

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present:

Mr. Justice Mian Saqib Nisar
Mr. Justice Gulzar Ahmed
Mr. Justice Umar Ata Bandial

CIVIL APPEAL NO. 307-L OF 2015

(On appeal from the judgment/order dated 26.08.2015 of the Election Tribunal, Multan passed in Election Petition No.355 of 2013 SCP, 30/2013 ETM)

Muhammad Siddique Baloch Appellant.

Versus

Jehangir Khan Tareen & others Respondents.

For the appellant : Mr. M. Shahzad Shaukat, ASC.
a/w appellant (in-person).

For respondent No.1 : Mr. Makhdoom Ali Khan, Sr. ASC.
Mr. Tariq Aziz, AOR.
a/w respondent No.1 (in-person).

Dates of hearing : 21st, 22nd, 26th, 27th & 28th October, 2015.

JUDGMENT

Umar Ata Bandial, J. – This election appeal assails the judgment dated 26.08.2015 of the learned Election Tribunal, Multan (**“Tribunal”**) whereby the appellant, who was returned as Member National Assembly in General Elections held on 11.05.2013 from the constituency NA-154 Lodhran-I, has been unseated by the judgment of the learned Tribunal declaring his election to be void. The impugned declaration is based on three findings. Firstly, that the appellant made a false declaration in his nomination papers about his B.A. qualification from the University of Balochistan. He has thereby incurred disqualification from being elected as member of Parliament under Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan (**“Constitution”**); secondly, that the appellant is the

beneficiary of large scale corrupt and illegal practices committed by the election staff on the election day which the appellant procured, whereby the election is void and also the appellant is disqualified from being elected as Member of Parliament under Section 99(1)(f) of the Representation of the People Act, 1976 (**"ROPA"**); thirdly, that the result of the election is materially affected by the failure of the election staff to comply the provisions of the ROPA and therefore the election as a whole is void under Section 70(a) of the ROPA.

2. The appellant contested the election from the NA-154, Lodhran-I constituency as an independent candidate and secured 86,629 votes to be elected as Member National Assembly. The respondent No.1 (**"election petitioner"**) was runner up in the election having bagged 75,738 votes, thereby losing the election by a margin of 10,891 votes. Nineteen other candidates (respondents No.2-20) also contested the election. Altogether they polled roughly 64,252 votes making a total tally of 226,619 votes being polled in the election. Even before the result of the election was consolidated, the election petitioner approached the Returning Officer of NA-154 with an application dated 13.05.2013 requesting for suspension of the consolidation of result proceedings scheduled for that day. It was alleged that corrupt and illegal practices had been committed during the election by the election staff at the behest of the appellant. The request of the election petitioner was not acceded. Thereupon he approached the Chief Election Commissioner with a written application dated 14.05.2013 (Exb.P-16/52) seeking deferral of the consolidation of the election result pending outcome of recounting of votes, verification of count furnished by the Presiding Officers, and in particular the verification and analysis of finger prints of the voters and of the ballot papers by National Database Registration Authority (**"NADRA"**) in order

“to identify the bogus voters.” By order dated 14.05.2013 (Exb.P-16/53) the Election Commission of Pakistan (“ECP”) directed the District Returning Officer, Lodhran (“DRO”) to carry out a recounting of votes after notifying all contesting candidates in constituency NA-154, Lodhran-I to attend such proceedings.

3. After the recount proceedings commenced by the DRO on 17.05.2013, the election petitioner again complained to the Chief Election Commissioner on 18.05.2013 that these were being conducted unfairly. Consequently, the ECP passed another order dated 18.05.2013 clarifying that the DRO/RO shall provide access to the nominee of the election petitioner for inspecting all documents available on record and to decide any objection raised about the recounting proceedings in a summary manner in writing. It was also ordered that the Regional Election Commissioner, Multan (“REC”) shall attend the proceedings of recounting as an “observer” to ensure their smoothness.

4. On conclusion of the recounting, two reports about these proceedings, one by the DRO (Exb.P-16/59) and the other by the REC (Exb.P-13), were submitted to the ECP. The report by the DRO (Exb. P-16/59) dated 21.05.2013 acknowledges the correctness of the objection taken by the election petitioner that the counterfoils of the ballot papers cast in the election did not at their back bear the signature and/or stamp of the Presiding Officer as required under Section 33(1)(e) of the ROPA. The second report (Exb.P-13) dated 23.05.2013 filed by the REC, Mr. Ashfaq Ahmed Sarwar (PW-11), is detailed and gives a polling station-wise account of different violations of the election laws committed by the election staff on election day. These breaches were noted by the REC (PW-11) during the proceedings of inspection of record and recounting of ballot papers attended

by him as an ECP observer from 19.05.2013 until 23.05.2013. The election material of 270 polling stations was examined during the said five days and are reported by the REC. However, the inspection and recount proceedings of 34 polling stations conducted on 17.05.2013 and 18.05.2013 prior to the REC's appointment as an observer by the ECP are therefore not dealt with in his report. From the election record of 270 polling stations examined during the recounting proceedings, the REC's report (Exb.P-13) notes contravention of election laws to have been committed at 104 polling stations. The most frequent violation committed at these polling stations is the non-signing and/or non-stamping of the counterfoils of ballot papers by the Presiding Officers. This omission constitutes a breach of the duty imposed under Section 33(1)(e) of the ROPA.

