IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT: MR. JUSTICE MIAN SAQIB NISAR
MR. JUSTICE IQBAL HAMEEDUR RAHMAN
MR. JUSTICE MAQBOOL BAQAR

CIVIL APPEAL NO.1086 OF 2014
(Against the judgment dated 7.8.2014 of the Election Tribunal, Karachi passed in Election Petition No.7/2013)

Syed Hafeezuddin

...Appellant(s)

VERSUS

Abdul Razzaq etc.

...Respondent(s)

For the appellant(s): Mr. Afzaal Ahmed Siddiqui, ASC

For respondent No.1: Mr. Tariq Mehmood, Sr. ASC
Mr. M. S. Khattak, AOR

Date of hearing: 19.11.2015

...

ORDER

MIAN SAQIB NISAR, J.- This appeal under Section 67(3) of the Representation of People Act, 1976 *(the Act)* is directed against the judgment of the learned Election Tribunal, Karachi dated 7.8.2014 whereby the election of the appellant *(returned candidate)* was set aside and the respondent No.1/election petitioner *(runner up)* was declared to be the returned candidate.

2. The brief facts of the case are:- elections in PS-93 Karachi were held on 11.5.2013 for which twenty-nine candidates contested, including the appellant and respondent No.1 *(respondent)*. The appellant, who was declared a returned candidate by the Election Commission of Pakistan *(ECP)* vide notification dated 22.5.2013, obtained 15,432 votes, while the respondent, securing 10,960 votes, was the runner up, and another candidate, namely, Bashir Jan *(at third position)* scored 9,664 votes. The difference between the number of votes obtained by the appellant and the

respondent is 4,472. The respondent filed an election petition on the ground that massive rigging had taken place in the elections and that illegal and corrupt practices were resorted to on account of which the election of the appellant be declared as void and the respondent be accordingly declared as the returned candidate. It may be pertinent to mention here that according to the contents of the election petition, this massive rigging etc. has been alleged and restricted to nine polling stations, i.e. 2, 18, 23, 29, 32, 55, 68, 71 and 77, but subsequently the respondent confined himself to only seven polling stations, i.e. 2, 18, 23, 29, 32, 55 and 68. It may also be added that the case of the respondent was that the Returning Officer and the Presiding Officer of these polling stations manipulated the results. After obtaining a reply from the appellant, the learned Tribunal framed the following issues:-

> *"1. Whether the petition is maintainable in accordance with the law.*
>
> *2. Whether the petitioner had obtained the votes as mentioned by him in his petition in paragraphs no.15(c) and 15(d)?*
>
> *3. Whether the Presiding Officers of polling stations no.29, 32, 68, 71 and 77 of the constituency had issued statements of count (Form-XIV) to the petitioner showing his votes as mentioned in paragraph 15(c) of the Petition?*
>
> *4. Whether the respondent no.1 didn't obtain the votes at polling station no.2, 18, 23, 29, 32, 55 and 68 of the constituency and consolidated statement of count (Form XVI) issued by the Returning officer in respect of these polling stations is not in accordance with the statements of count (Form XIV) issued by the Presiding Officers of these polling stations?*
>
> *5. Whether the returning officer had failed to issue notices to the contesting candidates before the consolidation of the result in form XVI in accordance with the law?*

6. *Whether the Respondent No.1 or his agents have committed any act of illegal practice during the polling?*

7. *Whether the Presiding Officers of the above mentioned polling stations and the Returning Officer in connivance with each other committed illegal act or illegal practice to support the Respondent no.1 if yes, its effect?*

8. *Whether the election of the Respondent no.1 (The Returned Candidate) is fit to be declared as void and the petitioner to have been duly elected?*

9. *What should the order be?"*

Upon giving its findings on various issues, the learned Tribunal came to the conclusion that the respondent was not able to prove any illegal and corrupt practice vis-à-vis the noted seven polling stations except polling station No.29. In this context, it may be mentioned that though the case of the respondent is that there was rampant rigging in connection with polling station No.32, this plea of the respondent has been discarded and the respondent has not challenged the finding of the learned Tribunal before this Court *(either by cross-objections or even orally)*. With regard to polling station No.29, suffice it to say that in the said polling station a total of 1,600 votes were cast out of which the appellant procured 1,400 votes while the respondent procured zero votes. The learned Tribunal, on account of the evidence, particularly the statement of Ms. Safia Sultana Malik and Ms. Saeeda Sagheer, the Presiding Officer and the Assistant Presiding Officer respectively of the said polling station, came to the conclusion that Ms. Malik had not counted the votes and committed grave illegalities in preparation of Form-XIV.

