

**IN THE SUPREME COURT OF PAKISTAN**  
**(APPELLATE JURISDICTION)**

**PRESENT:** MR. JUSTICE MIAN SAQIB NISAR  
MR. JUSTICE FAISAL ARAB  
MR. JUSTICE TARIQ PERVEZ

**CIVIL APPEAL NO.1611 AND 1612 OF 2014**

*(Against the judgment dated 19.11.2014 of the Election Tribunal, Karachi passed in E.P. No.9/2014)*

Asghar Ali Sheikh  
Asadullah Junejo

...in C.A.1611/2014  
...in C.A.1612/2014  
...Appellant(s)

**VERSUS**

Liaqat Ali Jatoi etc.

...Respondent(s)

For the appellant(s):  
(in C.A.1611/2014)

Mr. Wasim Sajjad, Sr. ASC  
Mr. Raja M. Shafqat Khan Abbasi, ASC

For the appellant(s):  
(in C.A.1612/2014)

Mr. Kamran Murtaza, ASC

For respondent No.1:

Mr. Afzaal Ahmed Siddiqui, ASC

Date of hearing:

06.01.2016

...

**ORDER**

**MIAN SAQIB NISAR, J.-** These appeals under Section 67(3) of the Representation of People Act, 1976 (*the Act*) have been filed against the judgment of the learned Election Tribunal, Karachi dated 19.11.2014 whereby the election of respondent No.2 (*returned candidate*) was set aside and respondent No.1 /election petitioner (*runner up*) was declared to be duly elected.

2. The brief facts of the case (*for the sake of convenience, we will be using C.A.1611/2014 as our reference point*) are:- the appellant, respondent No.1 (*respondent*) and pro-forma respondents contested the general elections held on 11.5.2013 for the Provincial Assembly Constituency PS-76 Dadu-III. Respondent No.2, who obtained 56,938 votes was declared to be the returned candidate by the Election Commission of Pakistan (*ECP*) *vide*

notification dated 22.05.2013, while the respondent, who secured 22,803 votes, was the runner up, and the appellant, also one of the contesting candidates, bagged 95 votes. The difference between the number of votes obtained by respondent No.2 (*returned candidate*) and the respondent (*runner up*) is 34,135 votes. The total number of valid votes cast at the election was 81,738, whereas the number of rejected votes was 2,298.

The respondent filed an election petition challenging the elections on the ground that there was widespread rigging and bogus voting at the election, that the election of respondent No.2 had been procured by corrupt and illegal practices and that there was rampant non-compliance of the provisions of the Act and the rules made thereunder, on account of which the election of respondent No.2 be declared as void and that the respondent be declared to have been duly elected, or alternatively that the election be declared void as a whole. After obtaining a reply from respondent No.2 and in view of the divergent pleadings of the parties to the election petition the learned Election Tribunal framed the following issues:-

- “1. *Whether petition is not maintainable? O.P.R.*
2. *Whether this election petition is time barred? O.P.R.*
3. *Whether Police personal and unqualified/incompetent polling staff was deployed at the polling stations at the command of respondent no. 1 and they openly supported the respondent no. 1? O.P.P.*
4. *Whether the notorious criminals before the election and on the election day worked for the respondent No. 1 rigged the election and polled bogus votes at 42 polling stations mentioned in para 7(i) of the petition? O.P.P.*
5. *Whether Qurban Ali Joyo and Mujeeb Laghari closed polling station number 272 at about 2:30 P.M. took the entire Polling Staff to Zarai Taraqiati*

*Bank, Mehar, there stamped the ballot papers on arrows and supplied the stamped ballot papers to various polling stations and 300/400 ballot papers were recovered from Zarai Taraqiati Bank, Mehar? O.P.P.*

6. *Whether respondent no. 1 and his associates attacked the Polling Stations number 35,104 and 120, injured the agents, workers of petitioners, took over the control and cast the bogus votes? O.P.P.*
7. *Whether Presiding Officer illegally rejected/excluded 2294 votes ?O.P.P.*
8. *Whether Presiding Officer of Polling Station number 3 was robbed and all the election material had been taken away by the associate of respondent no. 1? O.P.P.*
9. *What should the order be?"*

Upon giving its findings on various issues, the learned Election Tribunal came to the conclusion that the election of respondent No.2 was procured by corrupt practices and thus declared her election to be void under Section 68 of the Act, and declared the respondent to be duly elected under Section 69 of the Act. We find it expedient to reproduce the conclusion reached by the learned Election Tribunal which reads as follows:-

*"...On account of the findings on the issues Nos. 3 and 4 in the affirmative which relate to commission of corrupt practices it can be held without any doubt that the election of the returned candidate has been procured by the corrupt practice as defined in Section 78(2) r/w Sec. 81(1)(a) and (b) of the Act... Hence to election of the returned candidate is declared as void as provided in Section 68(1)(c) of the Act. The Petitioner being the runner up and has so claimed to be declared as elected and this tribunal is satisfied that he is entitled to be declared as such under Section 69 of the Act and therefore declared accordingly."*

3. It has been argued by the learned counsel for the appellant that the appellant has no grievance with the setting aside of the elections by the learned Election Tribunal, rather his sole attack against the impugned judgment before us today is that the respondent could not have been automatically declared to be duly elected under Section 69 of the Act, as this has resulted in the disenfranchisement of 56,938 voters. He further stated that the principle of throw away votes would only come into operation if the disqualification of a returned candidate was notorious at the time of polling, which is not the situation in the instant case. In this respect he has relied upon the judgment reported as **Sh. Amjad Aziz vs. Haroon Ahtar Khan and 10 others (2004 SCMR 1484)**.