5. Another violation of the election law noted in the REC's report (Exb.P-13) is the absence of the thumb impression of the voter on the voters' list. The said defect is reported to be less frequent than the one first mentioned above. But for the number of polling stations involved in these breaches of law, the exact number of votes affected by such omissions made by the election staff is not available in the REC's report. A general picture that nevertheless emerges is that the election record of more than 30% of the polling stations (104 out of 270) is tarnished with the violation of statutory requirements. The widespread and random occurrence of these defaults in the record of the 270 reported polling stations suggests a trend which the record of the 34 polling stations not covered by the REC's report may also bear out. In order to understand the seriousness of the said default in duty committed by the Presiding Officers, the relevant provisions of, *inter alia*, sub-Sections (1), (2) and (3) of Section 33 of the ROPA are reproduced below:

"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 National 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)** [omitted]
- (b)** the number and name of the elector as entered in the electoral roll shall be called out;
- (c)** the entry relating to the elector on the electoral roll shall be struck off to indicate that a ballot paper has been issued to him;
- (cc)** he shall be required to receive a personal mark, made with indelible ink, on any finger of either hand as indicated by the Commission;
- (d)** the ballot paper shall be stamped on its back with the official mark and signed by the Presiding Officer;
- (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 National Identity Card issued to him under the National Database and Registration Authority Ordinance, 2000 (VIII of 2000);
- (b)** [Omitted];
- (c)** refuses to put his thumb impression on the counterfoil or whose thumb bears traces of its having already been used for putting an impression; or
- (d)** refuses to receive the personal mark with indelible ink or who already bears such a mark or traces of such a mark."

6. Armed with the above information, the election petitioner filed an election petition in July, 2013, *inter alia*, making three principal allegations against the appellant that were upheld in the findings of the impugned judgment. In support of these allegations, fourteen witnesses including the election petitioner were examined before the learned Tribunal. A Misc. Application seeking verification/comparison by NADRA of thumb impression of voters affixed upon counterfoils of ballot papers cast in the elections was also filed along with the election petition. After hearing the learned counsel for the appellant and the election petitioner, the learned Tribunal by order dated 21.05.2014 allowed the said application. NADRA was directed to carry out verification and comparison of thumb impressions of voters on the counterfoils of the ballot papers cast in the election. The

DRO/learned District & Sessions Judge, Lodhran was directed to procure the relevant election material comprising counterfoils of ballot papers along with voters' list from the treasury and to dispatch the same in sealed condition to NADRA, in the presence of the representatives of each party.

7. After hearing the learned counsel for the parties and the officer of NADRA, the learned Tribunal on 25.06.2014 appointed its representative to observe the verification proceedings conducted by NADRA. The said representative was replaced on 09.07.2014 by Mr. Shabbir Hussain Chattha (CW-2), a retired District & Sessions Judge. The proceedings of opening, scanning and verification of the election record by NADRA were conducted in the presence of the Tribunal's representative. The process was spread over three stages. Firstly, on the receipt of election material, it was opened, counted and tabulated in an electronic record for future reference. Secondly, each item of counterfoils and photo electoral rolls was digitally scanned and transferred to a database; thumb impressions, NIC number recorded on the scanned counterfoils and photo electoral rolls were captured and digitized; thereafter, the original election material was repacked and stored in safe custody of NADRA. Thirdly, the digital record of thumb impression and given CNIC number captured from the election material were put to authentication and verification under the Automated Fingerprint Identification System (**"AFIS"**) of NADRA by comparison with its record linking the thumb impression of every recorded citizen of the State with his CNIC. On completion of the authentication/verification stage, NADRA filed its analysis report (Exb.CW-10/1-6) before the learned Tribunal on 28.10.2014 identifying three categories of thumb impressions contained in the election record. Firstly, the thumb impression on the counterfoils that matched with the thumb print in NADRA's citizens' database for the CNIC given on the

counterfoils. This is the category of verified votes. The second category of thumb impression on the counterfoils failed the above said authentication by not matching with NADRA’s citizens’ database in the NIC number recorded on the counterfoils. This category included the cases where someone other than the person holding NIC number recorded on the counterfoils had used the ballot papers. Finally, the third category of thumb impressions comprised finger prints of bad quality that could not be deciphered for comparison or matching through the AFIS of NADRA.

