

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT: Mr. Justice Anwar Zaheer Jamali, HCJ
Mr. Justice Amir Hani Muslim
Mr. Justice Iqbal Hameedur Rahman

Civil Appeal No. 1002/2014

(On appeal against the judgment dated 18.7.2014 passed by the Election Tribunal, Bahawalpur and D.G.Khan Divisions, Bahawalpur in E. P. No. 13/2013)

Sultan Mahmood Hinjra

Appellant

Versus

Malik Ghulam Mustafa Khar, etc.

Respondents

For the Appellant:

Mr. Muhammad Shahzad Shoukat, ASC
Mr. Arshad Ali Ch., AOR (Absent)

For Respondent No. 1:

Ch. Muhammad Wasi Zafar, ASC
Mr. Mehr Khan Malik, AOR

For Respondent No. 5:

Sardar Muhammad Aslam, ASC
Mr. M. S. Khattak, AOR

Date of Hearing:

20.04.2016.

JUDGMENT

Iqbal Hameedur Rahman, J.- This appeal is directed against the judgment dated 18.7.2014 passed by the learned Election Tribunal, Bahawalpur & D. G. Khan Divisions, Bahawalpur, whereby the election petition filed by Respondent No. 1 bearing number E. P. No. 13/2013 against the Appellant and 17 others was partly accepted and the election of the Appellant was declared as void and re-election ordered.

2. The relevant facts of the matter are that the Appellant and the Respondent contested elections for the seat of NA-176 Muzaffargarh-I in the general election held on 11.05.2013. The

Appellant, Sultan Mahmood Hinjra was declared as the returned candidate after securing a total of 87335 votes, whereas Respondent No. 1 secured a total of 74845 votes. Accordingly, the Appellant was notified as the Returned Candidate. The success of the Appellant was challenged by Respondent No. 1 by means of an Election Petition. It was averred in the election petition that the Appellant utilized his influence in the Education Department for the appointment of Presiding and Assistant Presiding Officers favorable to the Appellant and that the objections of Respondent No.1 in this regard were not attended to; the unofficial result of 60 polling stations reflected that the Respondent No.1 had secured 29608 votes whereas the Appellant had secured 9454 votes, thereafter the results stopped coming in, however, the next morning when the unofficial results were announced, the Appellant's votes had drastically increased to a total of 87,335 and those of the Respondent No.1 were 74,845, as such, it was stated that these results were obtained through the commission of corrupt and illegal practices as during the process of polling and counting of votes, the Presiding Officers and Assistant Presiding Officers committed corrupt and illegal practices in violation of the law. It was also canvassed in the petition that no notice under Section 39(1) of the Representation of Peoples Act, 1976 (the ROPA, 1976) was issued to the Respondent No.1 by the Returning Officer and that no date, time or place was fixed for the consolidation of the result thereby compelling the Respondent No.1 to submit an application in this regard. It was pleaded that upon receipt of the said application, the Returning Officer (RO) fixed

15.05.2013 as the date of hearing, however, in the absence of the respondent, the learned RO illegally prepared a fictitious final result sheet dated 14.05.2013. It was stated that by relying on this forged and fictitious report and by mentioning incorrect facts in his order, the RO dismissed the said application. With regard to pre-elections disqualification, it was averred in the petition that the appellant knowingly misstated various facts and intentionally omitted/concealed important information in his nomination papers including *inter alia* the details of assets of his wife and children; that even though the Appellant mentioned that a criminal case bearing number 134/2000 was registered against him, but the same was cancelled pursuant to report of the Anti Corruption Establishment, however, no such report or order was produced before the learned RO. It was further averred in the petition that the Appellant is a defaulter of payment of Agricultural Income Tax, therefore, he is disqualified from being elected as a member of the National Assembly. In this regard it was stated in the petition that Appellant's agricultural income was Rs. 4,000,000/- ,Rs. 3,500,000/- and Rs. 4,200,000/- for the years 2010-11, 2011-12 and 2012-13 respectively, however, no tax was paid for the year 2010-11 on account of floods and paid only Rs. 1,950/- each in the year 2011-12 & 2012-13. These admissions prove that he is a defaulter as even on the said declared income, the amount of income tax payable was much more than the one paid by him. The Respondent No.1 also averred in his election petition that the Appellant acquired government land on lease situated in Mouza Parhar Sharqi by