3. It has been argued by the learned counsel for the appellant that the difference of votes between the appellant and the respondent is

4,472 and even if 1,400 votes are excluded from the count, which were allegedly not properly and validly counted vis-à-vis polling station No.29, yet the appellant is a winning candidate with a margin of 3,072 votes. It is also argued that there was no evidence produced by the respondent vis-à-vis corrupt and illegal practices falling within the provisions of Sections 78 and 83 of the Act. Therefore, on account of lack of such evidence the appellant cannot be prejudiced by declaring him as having procured his election through massive rigging and corrupt and illegal practices.

4. On the contrary, learned counsel for the respondent has at the very outset drawn a distinction between Sections 68 and 69 on the one hand and Section 70 on the other, stating that the question of an election being *"materially affected"* only relates to the latter section, when considering declaration of an election as a whole void, whereas the former sections pertain to declaration of the election of the returned candidate as void on certain grounds enumerated therein, and in this respect he particularly relied upon Section 68(c) read with Section 68(2)(a), and Section 68(d). Furthermore, he justified and defended the judgment of the learned Tribunal by submitting that from the beginning of election till the counting of votes, there have been violations of law. In this context, it is argued that it was the duty of the Presiding Officer to have counted the votes and prepared the statement of count *(Form-XIV)* personally which, as per the statement of the Presiding Officer herself as also the Assistant Presiding Officer, was not so done, rather the form was filled up by the Assistant Presiding Officer and this is a glaring illegality which is apparent on the face of the record. It is also stated that the Presiding Officer of polling station No.29 signed the hand-written result and provided it to the polling agents of the respondent, which result is different from that reflected in Form-XIV, which plea is also supported by the Assistant Presiding Officer. Further, that the name of the respondent was not even contained in Form-

XIV of polling station No.29. It is also submitted that the statement of count pertaining to the votes cast in favour of the candidate of the National Assembly is absolutely different from the votes of the Provincial Assembly which reflects that Ms. Malik had committed an illegality vis-à-vis the proper count and preparation of Form-XIV. Above all, it is argued that Ms. Malik had connived and colluded with the appellant because she, in ordinary course, should have been summoned through the learned Tribunal as an official witness, but in this case she not only appeared as a witness on behalf of the appellant rather it is a fact apparent on the record that she had provided him with her affidavit and that affidavit was produced before the learned Tribunal by the appellant himself meaning thereby that she had colluded with the appellant and such inference can be safely drawn. In support of his submissions, learned counsel for the respondent relied upon the case reported as **Sardar Abdul Hafeez Khan v Sardar Muhammad Tahir Khan Loni and 13 others (1999 SCMR 284)**.

5. Heard. The key questions involved in this matter are:- first, whether the election of the appellant, on account of the amiss which is pointed out by the learned counsel for the respondent and the proof of committing illegal and corrupt practices by the appellant in connivance with the Presiding Officer, can be declared to be void; and secondly, whether such illegality if committed falls within the purview of Section 70(a) of the Act and thus the election could be declared void as a whole but because the findings of the learned Tribunal vis-à-vis all other polling stations is in favour of the appellant and the only grouse is regarding one polling station, the difference of votes whereof is only 1,400, thus even if these votes are excluded, in that eventuality the election of the appellant would not be materially affected. In order to appreciate the above, the relevant provisions *(parts)* of Sections 68, 69, 70 and 83 are reproduced as below:-

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

(a) ……. or

(b) ……. or

(c) the election of the returned candidate has been procured or induced by any corrupt or illegal practice; or

(d) a 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 on the ground–

(a) that any corrupt or illegal practice has been committed, if the Tribunal is satisfied that it was not committed by, or with 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; or

(b) that any of the other contesting candidates was, on the nomination day not qualified for or was disqualified from, being elected as a member.