8. Based on the said analysis of the counterfoils, the NADRA report at the end of its narrative gives the following summary of its findings:

S.No.	Description	Count of Votes
1	Election material of 290 x Polling Stations received from Election Tribunal (Ref: Para-2, 3 of this report)	218,056
2	Invalid NIC number mentioned on used counterfoils. This also includes such counterfoils that do not have CNIC mentioned over it.	20,601
3	Out of constituency voters found on used counterfoils.	121
4	Duplicate votes on used counterfoils	728
5	Used counterfoils without fingerprints	587
6	Fingerprints successfully authenticated on used counterfoils and ER	73,707
7	Fingerprints on used counterfoils and ER failing authentication	179
8	Fingerprints of bad quality affixed on used counterfoils resultantly NADRA was unable to decipher them due to non-utilization of proposed ink beside other possibilities. However, CNIC number mentioned on such counterfoils having bad thumb impressions were valid CNICs.	122,133

9. The summary of findings given in the NADRA report (Exb.CW-10/1-6) reproduced above is explained in its narrative. The report states that the election material of 298 polling stations out of a total 304 polling stations in the constituency was received from the ECP. However, relevant election material of eight polling stations was damaged or unavailable and only the record of 290 polling stations was scanned and analyzed. From this election material, a total of 218,056 counterfoils of ballot

papers were examined by NADRA. 122,133 counterfoils equaling 56% of the available number, contained bad quality finger prints that were not readable by the NADRA software for the purpose of their comparison with and verification through the NADRA database. As a result, only 95,927 counterfoils contained thumb impressions that were readable by the NADRA software. Out of this total, 20,601 counterfoils bore invalid CNIC numbers that had never been issued by NADRA. This count includes 733 counterfoils which did not contain any CNIC number. The said mismatch with the NADRA record shows either that the election staff failed to verify CNIC identity of electors or made bogus entries on the counterfoils, reflecting their indifference or otherwise an improper purpose.

10. In addition to the 20,601 counterfoils containing invalid CNIC numbers, another 587 counterfoils were defective for absence of thumb impression of the voter. Yet another 728 counterfoils were issued to 362 voters showing duplicate votes being cast by such voters; 121 counterfoils were issued to out of constituency voters and 179 counterfoils bore valid CNIC numbers but un-matching thumb impressions. Accordingly 22,216 counterfoils contain evidence of bogus voting out of a total number of 95,927 counterfoils that were found readable by NADRA software. These figures reveal that 23% of the total counterfoils read and deciphered by NADRA software contain false identities of persons who voted in the election on account of absent or invalid CNIC number or thumb impression. Casting of vote by unidentified strangers is contrary to Section 33 of the ROPA that aims at curbing, *inter alia*, the practice of bogus voting.

11. The NADRA report is signed on each page by Mr. Ghazali Zahid, Director, NADRA Data Warehouse, NADRA Headquarters, Islamabad. He appeared before the Tribunal as CW-2 and was cross-

examined by the learned counsel for both the parties. Notwithstanding intense questioning on CW-2, by the learned counsel for the appellant, no dent could be caused to the credibility, transparency and analytical propriety of the NADRA scanning and verification process. The appellant did not file any written objections before the learned Tribunal to the NADRA report. Nor has the learned counsel for the appellant criticized the said report before us. The findings given in the NADRA report are therefore authentic, independent credit worth possessing high probative value.

12. According to the learned counsel for the election petitioner, NADRA report (Exb.CW-10/1-6) represents compelling affirmative evidence about illegalities committed on a widespread scale on the election day. The appellant is the beneficiary of such acts of commission and omission done by the election staff. Therefore, firstly, his election is liable to be declared void on account of its result being achieved through bogus voting. This is evident from the violations of law committed by the election staff as that have been detected in the NADRA report. Secondly, the learned Tribunal's conclusion about the appellant's disqualification arrived in the impugned judgment be affirmed. This conclusion finds the appellant to be the principal beneficiary of violations of law committed by the election staff, therefore, he has procured these acts by resorting to corrupt and illegal practices. Consequently, the appellant is disqualified from being elected for committing the said wrongs. The learned counsel for the appellant has not contested the findings recorded in the NADRA report. He has, however, vehemently opposed the finding of the learned Tribunal that the appellant has procured the violations of law by the election staff and won the election by resorting to the commission of corrupt and illegal practices.

13. The NADRA report does not take account of the defects noted in the inspection and recounting of votes conducted by the DRO, Lodhran in May, 2013. These proceedings were observed by the REC (PW-11) and documented in his report (**REC report**) dated 23.05.2013 (Exb.P-13) addressed to the ECP. The violations noted therein include the absence of the stamp and/or signatures of the Presiding Officer on the counterfoils of ballot papers required under Section 33(1)(e) of the ROPA. The said provision of law aims at ensuring that a ballot paper is issued by the competent authority to a person who is verified to be a voter in the constituency. The REC report noted the afore-noted defect in the record of 72 polling stations during the scrutiny of election record of 270 polling stations, observed by the REC. On this analysis as well the election record of roughly 25% of polling stations contain a violation of a crucial legal requirement aimed at identifying genuine voters before the issuance of ballot papers. The total number of ballot papers affected by this defect is not calculated by the REC report but the fact that at 72 polling stations the bulk of issued ballot papers suffered from the said violation of law highlights another serious failing and defect in the management and conduct of the election process in the constituency on the election day. The combined effect of the distinct violations of law committed in the identification of the voters highlighted in the NADRA report and in the issuance of ballot papers by unauthorized persons indicate serious flaws in the voting process that render no less than 25% and may be much more of the total votes cast in the election to be suspect, dubious and bogus.