making misstatements through deed No. 1793 dated 17.09.1991 and sold half of the same on that very day and the remaining half subsequently. It was contended that the Appellant has no house adjacent to the said government land and as such he misstated when he said that he required the land for extension of his *dera*. The Respondent No.1 also stated in his petition that the Appellant illegally procured allotment of a plot which was a part of a scheme prepared by the provincial government for the poor and the down trodden. The Respondent No.1 also stated in his petition that the process of the election was rife with instances of corrupt practices, in that, the ballot papers were handed over by the polling staff to the polling agents of the Appellant who marked stamps thereon, fictitious ballot papers were issued to favour the Appellant, the Appellant's polling agents opened the ballot boxes and started process of counting of votes themselves, during which the polling agents of the Respondent No.1 were not allowed to be present and that to facilitate this, Presiding Officers and Assistant Presiding Officers prepared false reports. The Respondent No.1 also alleges in his petition that during counting of votes several ballot papers were observed to have not been issued at the concerned polling station, and that after the process of counting was complete, the Presiding Officers did not prepare statement of count in the prescribed form. Additionally, it was urged that the Presiding Officer also did not prepare the prescribed forms showing the number of ballot papers entrusted to him, number of unissued ballot papers, number of ballot papers taken out from the boxes and counted, number of

tendered ballot papers, number of challenged ballot papers and number of spoilt ballot papers and further that at all the polling stations, the Presiding Officers did not give any certified copy of statement of count and the ballot paper account to the polling agents of the Respondent No.1. To substantiate this allegation, it was averred that no statement of count or ballot paper account contains the signature of the polling agents of the Respondent No.1. The Respondent No.1 also averred in his petition that 40,000 bogus ballot papers/votes were added in the record to ensure the success of the Appellant. Further, that Mr. Asghar Ali Pachar Advocate, who appeared before the RO at the time of consolidation of result had not been appointed by Respondent No. 1 as his attorney. While relying on major differences of about 9,900 votes cast for NA-176 and for PP-251 & PP-253 at the common polling stations of these constituencies, as well as in the unofficial and official results, inasmuch the votes of the Appellant increased but the number of votes of the Respondent No.1 were decreased, as a result the entire election was conducted in an illegal and non transparent manner, and accordingly prayed for the declaration that the election of the Appellant as void and that the Respondent No.1 be declared as returned candidate, or in the alternative, the election as a whole be declared as void.

3. The Appellant contested the petition on legal as well as factual plane. It was urged that the petition merits dismissal for non-compliance of the mandatory provisions of Section 55(3) of the ROPA, 1976. On facts, it was stated that no substantive material has been brought on record to substantiate the allegations contained in

the petition. It was also asserted in the written statement that Respondent No. 1 committed corrupt and illegal practices through his son Bilal Mustafa Hussain and Ashraf Rind candidate for MPA to maneuver favourable result, who launched criminal assault alongwith 100 supporters to possess forcibly the ballot boxes and election record, resulting in the registration of FIR No. 232/2013. Out of the divergent pleadings of the parties, the learned Tribunal framed as many as 15 issues. Thereafter, the parties were afforded an opportunity to adduce evidence. After completion of the trial, the learned Tribunal partly allowed the petition by declaring the election of the Appellant void, and ordering a re-election in NA-176, hence this appeal.