***69. Ground for declaring a person other than a returned candidate elected**.–The 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 Tribunal is satisfied that the petitioner or such other contesting candidate was entitled to be declared elected.*

***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.

> ***83. Illegal practice**.–(1) A person is guilty of illegal practice if he–*
>
> *(a) ……..*
>
> *(b) obtains or procures or attempts to obtain or procure, the assistance of any person in the service of Pakistan to further or hinder the election of a candidate;*
>
> *(c) ……..*
>
> *(d) ……..*
>
> *(e) ……..*
>
> *(f) …….. or*
>
> *(g) knowingly induces or procures any person to do any of the aforesaid acts.*
>
> *(2) Any person guilty of illegal practice shall be punishable with imprisonment for a term which may extend to six months and fine which may extend to five thousand rupees."*

6. Before answering the two aforementioned questions, we find it expedient to understand the legal framework of Sections 68, 69 and 70 of the Act. These sections can be broadly divided into two parts:- (i) Sections 68 and 69 stipulate the grounds for declaring the election of a returned candidate void and declaring a person other than the returned candidate as elected, respectively; and (ii) Section 70 governs the grounds for declaring the election as a whole void. Once any of the grounds enumerated in Section 68 have been established through such quality evidence which has been prescribed by various dicta of the apex Court in this behalf; the obvious consequence as per the law shall thus be to declare the election of such returned candidate as void. While passing such order the Tribunal under Section 69 *ibid* though is duly empowered to declare the election petitioner or any of the contesting respondents as the returned candidate, it

may make such declaration only if a claim in this regard has been set out by them. Furthermore, such declaration shall not be made as a matter of course or a right or *ipso facto* rather only in the circumstances of the case where the election petitioner or the respondent of the election petition is able to substantiate and make out a case qua his entitlement to the satisfaction of the Tribunal. This entitlement shall be dependant on the facts and circumstances of each case; the reasons set out and proof for the entitlement thereof; in this context the guiding principles have been propounded in the case reported as **Syed Saeed Hassan v Pyar Ali and 7 others (PLD 1976 SC 6)**. Thus the grant of relief to the election petitioner or any other respondent in the election petition under the provisions of Section 69 of the Act must be proved on the strength of their own entitlement to get elected in place of the returned candidate, as has been laid down by this Court in **Dr. Sheela B. Charles v Qaisar Ifraeem Soraya and another (1996 SCMR 1455)**.

While considering the parameters of Section 69, particularly with respect to a runner up *(and not any of the other candidates)* and where the returned candidate has been found to be disqualified and his election has been declared as void, as has been consistently held by this Court in a line of cases reported as **Rashid Ahmad Rahmani v (1) Mirza Barkat Ali, (2) Master Fazal Elahi and (3) The Additional Commissioner, Lahore (PLD 1968 SC 301)**; **Lal Muhammad v Muhammad Usman and others (1975 SCMR 409)**; **Pyar Ali**; **Muhammad Ilyas v The Returning Officer etc. (1981 SCMR 233)**; **Junaid Ahmad Soomro v Haji Mehboob Ali Bhayo and others (PLD 1986 SC 698)**; **Sahibzada Tariqullah v Haji Amanullah Khan and others (PLD 1996 SC 717)**; **Engr. Iqbal Zafar Jhagra and others v Khalilur Rehman and 4 others (2000 SCMR 250)**; **Ellahi Bakhsh v District and Sessions Judge, Rajanpur/Election Tribunal, Dera Ghazi Khan and others (PLD 2003 SC 268)**; **Mian Ahmed Saeed**