14. Turning to the conclusion to be drawn from the above mentioned clear and convincing evidence of widespread violations of the ROPA committed by the election staff. The learned counsel for the appellant

has seriously questioned the findings given by the learned Tribunal that the appellant is accountable for non-compliance of sub-section 1(e) and 3(c) of Section 33 of the ROPA. He submits that there is no evidence on record showing that the appellant procured the violations of law committed by the election staff. He has read from the affidavits of the 13 witnesses produced by the election petitioner in aid of his allegation of corrupt or illegal practices being committed by the appellant on the election day. None of these affidavits nor the statements in cross-examination of the said witnesses including the election petitioner disclose any fact nor nominate any person, for connecting the appellant with the said violations of the ROPA committed by the election staff. Equally, neither of the two reports, that is, the REC report (Exb.P-13) and the NADRA report (Exb.CW-10/1-6) insinuates the appellant's involvement in the breach of requirements under Section 33 of the ROPA. The anxiety of the appellant to obtain the reversal of the finding that he has committed corrupt or illegal practices is to avoid his disqualification for five years from contesting election under Section 99(1)(l) of the ROPA. The fact that the appellant won the election cannot be presumed by the election petitioner as proof that the appellant procured violations of election law to be committed.

15. The law regarding the quality of evidence necessary to prove an allegation of corrupt and illegal practices committed by a candidate during his election is by now well settled. "Corrupt practice" is defined in Section 78 of the ROPA while "Illegal practice" is defined in Section 83 of the said statute. The allegation in the present case would, *prima facie*, fall within the ambit of Section 83(1)(b) of the ROPA. The delinquent conduct under the said provision pertains to, *inter alia*, procuring the assistance of any person in the service of Pakistan to further or hinder the election of a candidate. The

successful proof of the commission of the said wrong by a returned candidate not only annuls his election under Section 368 (1)(d) as well as Section 70(b) of the ROPA but also disqualifies him from contesting an election for a period of five years under Section 99(1A)(f) of the ROPA and exposes him to criminal prosecution for an offence carrying punishment of six months imprisonment. In view of the severe consequences following the proof of corrupt and illegal practices in particular by a returned candidate, different pronouncements by this Court adopt a cautious stance towards a defending incumbent of elected office. The earliest case on the subject is **Muhammad Saeed vs. Election Petitions Tribunal, West Pakistan, etc.** (PLD 1957 SC 91) which holds that each ingredient of the misdemeanor of corrupt or illegal practices must be affirmatively proved by direct or circumstantial evidence. Circumstantial evidence is to be believed if all reasonable hypotheses which are consistent with the non-commission of corrupt or illegal practices have been excluded. The said rule has been reiterated with approval in **Muhammad Yusuf vs. S.M. Ayub** (PLD 1973 SC 160) and in **Muhammad Afzal vs. Muhammad Altaf Hussain** (1986 SCMR 1736).

16. In the present case, there is no circumstantial, let alone, any direct evidence implicating the appellant in the commission of corrupt or illegal practices during his election. Only an inferential allusion in the submissions by the learned counsel for the election petitioner is suggested to entangle the appellant. The half heartedness of the suggestion itself indicates the weakness of any merit in the learned Tribunal's finding that the appellant is guilty of committing corrupt or illegal practices during the general election in constituency NA-154 Lodhran-I. Correspondingly, there

cannot be any finding that the result of the said election is vitiated by such practices under Section 68(1)(d) or Section 70(b) of the ROPA.

17. Be that as it may, the question that arises is whether the inclusion of 22,216 invalidly issued ballot papers in the count of election result is inconsequential in the eyes of law or has any bearing on the result of the election. It may be reiterated that the objection to the validity of issued ballot papers arises from non-compliance with the requirements of Section 33(1)(e) and 33(3)(c) of the ROPA to different degrees by the election staff at almost all the polling stations. Section 70 of the ROPA is relevant for widespread violations of mandatory law made during the course of election.

It reads as under:

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 this Act or the rules; or

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

18. Clearly, the provisions, *inter alia*, of Section 33 of the ROPA relating to the identification of an elector before the issuance of a ballot paper to him are crucial for preventing bogus voting and ensuring a free and fair election. These provisions with the said object would, according to the dicta laid down in Abdul Hafeez Khan vs. Muhammad Tahir Khan Loni (1999 SCMR 284) have mandatory effect, and the widespread non-compliance of the said provision would attract the application of Section 70(a) of the ROPA. However, it is noticed that a declaration under Section 70(a) *ibid* is predicated upon the satisfaction of the Election Tribunal that “*the result of the election has been materially affected by reason of*” non-compliance with the provisions of the ROPA or Rules framed there under. Straightaway, those violations of the election law that have significant numerical impact on the

count of election result would fall within the ambit of Section 70(a) of the ROPA. At the same time, arithmetical precision in determining the number of votes invalidated by delinquent acts committed during the election is not essential and a Tribunal in principle should consider the imperativeness of the law violated and the scale of the violation committed in order to estimate their impact on the result of the election.