3. Learned counsel for the Appellant at the very outset vehemently argued that the petition merited dismissal on the ground that the same had not been duly verified in terms of Section 55 of the ROPA, 1976 and in accordance with Order VI rule-15(2) of CPC, instead the same has been verified by means of a separate affidavit. No date has been given at the foot of the petition. Learned counsel submits that the Tribunal erroneously arrived at the conclusion that verification through an affidavit is a suitable alternative to the mode of verification mandatorily prescribed under Section 55 of the ROPA, 1976. Learned counsel for the Appellant also contended that the signature on the petition and the affidavit are visibly different as such the signature has been fabricated; that the affidavit has been attested in Islamabad whereas the petition has been prepared in Multan, the dates of the petition and verification

are different. Learned counsel submitted that as per the mandate of the ROPA, 1976, annexures to the petition also have to be verified, however, the affidavit annexed with the petition does not make reference to the annexures appended with the petition, therefore, the petition has not been verified in terms of Section 55 of ROPA, 1976. In this regard, he placed reliance on the cases of **Feroze Ahmed Jamali vs. Masroor Ahmad Khan Jatoi and others** (2016 SCMR 750), **Lt. Col(R) Ghazanfar Abbas Shah vs. Mehr Khalid Mahmood Sargana and others** (2015 SCMR 1585), **Inayatullah vs. Syed Khursheed Ahmed Shah and others** (2014 SCMR 1477) and **Malik Umar Aslam vs. Sumera Malik and another** (PLD 2007 SC 362). Regarding the merits of the case, the learned counsel for the Appellant submits that main allegation against the Appellant was that of corrupt and illegal practices, however, no substantial evidence in this regard has been produced and all that there is on the record is the sole statement of the Respondent No.1 as such allegation of rigging has not been proved, even the allegation of concealment of assets has not been proved through evidence. Further contended that during Appellant's cross examination, no question regarding the allotment of land or default in payment of tax was put to him. Learned counsel contended that the learned Tribunal arrived at contradictory findings, inasmuch as it has been observed in the impugned judgment that the Appellant was not a defaulter, however, despite such observation, the Tribunal came to the conclusion that tax had not been paid by the Appellant, further submitted no such demand had been raised in this regard by the

concerned authorities as such the Appellant could not be considered to be a defaulter *strictosensu*, and in this regard, reliance was placed on the case of **Nadeem Sarwar vs. Election Commission of Pakistan through Election Commissioner, Punjab and 3 others**(2013 CLC 1481). Learned counsel submitted that while arriving at the conclusion that the Appellant illegally got land allotted to him, the Tribunal relied on an application which was not part of the record, as the same was not tendered in evidence and the same has been illegally scanned and made part of the judgment. In conclusion, learned counsel for the Appellant submits that non-observance of statutory provisions by election staff, unless shown to materially affect the result of the election in view of the fact that the margin of difference of votes is substantial, cannot be made basis to declare the whole election as void and in this regard placed reliance on the case of **Muhammad Siddique Baloch vs. Jehangir Khan Tareen and others** (PLD 2016 SC 97). Further argued that in election laws, the finding of disqualification must be based on positive evidence, as the standard of evidence in election matters is similar to that of a criminal trial. Accordingly, the Tribunal cannot decide the same on the basis of conjectures and surmises. In this regard, he placed reliance on the cases of **Muhammad Saeed and 4 others vs. Election Petitions Tribunal, West Pakistan and others** (PLD 1957 SC 91), **Khan Muhammad Yusuf Khan Khattak vs. S. M. Ayub and 2 others** (PLD 1973 SC 160), **Syed Saeed Hassan vs. Pyar Ali and 7 others**(PLD 1976 SC 6) and **Lahore Improvement Trust, Lahore through its Chairman vs. The Custodian, Evacuee Property, West**

Pakistan, Lahore and 4 others (PLD 1971 SC 811 ⁽⁸³⁶⁾). He lastly argued that the Respondent No.1 had not filed any list of documents or witnesses as required by law, as such the election petition merited dismissal under Section 63 of the ROPA, 1976 due to non-compliance of mandatory provisions Section 55 of the ROPA, 1976.

