed any merits in the application and dismiss the same.”

Having already decided the issue of verification *vide* the abovementioned order, it was not open for the learned Tribunal to reverse its own order, when that was not being done in the exercise of any power of review (*if review was permissible*) and such order operated as a *res judicata inter se* the parties with respect to the said issue having been finally and conclusively settled by the learned Tribunal itself. Further even if the principle of *res judicata* is considered not *stricto sensu* applicable, it is not comprehended that when the learned Tribunal earlier took up the firm view that the election petition and the annexures are duly verified but without meeting the reasons assigned in the previous order subsequently changed its opinion and held otherwise, without even advertng to the

said order. Be that as it may, in light of the above we are of the candid view that the election petition and the annexures both have been duly verified in accordance with law and the finding of the learned Tribunal in this regard is unfounded.

8. The next issue which requires deliberation is whether the averments of corrupt and illegal practices made in the election petition were vague and general in nature warranting dismissal, suffice it to say that we have examined paragraph No.6 of the election petition and are of the opinion that the appellant has set out in clear and detailed terms the grounds on which he had challenged the election of the respondent. In light of grounds a. to l. in paragraph No.6 of the election petition which mention with quite a precision, the irregularities, illegalities and corrupt practices with regard to the conduct of the election, we find that the contents of such grounds cannot be considered or held to be vague in any manner whatsoever.

9. As far as the question as to whether the appellant was able to prove his grounds of challenge to the election through evidence, it may be mentioned that two witnesses namely Abdul Latif (*PW-2*) and Moula Bux (*PW-3*), polling agents of the appellant, were examined. The statements of both these witnesses when read in the context of their cross-examination reveal that they both did not have any personal knowledge of the allegations of bogus voting etc. which is not sufficient proof of the commission of corrupt and illegal practices by the respondent. Besides no other oral evidence has been led by the appellant except his own statement and from such statement too, which is hearsay in nature we are not convinced that the allegations of corrupt and illegal practices and illegalities and irregularities in the conduct of election were proved through positive evidence which is the requirement of the law in election matters as laid down by this Court in numerous cases such as

Muhammad Saeed and 4 others vs. (1) Election Petitions Tribunal, West Pakistan, (2) Mehr Muhammad Arif Khan,(3) Ghulam Haider and (4) West Pakistan Government and others (PLD 1957 SC (Pak.) 91; Mian Jamal Shah vs. (1) The Member Election Commission, Government of Pakistan Lahore, (2) The Returning Officer, Constituency of the National Assembly of Pakistan No. NW-II, Peshawar II, and (3) Khan Nasrullah Khan (PLD 1966 SC 1); Khan Muhammad Yusuf Khan Khattak vs. S. M. Ayub and 2 others (PLD 1973 SC 160); Syed Saeed Hassan vs. Pyar Ali and 7 others (PLD 1976 SC 6); Raja Muhammad Afzal vs. Ch. Muhammad Altaf Hussain and others (1986 SCMR 1736); Muhammad Siddique Baloch vs. Jehangir Khan Tareen & others (C.A. No.307-L of 2015) and Syed Hafeezuddin vs. Abdul Razzaq & others (C.A. No.1086 of 2014).

Therefore we opine that the findings of the learned Tribunal in this regard are apt and are upheld by us.

10. As regards the question and the effect of the NADRA report it seems expedient to reproduce the relevant part of the report:-

Invalid CNIC on Counterfoils

15. *There were 2,147 used counterfoils that had invalid NIC numbers (NIC numbers which NADRA has never issued) written on them. This also includes such counterfoils that do not have CNIC mentioned over it. This was observed mainly in polling station # 24 (340 votes) and at polling station # 40 (279 votes).*

Counterfoils without fingerprints

19. *61 used conuterfoils were found without having fingerprints on them. These counterfoils were mainly used at polling station #37 (8 votes) and at polling station #27 (7 votes).*

Summary:

29. *Summary report is described below:*

<i>S. No</i>	<i>Description</i>	<i>Count of Votes</i>
<i>1</i>	<i>Votes polled in polling stations whose election material was received by NADRA</i>	<i>12,174</i>
<i>2</i>	<i>Invalid NIC number mentioned on used counterfoils, this also includes such counterfoils that do not have CNIC mentioned over it.</i>	<i>2,147</i>
<i>3</i>	<i>Out of Constituency Votes</i>	<i>0</i>
<i>4</i>	<i>Duplicate Voters on Counterfoils</i>	<i>0</i>
<i>5</i>	<i>Used counterfoils without fingerprints</i>	<i>61</i>
<i>6</i>	<i>Fingerprints successfully authenticated on used counterfoils and ER</i>	<i>3,121</i>
<i>7</i>	<i>Fingerprints on used counterfoils and ER failing authentication</i>	<i>0</i>
<i>8</i>	<i>Fingerprints of bad quality affixed on used counterfoils</i>	<i>6,845</i>

We find it useful to mention at the very outset that it was permissible for the learned Tribunal to seek the examination/verification of the election material from an expert, i.e. NADRA, in order to find out if the provisions of the Act and the rules framed thereunder have not been complied with and then to determine itself whether such non-compliance materially affects the result of the election. In this context, as has been mentioned above, the material of 19 polling stations was sent to NADRA pursuant to the order passed by the learned Tribunal dated 23.8.2013. Before proceeding further with the matter, we would like to highlight that the learned Election Tribunal has given no reason to reject the report of NADRA, but according to the report, the summary of which is reproduced above, it is clear and unmistakable that 2,147 used counterfoils out of these polling stations had invalid NIC numbers (*meaning thereby that the said used counterfoils either contained NIC numbers that were never issued by NADRA or had no mention of NIC number thereupon*). The mention of such number is the mandatory requirement of the provisions of Section 33 of the Act. As regards 61 used counterfoils the report is that there were no fingerprints/thumb impressions on them, again this is the non-compliance of Section 33 thus the total votes which from the report of

NADRA were not issued as per the used counterfoils comes to 2,208 and thus the ballot papers corresponding thereto were liable to be excluded. With regard to the argument of the learned counsel for the respondent that the 2,147 used counterfoils which had invalid NIC numbers were those counterfoils where the correct NIC was produced when the voter came to vote and an error was committed while writing the NIC number down, and since this was due to a lapse by the election staff, the benefit or prejudice of such error in writing of the NIC number on the counterfoil should not go to any candidate or in other words the returned candidate should not suffer for the omission and mistake of the election staff, suffice it to say that we cannot say with utmost certainty whether the eligible voter came and brought his correct NIC but the number was written incorrectly, or that an imposter came with a bogus NIC. The fact of the matter stands that a voter has to be properly identified and his correct NIC has to be noted on the counterfoils, which is required by the law, and the above has not been done, which is the non-compliance of the provisions of the Act. According to the provisions of Section 70 of the Act, the result of the election can be declared to be void for non-compliance of the provisions of the Act and the rules made thereunder if the result has been materially affected. Obviously the object of requiring affixation of thumb impressions and to record NIC numbers on the counterfoils is to ensure that the correct voter to whom a ballot paper has been issued casts his vote and subsequently to provide a reference point to find out if any bogus votes have been cast in the election. Therefore in this scenario since the votes to be excluded, i.e. 2,208 (2,147 plus 61 votes) are greater in number than the differential of 1,611 votes between the number of votes secured by the appellant and respondent, this would materially affect the result of the election, thereby bringing the case within the purview of the provisions of Section 70 of the Act,

warranting declaration of the election to be void as a whole. This very important and conspicuous aspect of the matter has not been attended to by the learned Tribunal and the impugned judgment is flawed in this respect.

11. In view of the above, by allowing this appeal and setting aside the impugned judgment, we accept the election petition filed by the appellant and declare the elections of PS-23, Naushahro Feroze-V as void. The ECP is required to hold fresh elections in the said constituency in accordance with law. No order as to costs.

JUDGE

JUDGE

JUDGE

Announced in open Court
on **26.01.2016** at **Islamabad**
Approved For Reporting
*Ghulam Raza/**

(JUDGE)