19. In the case of Jam Mashooq Ali vs. Shahnawaz Junejo (PLD 1996 SC 426) this Court treated the non-supply of amended electoral rolls to the election staff at several polling stations, the prohibition of electors to vote on account of having identity cards bearing numbers from specified series and non-issuance of postal ballots to electors who had used photocopy forms issued for the purpose to have vitiated the process of the election as a whole. The Court approved the observation that in the facts and circumstances of a case if it is not possible to even assess as to what should have been the result of the election on account of non-compliance with the election law, then the result of the election ought to be treated as being materially affected. The denial of a right of franchise to the electors on a widespread scale or conversely the grant of opportunity to strangers to usurp or defeat such right of franchise through bogus voting are both acts that go to the roots of the electoral process and contravene the constitutional mandate expressed in Article 218 (3) of the Constitution that *"elections are to be held honestly, justly, fairly and in accordance with law and that corrupt practices are guarded against."*

20. In cases where an estimate of the votes tainted with delinquent conduct can be made, one approach taken by the Court has been to deduct the number of tainted votes from the lead secured by a winning candidate. Where the lead significantly exceeds the number of tainted votes, the adjustment reduces such margin but the winning candidate nevertheless

succeeds. Therefore, in such cases it cannot be said that the result of the election has been materially affected. In the case of **Ehsanullah Reki vs. Abdul Qadir Baloch** (2010 SCMR 1271), this Court adjusted the disputed votes cast at the polling stations nominated by the election petitioner against the lead attained by the returned candidate. It was held that even after giving the election petitioner benefit of all the disputed votes, the lead of the winning candidate survived by a margin of 188 votes over the total number of votes attributed to the election petitioner. A similar approach was adopted by this Court in the case of **Raja Ameer Zaman vs. Omer Ayub Khan** (2015 SCMR 890) wherein it was contended before the Court that a re-poll at specified polling stations could not be ordered because the non-compliance in election process with the provisions of election law had not been attributed to corrupt or illegal practices committed by any candidate. The returned candidate could not be punished for neglect or defaults committed by the election staff. This Court answered that contention as follows:-

“26. ... The scheme of the law appears to be that the primary and perhaps this most effective defence against bogus voting is to ensure that a ballot paper is only issued to a person whose name appears on the Voters List/ Electoral Roll of the Polling Station in question, that too, after proper identification. To achieve the object of fair election the availability and proper utilization of the Voters List is therefore crucial. The failure of an effective filter for the issuance of ballot paper to a *bona fide* Elector would tantamount to leaving the barn door open and the Cow will run away. Any subsequent attempt to track down the proverbial Cow (the illegally issued ballot paper) is by no means easy if not impossible.

27. Yet another safeguard against the bogus voting is the counterfoils of the ballot papers. Any discrepancy in the number of votes cast and the counterfoils available would obviously make the result questionable. Similarly, rejected votes can become a bone of contention effecting the outcome of the election. It is no coincidence that Voters Lists, counterfoils of ballot papers and rejected votes are required to be preserved along with other election material as mandated by section 38 of ROPA. The resolution of future dispute through verification appears to have been catered for.

28. There can be no escape from the fact that in the instant case the requirement of the law has not been fulfilled. Section 70 of ROPA clearly provides that the Tribunal can declare an election to be void on account of failure of any person to comply with the provisions of ROPA or the Rules framed thereunder, if such failure materially affects the result. This Court in the case, reported as Jam Mashooq Ali vs. Shahnawaz Junejo (1996 SCMR 426) set aside an election, *inter alia*, on the ground that up-to-date amended Voters List/ Electoral Roll had not been made available to the Presiding Officer before the commencement of the voting process on the election day."

With respect to the numerical difference of 1304 votes between the returned candidate and the challenger, it was held that if the votes polled by both the appellants and respondent No.1 [in the seven objected polling stations] are excluded from the total tally, then it is the respondent No.1, whose votes would exceed those cast in favour of the appellant [returned candidate]; thus it is obvious that non-compliance of the law in seven polling station has materially affected the election results of the entire election. On the said test the judgment of the Tribunal for re-poll at the seven polling stations was upheld. Subsequently, in review proceedings, Raja Ameer Zaman vs. Omer Ayub Khan (2015 SCMR 1303), this Court modified the extent of the re-poll to the entire constituency and thereby approved the approach that material affect upon the result election can be established by excluding the objected votes from total count in order to assess whether the winning margin of the returned candidate is upset.

21. In the present case, there are two reports: one is dated 23.05.2013 (Exb.P-13) prepared by the REC (PW-11) and the other is dated 28.10.2014 (Exb.CW-10/1-6) authored by Mr. Ghazali Zahid, Director, NADRA (CW-2). Both these witnesses were cross-examined incisively by the learned counsel for the appellant, however, the integrity and correctness of the findings given in the two reports remain unaffected. The violations of election law noted in the NADRA's report clearly invalidate 22,216 ballot

papers issued to persons contrary to the provision of Section 33 of the ROPA, which are intended to exclude the possibility of bogus voting and are therefore mandatory for advancing the mandate expressed in Article 218(3) of the Constitution. On the other hand, the appellant was returned as Member National Assembly in the election with a lead of 10,891 votes. Consequently, by adopting the straight forward numerical approach of this Court taken in Raja Ameer Zaman's case (2015 SCMR 890) and also visible in Ehsanullah Reki's case (2010 SCMR 1271), it is patently clear that after adjusting the 22,216 disputed votes against the lead of the appellant, the result of the election is materially affected and his margin of victory is eliminated to a losing difference from the tally of the election petitioner. Equally, on the alternative test adopted by this Court in Jam Mashooq Ali's case (PLD 1996 SC 426), the widespread scale of the violations of election law committed by the election staff in NA-154, Lodhran-I, makes the pervasiveness of their default to infect the election process as a whole with doubt and suspicion thereby materially affecting the election result.