4. Conversely, while supporting the impugned judgment, the learned counsel for the Respondent No.1 submitted that allotment of 13 marlas of commercial property was illegally procured through a simple application moved to the Chief Minister, who was not empowered to allow the same. States that land was allegedly required by the Appellant for extension of his *dera*, but said land was not adjacent to Appellant's property and further, the said land was further alienated on the same day and adverted to Registry of Sale Deed of *Ahata* at pages-393 & 435 regarding sale to Dr. Faiz Muhammad, as such making false statement and getting *Ahata* of 2 kanals and then selling both the properties to make money disqualified the Appellant to contest election as he was not *Sadiq* and *Ameen*. In support of his arguments he relied upon the judgments of this Court delivered in the cases of **Sardarzada Zafar Abbas and others vs. Syed Hassan Murtaza and others** (PLD 2005 SC 600) and **Lt. Col(R) Ghazanfar Abbas Shah vs. Mehr Khalid Mahmood Sargana and others** (2015 SCMR 1585).

5. We have heard the arguments of the learned counsel for the parties and also perused the material placed on the record as well as the impugned judgment with their able assistance.

6. Since the learned counsel for the Appellant at the very outset has raised the question with regard to the maintainability of the election petition filed by the Respondent No. 1, hence we are forfeited to address this issue first. It was objected by the learned counsel for the Appellant that the petition had not been verified in terms of the mandatory provisions of Section 55 of the ROPA, 1976 read with Order VI Rule 15 CPC as neither the petition nor the annexures or schedules appended thereto had been verified, but instead an affidavit had been belatedly filed to cure such defect. It would be pertinent to reproduce the above quoted provisions of law:

55. Contents of Petition:-

- (1).....
- (2).....
- (3) Every election petition and every schedule or annex to that petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings.

Order VI Rule 15.*Verification of Pleadings* (1) Save as otherwise provided by any law for the time being in force, every pleading shall be verified on oath or solemn affirmation at the foot by the party or by one of the parties pleading or by some other person proved to the satisfaction of the Court to be acquainted with the facts of the case.

- (2) The person verifying shall specify, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon information received and believed to be true.
- (3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed."

From the above it is crystal clear that verification of an election petition in the prescribed manner is a mandatory requirement and that too in accordance with the provisions of Order VI Rule 15

C.P.C. specifying to numbered paragraphs of the pleadings what he verifies of his own knowledge and what he verifies upon information received and believed to be true. From the record it reveals that the Appellant while filing his election petition did not comply with the mandatory requirements with regard to the verification of the election petition and to cure such defect subsequently submitted an affidavit in this regard, wherein the entire contents of his election petition were reproduced. It would be pertinent to mention at this juncture that although the provisions relating to the verification of pleadings are generally directory in nature, the position is different in election laws by virtue of Section 63 of the ROPA, 1976 which casts upon the Tribunal a duty to dismiss the election petition if the provisions of Sections 54 or 55 of the ROPA, 1976 have not been complied with, as such its compliance has been held to be mandatory in nature by virtue of the penal consequences prescribed under Section 63 of the ROPA, 1976.

7. We would now proceed to examine the affidavit, which finds mention at the foot of the petition and purportedly serves to verify the same. In the said affidavit, the Respondent/Election Petitioner has reproduced the entire contents of his election petition. In order to determine the sufficiency of verification by affidavit, it would be useful to reproduce the provisions of High Courts Rules and Orders, Chapter 12, Volume No. IV, Rules No. 11, 12, 14, 15 and 16 as these have material bearing on the case at hand:-

“11. Identification of Deponent- Every person making an affidavit shall , if not personally known to the Court, magistrate

- 12. Mode of attestation-
- 14. Attesting Officers duty
- 15. Attesting, signing and making of affidavit.
- 16. Manner of administering oath to deponent.

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FORM OF VERIFICATION OF OATH OR AFFIRAMTION

(Vide paragraph 15 above)

Oath.

I solemnly swear that this may declaration is true, that it conceals nothing, and that no part of it is false..... so help me God.

Affirmation.

I solemnly affirm that this my declaration is true, that it conceals nothing and that no part of it is false.