To buttress his arguments, learned counsel for the appellant also submitted that even if the 56,938 votes cast in favour of respondent No.2 are held to be bogus on the basis that they have been obtained through corrupt and illegal practices (*which has been so held in the impugned judgment*), since such number of votes (56,938) constitutes approximately 70% of the total votes cast, thus the elections stand to have been materially affected, warranting declaration of the election to be void as a whole under Section 70 of the Act. Therefore in any case, the respondent cannot be automatically declared to be duly elected, rather fresh elections must be held.

4. On the other hand, learned counsel for the respondent, while apprising us of the fact that respondent No.2 has withdrawn her candidacy, has submitted that once the returned candidate has withdrawn then the respondent being the runner up is the only one left in the field to be declared as duly elected.

Learned counsel for the respondent, in order to controvert the submissions of the learned counsel for the appellant regarding the

principles of throw away votes and notorious disqualification, stated that the respondent had challenged the election of respondent No.2 on the ground of corrupt and illegal practices and not that she was liable to be disqualified, and having successfully proved that her 56,938 votes were secured by corrupt practices, such number of votes were essentially not in fact cast in her favour and thus the respondent can most definitely be declared to be duly elected. He further argued that the attack put forth by the appellant (*who only secured 95 votes*) is not sustainable, as it is more in the nature of *quo warranto*, as he (*appellant*) is only seeking a declaration of the election to be void, and not to have himself declared as duly elected. Learned counsel for the respondent submitted that the fact that the respondent's election petition was given on oath and that the evidence produced by the respondent was not cross-examined by any party to the election petition was sufficient to prove to the satisfaction of the learned Election Tribunal that the respondent was entitled to be declared elected.

5. Heard. Since the learned counsel for the appellant has stated at the very outset that the appellant has no objection to the invalidation of the election of respondent No.2, therefore we do not find it necessary to discuss the same, and shall confine ourselves to the relevant key issue of declaration of the respondent (*runner up*) as duly elected under Section 69 of the Act. In order to appreciate the above, the section *ibid* is reproduced below:-

**69. Ground for declaring a person other than a returned candidate elected.**—*The Tribunal shall declare the election of the returned candidate to be 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.*

As has been held by this Court in the recent judgment passed in **Syed Hafeezuddin vs. Abdul Razzaq etc.** (C.A. No.1086/2014) the requirements of Section 69 of the Act are that a claim to be declared as duly elected must be made either by the election petitioner or any of the respondents to the election petition, and that the person seeking such declaration has been able to substantiate and make out his case vis-à-vis his entitlement to the **satisfaction** of the Election Tribunal. It may be pertinent to mention that satisfaction should not be a subjective assessment of the Tribunal rather must be objective in manner based upon the evidence brought on the record by the respondent (*who claims to be declared as duly elected*) and justifiable reasons must be duly recorded and assigned in this behalf. Thus such declaration cannot be made *ipso facto* or as a matter of right, rather, such person seeking a declaration will have to prove on the strength of his own evidence his entitlement to be declared as duly elected.

6. In order to determine whether the respondent had indeed proved his entitlement to be duly elected to the satisfaction of the learned Election Tribunal, an appraisal of the evidence produced by him would be necessary. Learned counsel for the respondent drew our attention to the evidence led by the respondent (*election petitioner*) during the election proceedings and stated that it (*evidence*) was sufficient to prove to the satisfaction of the learned Election Tribunal that the respondent should be declared as duly elected. The respondent himself appeared as a witness (*PW.1*) and he produced and got exhibited his election petition (*Exb.C*) which was to form his examination in chief. The three other documents tendered in evidence were a certified copy of a complaint

regarding the conduct of elections filed by the respondent's counsel to the ECP, a certified copy of an FIR (*bearing No.81/2013 dated 12.05.2013*) pertaining to allegations vis-à-vis the elections (*Exb.C/2*), and a certificate issued by TCS courier service regarding verification of a receipt (*Exb.C/3*). The second witness, Mr. Riazuddin (*PW.2*) only produced three documents which were a letter (*PW.2/1*) from the Additional Session Judge/Returning Officer stating that Mr. Riazuddin has been deputed to produce documents pertaining to the election petition, and two complaints from the respondent to District Returning Officer, Dadu (*PW.2/2*) and Returning Officer, Mehar (*PW.2/3*) respectively regarding certain anomalies in the conduct of election.