22. According to the NADRA's report (Exb.CW-10/1-6) the election record of 290 polling station was scanned and verified. Out of these, entries of bogus CNIC are contained in the record of 288 polling stations. Nearly fifty of these polling stations had bogus ID Cards entries on a minimum of 100 counterfoils upto a maximum of 414 counterfoils. This result is based on the analysis of 95,927 counterfoils pertaining to almost all the polling stations. However, the NADRA report states that thumb impression on 122,123 counterfoils could not be deciphered and therefore, were excluded from the count. What extent of violation may have taken place in respect of said unreadable counterfoils can only be guessed, since these cannot be totally immune from the otherwise universal malaise of

bogus entries. Add to these figures the violation of section 33(1)(e) of the ROPA occurring at 104 polling stations highlighted in the REC's report. The Presiding Officers at these polling stations did not sign and/or stamp the counterfoils of ballot papers. The issuance of ballot papers against such counterfoils is unauthorized and invalid. Therefore, the combined impact of the violations of the ROPA and the Rules framed thereunder that are noted in the NADRA report and the REC report in the election of NA-154 Lodhran-I is so widespread and extensive that the test laid down in **Jam Mashooq Ali's case** (PLD 1996 SC 426) is also squarely satisfied. Consequently, the finding of the learned Election Tribunal, that the result of the election of NA-154 is materially affected on account of violations to comply with the provisions of the ROPA or Rules framed thereunder, is entirely justified and is upheld. The derivative finding by the learned Tribunal that such violations have been committed by the election staff by or at the behest of the appellant is unsupported by any evidence and is therefore set aside. We hold that in consequence of non-compliance of the election laws, the election in NA-154 Lodhran-I is void as a whole.

23. It may be observed at this stage that owing to afore-noted significant and substantial evidence of statutory violations in the conduct of election in NA-154 Lodhran-I, learned counsel for the appellant on instructions gave his consent to the appellant's election being declared as a whole to be void and for a fresh election to be held in the constituency NA-154 Lodhran-I. That concession was pondered and disregarded by us because private consent cannot prompt a judicial direction for holding a fresh election in the constituency. The present *lis* involves the enforcement of public law in respect of an elected public office under the Constitution and involves the commitment of huge public funds through the ECP for

financing a bye-election. The outcome of such a controversy must be decided in accordance with law and not pursuant to the wishes of affected private parties.

24. Keeping in view the above noted vast extent and degree of neglect, indifference or otherwise malice of the election staff in the conduct of election in NA-154 Lodhran-I, the object and motivation for such wrong doing cannot be overlooked or condoned. The ECP is therefore directed to inquire into the cause and purpose, if any, of such errant conduct by the election staff and to prosecute the responsible persons for breaches of their duties, *inter alia*, committed under Section 91 of the ROPA.

25. This brings us to the last and highly contested finding given by the learned Tribunal. It has been held that the appellant made a false declaration in his nomination papers about his B.A./Graduation qualification from the University of Balochistan. Such a false declaration deprives the appellant of the qualification contained in Article 62(1)(f) of the Constitution, which provides as follows:

“62.(1). A person shall not be qualified to be elected or chosen as a member of the Majlis-e-Shoora (Parliament) unless –

...

(f) He is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law;”

The learned counsel for the appellant has contested the said finding because there is no direct evidence on record showing that the appellant’s claim of his graduate qualification is false. The election petitioner as an accuser cannot establish the allegation without bringing proof that is beyond reasonable doubt. In such matters involving a penal consequence, the benefit of doubt must favour the accused, in this case the appellant. Reliance has been placed on the judgments by this Court in **Muhammad Saeed vs. Election Petitions Tribunal, West Pakistan, etc.** (PLD 1957 SC 91), **Saeed**

Hassan vs. Pyar Ali (PLD 1976 SC 6) and Muhammad Afzal vs. Muhammad Altaf Hussain (1986 SCMR 1736).