II-FORM OF CERTIFICATE

(vide paragraphs 12, 14 and /5 above)

Certified that the above was declared on..... (here enter oath)/affirmation as the case may be) before me this.....(date) day of.....(month).....(of 19 , at (place) in the district of (name of district)..... by (full name and description of declarant) who is..... here enter "personally known to me" or identified at (time and place of identification) by (full name and descriptor: of person marking the identification), who is personally known to me".

(Full Signature) A. B.

(Officer) District Judge (or as the case may be) of

.....

II-A

The exhibits marked A.B.C. (as the case may be) above referred to are annexed hereto under this date and my initials.

Certified further that this affidavit has been read and explained to (name) the declarant who seemed perfectly to understand the same at the time of making thereof. "

Placing reliance on the case of **Lt Col (R) Ghazanfar Abbas Shah vs Khalid MehmoodSargana** (2015 SCMR 1585), would be beneficial here, wherein, the issue of verification by an affidavit was agitated before this Court and while referring to the above Rules, this Court highlighted the following pre-requisites for a valid affidavit:

- 1. Identification of Deponent (Rule 11)

2. Particulars of deponent and identifier to be mentioned at the foot of the affidavit (Rule 11)
3. Time and place of making of the affidavit to be specified (Rule 11)
4. Certification by court/magistrate/other officer at the foot of the affidavit that such affidavit was made before them. (Rule 12)
5. Date, Signature and name of the office and designation of the court/magistrate/other officer to be subscribed underneath the Certification. (Rule 12)
6. Every exhibit referred to in the affidavit to be dated and initialed by the court/magistrate/other officer. (Rule 12)
7. Where deponent of an affidavit does not understand the contents of an affidavit, the court/magistrate/other officer administering oath must read out the contents of the affidavit to such person so that he understands. Where such is the case, the court/magistrate/other officer shall note at the foot of the affidavit that the affidavit has been read out to the deponent and he understands its contents. (Rule 14).
8. Deponent to sign/mark and verify the affidavit and the court, magistrate or other officer administering the oath or affirmation to attest the affidavit. (Rule 15)
9. Oath to be administered by the court/magistrate/other officer in accordance with the Indian Oaths Act 1878 and affidavit to be verified by deponent and attested by court/magistrate/other officer on forms appended thereto (Rule 16)"

When the affidavit at hand is examined in the light of the above it transpires that certain essential requirements are missing therefrom. Firstly, it has not been mentioned whether the Respondent No.1 was administered oath by the Oath Commissioner before the attestation was made. Secondly, it has not been specified whether the Respondent No.1 was duly identified before the Oath Commissioner. In this regard, it has simply been stated at the foot of the affidavit that the Respondent No.1 was present before the Oath Commissioner in person, however, the details of the person identifying the Respondent No.1 have not been mentioned whereas according to the above quoted provisions, the Oath Commissioner is bound to specify at the foot of the affidavit the name and description of the person by whom identification of the deponent was made and in this regard a certificate has to be appended. Furthermore, it is also

not clear from the affidavit that the Respondent No.1 was identified with reference to his ID card and in this regard, no ID card number is given, as such the identification does not seem to have been made. There is yet, another aspect to the matter. The affidavit in question does not make any reference to the numbered paragraphs contained therein which the Respondent No.1 verifies on his own knowledge and what he verifies upon information received and believed to be true. Further, the affidavit in question also does not make any reference to the verification of the annexures appended along with the petition, which although have been mentioned in the said affidavit.