Suffice it to say that merely exhibiting an election petition (*even if verified on oath*) is not a substitute for an examination on oath, in the form of statement by a witness, therefore in this respect the respondent's evidence is completely inadequate and cannot be taken into consideration for the purposes of proof of the respondent's entitlement to be declared as duly elected. Further, the FIR and various complaints/letters *per se* cannot be deemed to be adequate, satisfactory and **positive** proof of the allegations leveled in the election petition, which (*allegations*) must be proved through independent evidence. With regard to the argument of the learned counsel for the respondent that the respondent's testimony was not subject to cross-examination (*Note: it appears that the respondent was subject to cross-examination by counsel for respondent No.8*) and that his evidence was not rebutted, suffice it to say that even if the evidence of the respondent went un-rebutted, it does not mean that an automatic conclusion should be drawn that such evidence was sufficient to 'satisfy' the learned Election Tribunal that the respondent should be declared to be duly elected in terms of Section 69 of the Act. As mentioned earlier in this opinion, positive evidence to this effect must be

provided, therefore, in light of the above we are of the candid view that the respondent has not been able to prove on the strength of his own evidence that he was entitled to be declared a duly elected in place of respondent No.2 (*returned candidate*). It may also be pertinent to mention at this juncture that in the instant case while reading the part of the impugned judgment under attack, we find the above criteria regarding satisfaction of the learned Tribunal based on an objective assessment set down (*by us*) to be conspicuously missing and the Tribunal in a cursory and routine manner having declared the election of respondent No.2 (*returned candidate*) as void has issued a declaration of the respondent to be duly elected in her place.

7. Now coming to the argument propounded by the learned counsel for the appellant pertaining to the non-applicability of the principles of throw away votes and notoriety of disqualification to this case, and thus the respondent should not have been declared as automatically duly elected under Section 69 of the Act. In order to controvert this argument, learned counsel for the respondent stated that the respondent did not challenge the election of respondent No.2 on the ground of her being disqualified, rather that illegal and corrupt practices were committed, which fact has even been admitted by the appellant himself as he has not challenged the impugned judgment to the extent of invalidation of the election of respondent No.2.

As has been laid down in various dicta of this Court [*which have been considered in detail in Syed Hafeezuddin (supra)*], a runner up to an election is not to be automatically declared as duly elected simply by virtue of having secured the next highest number of votes after discarding or '*throwing away*' the votes secured by a returned candidate whose election has been declared to be void under Section 68 of the Act. The *raison d'être* against automatic '*throwing away*' of the votes of a person whose election has been



declared to be void, is that such would result in disenfranchisement of the voters who voted for the returned candidate (*in this case 56,938 voters*) unless it can be proved that the said voters casted their vote despite the fact that they were aware of such person's negative conduct in the elections. A perusal of the record indicates that there is no proof whatsoever brought by the respondent (*election petitioner*) that the 56,938 voters were aware of any such information that would hurl doubt upon the validity of the votes cast, thereby potentially warranting throwing away of their votes. It may also be pertinent to mention here that the fact that the respondent only procured 22,803 votes (*as opposed to 56,938 votes secured by respondent No.2*) out of a total of 81,738 votes cast in the constituency (*approximately 28% of the total votes*) speaks for itself that he may not necessarily be a true representation of the will of the people. The real concept of elections is that the true representative of the people should come forth, therefore in order to uphold the mandate of representative democracy enshrined in the Constitution of the Islamic Republic of Pakistan, 1973, we are of the view that the elections should be declared to be void as a whole and fresh elections should take place to ensure that the peoples' desired representative is elected.

8. Another aspect of the matter is that as per the impugned judgment since the 56,938 votes cast in favour of respondent No.2 have been held to be obtained through corrupt practices and thus there could be said to have been a breach of the provisions of Section 70(a) and/or (b) of the Act, if these 56,938 votes (*which constitute approximately 70% of the total votes cast*) are excluded from the count, which are greater than the differential between the votes secured by respondent No.2 (*returned candidate*) and the respondent (*runner up*), i.e. 34,135 votes, thus it can be said that the election has been materially affected and should be

declared to be void as a whole. Resultantly, in this scenario as well fresh elections would have to take place.

9. In respect of the argument of the learned counsel for the respondent that respondent No.2 has withdrawn from her candidacy, we opine that subsequent withdrawal does not change the fact that during the elections the respondent could not be said to be the true representative of the people, having secured only approximately 28% of the votes from his constituency as mentioned above.

10. In view of the foregoing, we find that the respondent was unable to prove through positive evidence his entitlement to the satisfaction of the learned Election Tribunal to be duly elected under Section 69 of the Act, therefore, the declaration to this effect by the learned Tribunal was unwarranted and erroneous. Therefore, these appeals are allowed to the extent that the respondent was declared to be duly elected in place of respondent No.2, and the ECP is directed to hold fresh elections in the constituency in accordance with law. Disposed of accordingly.

JUDGE

JUDGE

JUDGE

**Islamabad, the**  
5<sup>th</sup> January, 2016  
Not Approved For Reporting  
Waqas Naseer/\*