26. The loss of qualification under Article 62(1)(f) of the Constitution has been visited with removal from elected office under the Constitution in a number of cases including Abdul Ghafoor Lehri vs. Returning Officer PB-29 Naseerabad-II (2013 SCMR 1271), Allah Dino Khan Bhayo vs. Election Commission of Pakistan (2013 SCMR 1655), Iqbal Ahmad Langrial vs. Jamshed Alam (PLD 2013 SC 179) and Najeeb-ud-din Owaisi vs. Amir Yar Waran (PLD 2013 SC 482). Weighty reasons have been assigned for adopting and implementing the constitutional mandate as a bar on membership in Parliament. Firstly, the qualifications of a candidate set out in Article 62 of the Constitution are a *sine-qua-non* for eligibility to be elected as Member of Parliament. No time limit for ineligibility on this score is given in the Constitution. A person who is untruthful or dishonest or profligate has no place in discharging the noble task of law making and administering the affairs of State in government office. Such faults in character or disposition, if duly established, cannot be treated as transient for the purpose of reposing trust and faith of the electorate and the Constitution in the holder of an elected office under the Constitution. The trusteeship attendant upon the discharge of every public office under the Constitution, whether Legislative, Executive or Judicial is a universally recognized norm. However, our Constitution emphasizes upon it expressly for an elected parliamentary office. The Constitutional norm must be respected and therefore implemented. The above noted precedents have applied a lifetime bar on a delinquent elected Member of Parliament. Therefore, the apprehension of the appellant, as expressed by his learned counsel about incurring the sanction under Article 63 of the Constitution is

fully justified. Irrespective of the period of disability inflicted for violation of Article 62(1)(f) of the Constitution, the learned Tribunal should have examined the evidence in relation to the allegation of false declaration by the appellant in his nomination papers very carefully and judiciously before depriving him of eligibility to contest for elected office under the Constitution.

27. The state of evidence on record about the falsity of the appellant's educational qualification is cursory, defused and inferential. No witness of the University of Balochistan was examined by the election petitioner. Likewise, no witness of Board of Intermediate and Secondary Education ("**BISE**"), Karachi wherefrom the appellant secured his Secondary School Certificate (Matriculation) and Higher Secondary School Certificate (Intermediate) was examined by the election petitioner. There is no report on record either by the University of Balochistan or BISE, Karachi disputing, disowning or rejecting diplomas/certificates conferred by the said institutions upon the appellant. At best, the case of the election petitioner is based on the belated decision of the appellant i.e. at the age of 43 years, to secure his Secondary School Certificate, Higher Secondary School Certificate and Graduation degree in the years 2002, 2004 and 2006 respectively. This initiative coupled with his poor English language skills and total lack of knowledge of the Sindhi language as well as failure to distinguish "General Science" from "Political Science" are highlighted by the learned counsel for the election petitioner as proof of the appellant's lack of graduate qualification. The order sheets of the learned Tribunal show that on 28.02.2014, the Deputy Controller of Examination, BISE Karachi attended the Court as a summoned witness. The election petitioner did not examine him because of the incomplete record that he had brought. Again on 15.04.2014 the Controller of Examination, University of Balochistan attended the Court

as a summoned witness. He also brought incomplete record and the election petitioner decided not to examine him.

28. The case law on the subject of false declaration of educational qualifications by a returned candidate covers in general three categories: firstly, where the degree or diploma is fake and bogus and is disowned by the institution claimed by the holder to have issued the same; secondly, where the degree or diploma has been procured through personation and some finding on this score has been rendered by the concerned educational institution; and thirdly, where unfair means have been adopted by a candidate to pass his examination or secure his degree or diploma fraudulently, deceitfully or with complicity. The election petitioner has made a vague and jumbled allegation against appellant's educational qualifications that does not specify either in his pleadings and his evidence, the precise reason for the invalidity of the B.A. qualification of the appellant. In the final analysis, when the learned counsel for the election petitioner declined to avail the opportunity to cross-examine the Controller of Examination of the University of Balochistan about his failure to bring the summoned record, the election petitioner gave up the chance to demonstrate complicity, design or impropriety in the issuance of the degree to the appellant. To cover that defect, the learned counsel for the election petitioner made a request that this Court should itself examine the appellant under Order X Rule 2 CPC. Reliance was placed on **Iftikhar Ahmad Khan Bar vs. Chief Election Commissioner** (PLD 2010 SC 817) and **Muhammad Rizwan Gill vs. Nadia Aziz** (PLD 2010 SC 828). However, both precedents are distinguishable. In the first case, the qualification claimed by the returned candidate was a *Sanad of Alshahadat-ul-Aalimia* equivalent of M.A. in Islamic Studies according to the Higher Education Commission Pakistan ("HECP").

However, the body authorized by the HECP for conferring the said *Sanad*, namely, the *Wafaq-ul-Madaris*, Pakistan, disowned issuance of the *Sanad* claimed by the returned candidate. In fact the *Jamia Rizvia Sardarul Madaris* which had conferred the *Sanad* was not even registered with the *Wafaq-ul-Madaris*. In the background of clear proof of bogus qualification of the returned candidate but before giving any adverse finding against an elected Member of Parliament, this Court in order to do justice decided to examine him. The second case is completely different in which the returned candidate himself wished to be heard in-person before this Court and to make a statement. The two cases were accordingly decided on their own facts. However, it cannot be canvassed that in these cases the Court ventured to fill any lacunae in the evidence against the returned candidate, whereby he would be disqualified to contest any election; whereas this is being presently canvassed before us on behalf of the election petitioner.