and others v Election Tribunal for Kasur at Okara and 7 others (2003 SCMR 1611); **Sh. Amjad Aziz v Haroon Akhtar Khan and 10 others (2004 SCMR 1484)**; **Bashir Ahmed Bhanban and another v Shaukat Ali Rajpur and others (PLD 2004 SC 570)**; **Shaukat Ali and another v District Returning Officer and another (PLD 2006 SC 78)**; **Imtiaz Ahmed Lali v Ghulam Muhammad Lali (PLD 2007 SC 369)**; and **Chaudhry Muhammad Munir and others v Election Tribunal, Mandi Bahauddin and others (2009 SCMR 1368)**, it is not the case that the votes of the returned candidate *(who has been **disqualified** and whose election as a returned candidate has been declared to be void under Section 68)* are to be simply disregarded or discarded on the doctrine of throw away votes and the runner up is to be automatically declared as the duly elected returned candidate by virtue of having secured the next highest number of votes; rather the notoriety of the disqualification amongst the voters at the time of polling has to be examined and if the disqualification is found to be notorious *(apparent or known to the public)*, only then can the votes of a winner of an election be thrown away, and the runner up be declared to be the duly elected returned candidate. If the disqualification is not notorious and depends on legal argument or upon complicated facts and inferences, then the runner up cannot be declared to be the duly elected returned candidate, as the possibility cannot be ruled out that any of the other candidates could have won the elections, hence the election must be declared to be void as a whole and fresh elections must take place (as per the law enunciated in the cases of **Rashid Ahmed**, **Pyar Ali**, **Lal Muhammad**, **Muhammad Ilyas** and **Ahmed Saeed**). It may be pertinent to mention here that a runner up is required to prove the notoriety of disqualification of the successful candidate at the time of polling through positive evidence. It is also worthy to point out that though notoriety is with respect to *disqualification*, the test is essentially that of the validity *(or otherwise)*

of the votes in question, which exercise was taken by this Court in the case of **Pyar Ali**, where there were allegations of illegal and corrupt practices as opposed to disqualification. Whether or not the principle of 'throw away votes' can be invoked in cases other than that of disqualification would ultimately depend upon the facts and circumstances of each case, the nature of the allegations leveled in the election petition and the quality of evidence produced before the election tribunal.

The upshot of the above discussion is that Sections 68 and 69 of the Act constitute a two-prong test, both limbs of which must be satisfied by any election petitioner or respondent to a petition challenging the election of the returned candidate, if any of them wish to be declared duly elected in place of such returned candidate.

Now coming to Section 70 of the Act, the provisions of which pertain to declaration of the election as a whole void *(as opposed to the election of the returned candidate only)*, such a declaration can only be so made if there is a failure of any person to comply with the provisions of the Act or Rules or there is prevalence of extensive corrupt or illegal practice at the election, either of which must materially affect the result of the election.

7. The first question which requires deliberation is whether the lapses in the election pointed out by the learned counsel for the respondent constitute illegal practices within the purview of the law and consequently the election of the appellant can be declared to be void. It may be pertinent to mention here that the evidence led by the respondent, the findings of the learned Tribunal and the submissions of the learned counsel for the respondent do not fall within the realm of *"corrupt practices" (defined in Section 78)*, thus we do not find it necessary to refer to the same, rather we have confined ourselves to the relevant issue of *"illegal practices" (defined in Section 83)*. A perusal of the election petition indicates that the thrust of the respondent's allegations is that the appellant colluded and connived with

the election staff, particularly the Presiding Officers of polling stations No.2, 18, 23, 29, 32, 55 and 68 *(the respondent discarded his allegations vis-à-vis polling stations No.71 and 77 during the trial of the election petition)*, who have fabricated, forged and manipulated the count in a manner which has illegally increased the votes of the appellant and decreased that of the respondent. The learned Tribunal held that the respondent could not prove his allegations vis-à-vis polling stations No.2, 18, 23, 55 and 68. With respect to polling station No.32, the minor discrepancy in the votes was admitted by the Presiding Officer of the said polling station to be a bona fide mistake on his part, thus in essence the respondent's allegations of collusion and connivance and illegal practice also did not stand to be proved vis-à-vis polling station No.32. The only contentious polling station that remained was that of No.29, with respect to which learned counsel for the respondent confined his arguments to before us. We find it beneficial to reproduce the relevant portions of the learned Tribunal's findings vis-à-vis polling station No.29:

> *"**Issues No.2,3 and 4.***
>
> *Now coming to the count in respect of Polling Station No 29 which is the most controversial count from the petitioner's point of view. Its Presiding Officer, Mst. Safia Sultana Malik was examined as exhibit O-5 and was cross examined by both the learned advocates for the parties. As per her evidence the returned candidate had obtained 1400 votes which were mentioned in her official statement of count, Form XIV, exhibit O-5/3. However, admittedly in this statement of count even the name of the petitioner was not mentioned as she was completely ignorant of the fact that he too had contested the election from the said constituency. This statement of count does not provide the other required details as far as the names of all the contesting candidates and the votes polled by them are concerned. Section 38(9) of the Act directs the Presiding Officer of polling station that immediately after the count he shall prepare statement of count in such form as may be prescribed (Form-XIV) showing therein the numbers of valid votes polled by each contesting candidate and the*

ballot papers excluded from the count. There are other unexplained discrepancies also in the same including corrections, overwriting and miscalculation in counting. The violation of the above provision of law has made the statement highly doubtful and requires further objective scrutiny before reaching to any firm conclusion as far its legal effects are concerned. For this the conduct and neutrality of the Presiding Officer will be the most important factor. In this regard the act of filing of her own affidavit in evidence, exhibit O-5/1, voluntarily in support of he returned candidate show her bias in favour and is sufficient to hold that she did not act fairly and independently while performing her duties as polling official for whom it was incumbent under the Act to discharge her duties honestly within the contemplation of its provisions. This finding gets full support from the consideration of the total votes cast at the corresponding Polling Station No 159 of National Assembly constituency, NA-241 in comparison with the total votes cast at polling station no. 29. The total votes cast at polling station no. 159 were 148 (as per exhibit P-5/17, consolidated result which is an admitted document) whereas the total votes cast at polling station no. 29 of this constituency were 1440 and there is no logical reason of such a huge difference when each voter is required to cast his vote to the contesting candidate of his choice for the National Assembly and Provincial Assembly. The Presiding Officer during her cross avoided to reply the questions in this regard showing her ignorance. The total votes polled at the polling station no. 149 of NA-241 corroborates the evidence of the polling agent of the Petitioner, Mst. Sajida, exhibit P-11, in which she has deposed that as per official count, the votes polled by the Petitioner and the returned candidate as furnished by the Presiding Officer were 117 and 83 respectively and the total votes cast at these two polling stations for both the constituencies were 117 and 111, exhibit P-11/1, This statement is bearing the purposed signature of the Presiding Officer, Ms. Safia Malik. Without going into the genuineness of this signature by comparing with her admitted signatures on exhibit, O-5/2 to O-5/5 but on the basis of quality evidence produced by the petitioner which is fully corroborated with the circumstantial evidence it is held at polling station no 29 the petitioner polled 117 votes and the returned candidate 83 votes.

…

To sum up the above discussion it is suffice to say that except for the polling station no. 29 and 32 the petitioner has failed to prove the statements of count relied upon by

> *him showing the figures of votes polled by him or by the returned candidate. The issue is decided accordingly.*
> …
>
> ***Issue Nos 6 and 7***
>
> …
> *Since it has been admitted that the returned candidate has obtained the assistance of the Presiding Officer to further his own election as a candidate, but for this it is to be examined whether the said presiding officer is in the service of Pakistan.*
> …
> *Applying the above principle the Presiding Officer Ms. Safia Sultana Malik was admittedly employed as school teacher in Sindh Welfare Board, Govt. of Sindh, as admitted by her in her evidence therefore she is in the service of Pakistan. The returned candidate has therefore committed an act of illegal practice within the ambit of Sec. 83(b) of the Act on account of obtaining her illegal assistance to further his election as a candidate.*
> …
> *In this case the connivance between Mst. Safia Malik, the Presiding Officer and the returned candidate is also floating on the surface of the record as discussed in detail in the relevant issues and there cannot be any doubt that the act of mentioning 1400 votes polled by the returned candidate illegally was nothing but to procure her assistance to further his election as candidate. Hence he has committed an act of illegal practice within the contemplation of the section 83(b) of the Act."*