8. This Court in a chain of judgments has addressed the issue of verification of pleadings wherefrom reproducing the relevant portions would be beneficial here. In the case of **Zia ur Rehman Vs. Syed Ahmed Hussain and others** (2014 SCMR 1015) it has been held as under:-

“10. Admittedly both the election petitions filed by the respondents in the afore-mentioned appeals were not verified on oath in the manner prescribed under the afore-quoted provision. If the law requires a particular thing to be done in a particular manner it has to be done accordingly. Otherwise it would not be in-compliance with the legislative intent. Non-compliance of this provision carries a penal consequences in terms of section 63 of the Representation of the People Act whereas no penal provision is prescribed for non-compliance with Order VI, Rule 15 of the Civil Procedure Code. The effect of non-compliance of section 55 of the Representation of the People Act, 1976 came up for consideration before this Court in **Iqbal Zafar Jhagra v. Khalilur Rehman** (2000 SCMR 250) wherein at page 290 it was candidly held that “the verification of pleadings has been provided under Order VI, Rule 15, C.P.C. which when read with section 39, C.P.C., clearly shows that the pleadings are to be verified on oath and the oath is to be administered by a person, who is duly authorized in that behalf. It is an admitted position that the petition filed by Syued Iftikhar Hussain Gilani though mentions that it is on oath, the oath was neither verified nor attested by a person authorized to administer oath and as such it could not be

said that requirements of section 36 of the Act were complied with. We have considered the reasons given by the learned Tribunal in holding that the petition filed by Syed Iftikhar Hussain Gillani did not comply the provisions of section 36 of the Act and are of the view that these reasons do not suffer from any legal infirmity."

And in the case of **Sardarzada Zafar Abbas and others Vs. Syed Hassan Murtaza and others** (PLD 2005 SC 600), this Court has laid the following guidelines:-

"The verification on oath of the contents of an election petition, is provided under section 55(3) of the Representation of the People Act of 1976, (hereinafter to be referred to as the Act). It provides that every election petition and every schedule or annexure to petition shall be signed by the appellant and verified in the manner laid down in the Code of Civil Procedure, 1908. The Code contains such provisions under Order VI, rule 15, which requires the verification of pleadings, on oath. Such verification is not to be signed in routine by the deponent but being on oath, it requires to be attested either by the Oath Commissioner or any other authority competent to administer oath. It needs hardly to be emphasized that every oath is to be practically administered.

So far as, the provisions of civil law are concerned, such verifications generally are of directory nature. An omission to do so can be rectified subsequently during trial and even the Court can direct such rectification. While, on the other hand, under election laws such verification on oath is mandatory because of being followed by penal consequences under section 63(a) of the Act that makes it mandatory for the Tribunal to dismiss election petition if the provisions of sections 54 and 55 of the Act have not been complied with. Similar view was taken by this Court in Iqbal Zafar Jhagra's case (2000 SCMR 250), though related to the Senate elections. It is, therefore, settled that the verification on oath of an election petition though mannered in accordance with civil law yet it entails upon penal consequences and hence is mandatory."

9. In the above perspective, and while placing reliance on the case of **Lt. Col (R) Ghazanfar Abbas Shah** (*supra*), the affidavit at hand, can hardly be considered to be a proper verification. The learned Election Tribunal therefore, erred in holding that the election petition had been duly verified. In our considered opinion, the election petition had not been duly verified in accordance with law and even the affidavit annexed thereto could also not be considered

to be proper verification as it failed to meet the criteria mentioned above, therefore, the election petition merited outright dismissal by the election tribunal.

10. In conclusion to our discussion we are of the opinion that when an objection with regard to the maintainability of an election petition for non-compliance of a mandatory provision is raised then the Tribunal should decide that very objection first because if such objection sustained then the Tribunal left with no option but to dismiss the election petition. Mentioning the case of Zia ur Rehman (*supra*) would again be beneficial here wherein it has been held as under:-

“7. If an objection is raised with regard to maintainability of such a petition for non-compliance of a mandatory provision, the Court/Tribunal should decide that preliminary objection. Because if that objection is sustained then the Court is left with no option but to dismiss the petition.....”

11. For what has been discussed above, this appeal is allowed, impugned judgment dated 18.07.2014 passed by the Election Tribunal is set aside and the election petition filed by the Respondent No.1 is hereby dismissed under Section 63 of the ROPA, 1976 as not being in conformity with the mandatory provisions of Section 55 of the ROPA, 1976.

Chief Justice

Judge

Judge

Announced in open Court at Islamabad on _____

Judge