29. At this juncture, it is important to emphasize that in cases involving a finding of fact about the disqualification of a returned candidate in election matters, such finding must be based on affirmative evidence and not on presumptions, inferences and surmises. That does not mean that proceedings in an election petition before an Election Tribunal are strictly criminal proceedings. It is settled law that even in civil proceedings, a finding of fact must be based on positive and affirmative evidence. This requirement rests in the basic principles of the Qanun-e-Shahadat Order, 1984 and is articulated in **Allah Din vs. Habib** (PLD 1982 SC 465). For that reason and the serious consequences that follow a finding of disqualification under Article 62(1)(f) of the Constitution, an additional evidentiary safeguard is adopted by the Court, namely, that any reasonable hypothesis

available in the recorded evidence to avoid the disqualification of the returned candidate ought to be adopted by the Court of law. The foregoing safeguards have already been laid down in relation to the proof of corrupt practice by a candidate in an election. Section 78(3)(d) of the ROPA treats a false statement by a candidate about his educational qualification to be a corrupt practice.

30. The earliest pronouncement on this subject is rendered by this Court in **Muhammad Saeed's case** (PLD 1957 SC 91), wherein it is held that:

"... the burden of proof of corrupt practices is on the petitioner; that the evidence of proof of such practices must be restricted to the charges or instances mentioned in the petition and the particular; that each ingredient of a corrupt practice so charged must be affirmatively proved by evidence, direct or circumstantial; and that where the evidence is wholly circumstantial, the commissioners before finding a corrupt practice proved must exclude all reasonable hypotheses which are consistent with that corrupt practice having not been committed..."

31. A case directly pertaining to disqualification of a returned candidate was heard by this Court in **Mohammad Yusuf's case** (PLD 1973 SC 160) wherein whilst adopting the view taken in **Muhammad Saeed's case** (PLD 1957 SC 91) this Court has observed that finding of disqualification must be based on positive evidence and should not be rendered inferentially on mere surmises; that since a disqualification was penal in nature, therefore, the terms thereof were subject to strict interpretation; and the benefit of doubt was to be extended in favour of a returned candidate. The later judgments of this Court rendered in **Saeed Hassan's case** (PLD 1976 SC 6) and **Muhammad Afzal's case** (1986 SCMR 1736) approve the principles enunciated in the afore-noted two judgments.

32. The defect with the election petitioner's case is his failure to bring direct or circumstantial evidence that affirmatively proves that the appellant has made a false statement about his graduate qualification. The

learned counsel for the election petitioner has contended that in civil matters, as in the present case, wherein pursuant to the provisions of Section 64 of the ROPA, the Election Tribunal exercises all the powers of the Civil Court under the Code of Civil Procedure, 1908, the initial burden of proof lies upon the appellant because he is the holder and beneficiary of the educational qualification claimed by him. That the appellant has never discharged that burden of proof and consequently, the genuineness of the claimed graduate qualification is not proven. The said submission ignores the verification certificate of the appellant's B.A. degree issued by the HECP and presented to the Election Tribunal vide Exb.R-27. This exhibit includes the Degree Submission Information Form ("**DSIF**") (Exb.R.24/1) signed respectively by the Controller of Examination and the Vice Chancellor of the University of Balochistan. Furthermore, the Director (Attestation) of the HECP deposed as RW-22 before the learned Tribunal to substantiate and defend the verification of the appellant's graduate qualification carried out by the HECP under orders of this Court dated 14.06.2010 passed in Civil Appeal No. 409 of 2010. Sadly, the cross-examination of the said witness by the learned counsel for the election petitioner failed to extract any concession or information favourable to the election petitioner by discrediting or demolishing the HECP verification of degrees procedure. No substantial defect in that procedure nor the inadequacy of safeguards and checks applied by the HECP for rendering its verification were demonstrated. In the absence of material showing that the appellant had failed to discharge his initial burden of proof to demonstrate his educational qualification clearly the burden of proof shifted to the election petitioner who, as already observed, failed to meet the standard specified in the precedents noted above. Accordingly, the findings given by the learned Tribunal to the effect

that the appellant has made a false statement/declaration in his nomination papers regarding his educational qualification is based on presumption, inferences and surmises and is therefore, unsustainable in law. It is accordingly set aside. The appeal is accordingly partly allowed with a direction to the ECP to hold a fresh election in constituency NA-154 Lodhran-I in accordance with law. There is no order as to costs.

33. Herein above are the reasons of our short order dated 28.10.2015, which is reproduced herein below:

“For the detailed reasons to be recorded later, this appeal is partly allowed, in that the finding of the learned Election Tribunal regarding disqualification of the appellant is set aside. However, as regards the finding on the question/issue about illegal and corrupt practices committed in the holding of the election in the constituency, the learned counsel for the appellant is prepared to face a fresh election. He does not press this appeal to the extent that the result of the election is void under Section 70(a) of the ROPA, 1976. However, he contests the finding given against the appellant under Section 68 of the ROPA, 1976.

2. In view of the concession given with respect to violations of law under Section 70(a) of the ROPA, 1976, the result of the election is materially affected and is therefore declared void. In light of the above, this appeal is partly allowed; the election of constituency NA-154 Lodhran-I having been declared void, the Election Commission of Pakistan is directed to hold fresh election in the said constituency in accordance with law.”

J.

J.

J.

Islamabad,
28.10.2015.
Irshad Hussain /*

APPROVED FOR REPORTING.