Before we embark upon an analysis of the evidence and a determination about the correctness or otherwise of the findings of the learned Tribunal, it is pertinent to mention that the rules of proof for the grounds challenging the election which are founded on corrupt and illegal practices are quite strict and stringent and the allegations in this regard must be absolutely proved through **positive evidence** without accepting any inferences and if there is any doubt, the benefit must go to the person against whom corrupt or illegal practices are being alleged, as held been held by this Court in the cases reported as **Muhammad Saeed and 4 others v (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 v (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 v S. M. Ayub and 2 others (PLD 1973 SC 160)** and **Pyar Ali**. Therefore let us examine whether in this case there is evidence to the effect that illegal practices in terms of the law as provided for in Section 83 of the Act have been committed and so proved. Learned counsel for the respondent submitted that the Presiding Officer of polling station No.29, Ms. Malik, did not fill up the statement of count, that the respondent's name was not mentioned in the statement of count and that she signed hand-written results and provided them to the polling agents of the respondent in which the count is different from that in Form-XIV. However, a perusal of Ms. Malik's evidence suggests that she admits to overwriting on figures in Form-XIV to make corrections; admits to writing the figure 1,600 on one page of Form-XIV of polling station No.29 and the figure 1,700 on the other page; admits to the errors in calculation while attributing it to absence of a calculator and lack of sufficient light due to a power breakdown; admits that the Form-XIV was not entirely prepared by her, in that the candidates' names were written by the Assistant Presiding Officer, but the rest including her name and signature are in her own handwriting; and that she attributed the absence of the respondent's name from the Form-XIV to the fact that she was not aware that he was contesting from the said constituency. Be that as it may, we are of the candid view that even if such lapses occurred, they certainly do not fall within the definition of *"illegal practice"* contained in Section 83(b) *(the other sub-clauses are not relevant in the instant matter)* as they do not constitute *"obtaining or procuring or attempting to obtain or procure the assistance of any person in the service of*

Pakistan to further or hinder the election of candidate". With regard to the argument that she had prepared her affidavit in the appellant's office and did not appear as an official witness which fact indicates connivance and collusion with the appellant, we are of the view that these are mere inferences, which are neither positive nor conclusive evidence of the fact that she colluded and connived with the appellant, and that the appellant *"obtained"* or *"procured"* the assistance of the Presiding Officer to secure his election as a returned candidate. The learned Tribunal has erred gravely in drawing such inference and concluding that this suggests that Ms. Malik was biased in favour of the appellant. The argument regarding the difference between the statements of count of the National and Provincial constituencies which, according to the learned counsel for the respondent, also suggests illegal practice by Ms. Malik also fails on the count of being a plain inference, not backed by sufficient evidence of the same. Furthermore, the record, particularly her evidence, does not suggest that Ms. Malik was ever confronted with the document relied upon by the learned Tribunal in this regard, i.e. P-11/1. In fact, the learned Tribunal has itself stated *"without going into the genuineness of this signature by comparing with her admitted signatures on exhibit..."* indicating that it undertook a handwriting comparison analysis which we find, anyone other than a handwriting expert, is not competent to carry out.

Learned counsel for the respondent has conceded that there is no evidence to directly prove that there was connivance between the appellant and the Presiding Officer but on account of inferences which should be necessarily drawn in this case because of the conduct of the Presiding Officer identified above, it should be held that the Presiding Officer acted in collusion with the appellant and thus the latter's election should be declared to be void. Reliance placed upon **Abdul Hafeez Khan**'s case by the learned counsel for the respondent in this regard is misconceived *(the said*

case may be more relevant to Section 70 of the Act and shall be discussed below). Even if an inference is to be drawn, it can only be so done where there is only one possible conclusion that can be reached, warranting proof through circumstantial as opposed to direct evidence. The fact that certain lapses/anomalies were committed by the Presiding Officer of polling station No.29 will not automatically lead to the conclusion that such was done in connivance or collusion with or on the instructions of the returned candidate/appellant. There is the possibility that the lapses committed by the Presiding Officer Ms. Malik were bona fide mistakes or due to lack of proper skill and adequate knowledge or expertise as to how to do the needful, or as a result of miscalculation of votes or lack of sufficient light due to a power breakdown. The possibility cannot be ruled out that any one of the candidates in an election colluded with the election staff at one polling station and had certain violations of the election law committed such as the wrong filling up of Form-XIV and by taking premium and advantage of their own fraud ultimately used this as a tool for having the election of the returned candidate declared as void. Since there is more than one possibility as to what could have happened on the day of election vis-à-vis counting of votes and preparation of statement of count, we cannot draw such inferences as suggested by the learned counsel for the respondent. A bare perusal of the findings of the learned Tribunal vis-à-vis polling station No.29 as reproduced above clearly suggests that it has concluded that the evidence indicates committal of illegal practices in connivance and collusion with the appellant based on pure inference and conjecture, without ruling out all the possibilities in light of the circumstantial evidence and without correctly appreciating the evidence and properly applying the law on the matter. The learned Tribunal appears to have acted upon the assumption that the respondent's case stood sufficiently proved on mere probability, as opposed to the strict positive

evidence that the respondent was required to produce in order to prove its serious allegations of illegal practice against the appellant. The evidence clearly suggests that there was doubt with respect to proof of the allegations of illegal practice and connivance and collusion, the benefit of which should have been given to the appellant. To hold, in the circumstances, that the appellant had *"obtained"* or *"procured"* the assistance of the Presiding Officer would be against the spirit of the law and against the settled norms of justice.

Since we have found that the lapses pointed out by the learned counsel for the respondent do not constitute illegal practices as contemplated by the provisions of Section 83 of the Act, the election of the appellant as a returned candidate is not liable to be declared as void under Section 68 of the Act. Consequently, the question as to whether the respondent was able to prove, on the strength of his own evidence, that he should have been declared as the duly elected returned candidate in place of the appellant in terms of the provisions of Section 69, does not arise and thus needs no consideration.

8. Now coming to the second question involved in this matter, i.e. whether in this case the election can be declared to be void as a whole as per the provisions of Section 70 of the Act. Since we have established above that no illegal practices took place within the contemplation of Section 83 of the Act *(and the question of "corrupt practices" is not relevant in this matter)*, hence Section 70(b) would not be relevant here, rather Section 70(a) which provides for declaration of the election as a whole void if there is a failure of any person to comply with the provisions of the Act or the Rules, provided that the election has been materially affected by such failure. The lapses/anomalies identified hereinabove may at best indicate a failure on behalf of the election staff, particularly the Presiding Officer of polling station No.29, to comply with the provisions of the Act, particularly Section 38(9) which

provides for preparation of statement of count by the Presiding Officer, thus the test that there must be a failure of any person to comply with the provisions of the Act/Rules, may be satisfied. It is then to be seen whether the second part of the test, that such non-compliance must have materially affected the election, is satisfied. Since the findings of the learned Tribunal vis-à-vis all polling stations other than polling station No.29 is in favour of the appellant and the only grouse is vis-à-vis the said polling station, the difference of votes whereof is only 1,400, thus even if these votes are excluded from the total count of the appellant's votes of 15,432, reducing it to 14,032, the appellant would still win by a margin of 3,072 votes. Therefore, as the election would not be materially affected, there is no occasion to declare the election as a whole to be void under Section 70(a) of the Act. It is here where **Abdul Hafeez Khan**'s case may be discussed, in which due to certain lapses committed by the election staff, the whole of the election was declared to be void under Section 70(a). However, the instant matter is distinguishable on the ground that the election has not been materially affected. Furthermore, in **Abdul Hafeez Khan**, there was found to be a general failure of the election machinery as there was widespread disregard of the law by the election staff, which is certainly not the case in the instant matter.

9. In view of the foregoing, we find that the respondent was unable to prove through positive evidence, the committal of illegal practices within the contemplation of Section 83 of the Act, and therefore declaration of the appellant's election as the returned candidate as void under Section 68 of the Act was not warranted. The learned Tribunal had erroneously declared the election of the appellant as the returned candidate to be void and thereby wrongly declared the respondent as the duly elected returned candidate.

10. The above are the detailed reasons for the short order of even date whereby the appellant's civil appeal was allowed, which reads as:-

> *"For the reasons to be recorded later, this appeal is allowed and the impugned judgment dated 7.8.2014 passed by the learned Election Tribunal, Karachi is set aside."*

JUDGE

JUDGE

JUDGE

Islamabad, the
19th November, 2015
Approved For Reporting
Waqas Naseer/*