JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Election Appeal No.01/2016

Chaudhary Wajid Ayub and another
Versus
Malik Rizwan Ahmed and others

Dates of Hearing:	01.03.2019, 15.03.2019 & 22.03.2019
Appellants by:	Malik Qamar Afzal and Mr. Saad Khan, Advocates
Respondents by:	M/s Tanveer Iqbal, Ali Murad Baloch and Salman Ajaib, Advocates.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellants, (Chaudhary Wajid Ayub and Khurram Zeb Khan), impugn order dated 17.10.2016, passed by the learned Election Tribunal, Islamabad, dismissing election petition No.53/2016, filed by the appellants to challenge the election of respondent No.1 (Malik Rizwan Ahmed) and respondent No.2 (Najam Hayat) as Chairman and Vice Chairman of Union Council No.47, Tehsil and District Islamabad, respectively.

2. The record shows that the appellants and the respondents contested elections for the seat of Chairman and Vice Chairman of Union Council No.47. The elections were held on 30.11.2015. Respondents No.1 and 2 were declared as returned candidates and in this regard, notification dated 05.12.2015 was issued by the Election Commission of Pakistan ("E.C.P.").

3. On 02.01.2016, the appellants filed an election petition under Section 37 of the Islamabad Capital Territory Local Government Act, 2015 ("I.C.T.-L.G. Act") before the learned Election Tribunal, Islamabad. In the said election petition, it was pleaded *inter alia* that respondent No.1, in his nomination papers, concealed his and his wife's assets; that respondent No.1's wife owned 63 *kanals*, 16 *marlas* of land in *Mouza Tarnol,* Tehsil and District Islamabad; that a portion of the said land was used for agriculture, whereas buildings were constructed on

the rest of the land; that respondent No.1 had also concealed his and his wife's share in a plot measuring 2 *marlas* and 96 square feet purchased through registered sale deed dated 01.01.1990, in three shops purchased through registered sale deed dated 08.04.1990, and in other property inherited by respondent No.1 and his wife; that the disclosure made by respondent No.1 in his nomination papers regarding his share in the Jammu & Kashmir Cooperative Housing Society was not accurate; that the said concealment disqualified respondent No.1 from being elected as Chairman of Union Council No.47; and that respondent No.1 had not paid income tax with respect to the rental income from his properties disclosed in the nomination papers.

4. The said election petition was contested by respondents No.1 and 2 (i.e., the returned candidates) by filing a written reply. In the said reply, the said respondents took preliminary objections to the maintainability of the election petition. It was pleaded *inter alia* that since the appellants, before the filing of the election petition, had not, either personally or through registered post with acknowledgment due, served a copy of the election petition on the respondents, the mandatory requirements in Rule 60 of the Islamabad Capital Territory (Conduct of Election) Rules, 2015 ("the 2015 Rules") had been violated rendering the election petition liable to be dismissed. Another objection taken by the said respondents was to the effect that the election petition, its schedule and annextures had not been verified in accordance with the law. Furthermore, it was pleaded that respondent No.1 had provided complete details of his assets as required by law and nothing had been concealed; that the details of respondent No.1's properties had been provided in Form-XVII; and that respondent No.1 and his family had been given plots in the Jammu & Kashmir Cooperative Housing Society as compensation for the acquisition of their ancestral land.

5. From the divergent pleadings of the contesting parties, the learned Election Tribunal framed 13 issues, which are reproduced herein below:-

1. ***Whether the petitioners have got cause of action to file the instant election petition? OPP***
2. ***Whether this election petition is not maintainable, in view of the objections raised by the respondents? OPR***
3. ***Whether the petitioners are estopped by their conduct to file the instant petition? OPR***
4. ***Whether the petition is false, frivolous and allegations are vague? OPR***
5. ***Whether any corrupt or illegal practices were committed and bogus votes were casted in favour of respondents and fake thumb impressions were affixed on ballots during the election of chairman & vice chairman on 30.11.2015? OPP***
6. ***Whether the returned candidates and returning officers were having nexus with each other and rigging took place to favour the respondents in connivance with the election staff? OPP***
7. ***Whether the returned candidates concealed their assets? If so its effects? OPP***
8. ***Whether respondent No.1 is defaulter of WAPDA and income tax, if so, its effects? OPP***
9. ***Whether 680 votes were illegally rejected? OPP***
10. ***Whether some ballot papers were considered spoiled and thumb marked, if so, the rights of the petitioners become prejudiced? OPP***
11. ***Whether there are differences between number of votes polled and number of entries in electoral roll, if so, its effects? OPP***
12. ***Whether the petitioners are entitled to the relief prayed for? OPP***
13. ***Relief?***

6. Before the learned Election Tribunal, the appellants did not press issues No.5, 6, 9, 10 and 11. The witnesses produced and the documents tendered in evidence on behalf of the contesting parties are detailed in paragraphs 5 to 18 of the impugned judgment dated 17.10.2016. The learned Election Tribunal decided issue No.2 in favour of respondents No.1 and 2 and held that the election petition was not maintainable in the eyes of law. Nevertheless, after holding so, the learned Election Tribunal went ahead and decided the remaining issues on merits. Vide impugned judgment dated 17.10.2016, the election petition was dismissed. In this appeal, the said judgment has been assailed.

7. The arguments of the learned counsel for the contesting parties were spread over several dates of hearings and were supported by voluminous documents and case law.

CONTENTIONS OF THE LEARNED COUNSEL FOR THE APPELLANTS:-

8. Learned counsel for the appellants, after narrating the facts leading to the filing of the instant appeal, submitted that the impugned judgment suffers from legal infirmities and factual errors; that the non-service of the election petition's copy on the respondents personally or through registered A.D. was a mere technicality; that a copy of the election petition was served on the respondents through courier; that the requirement of Rule 60 of the 2015 Rules was directory and not mandatory, because no penal consequence is provided for its non-compliance; that the learned Election Tribunal, vide order dated 02.01.2016, directed summons to be issued to the respondents through courier; that notice served on the respondents through courier was valid since the same was in compliance with the order of the learned Election Tribunal; that the requirements of Rule 60 of the 2015 Rules were sufficiently and substantially complied with when the respondents were served with the notice regarding the filing of the election petition; that the respondents tendered appearance before the learned Election Tribunal after they were served with the notice through courier; and that the verification of the election petition was strictly in accordance with the law.

9. Furthermore, learned counsel for the appellants submitted that the placement of the Oath Commissioner's signature has been made a ground by the learned Election Tribunal to oust the appellants; that all material documents had been signed by the Oath Commissioner; that all documents brought on record by the appellants were verified on oath; that the object of the Legislature was achieved when the documents on record were attested on oath; that the learned Election Tribunal unlawfully discarded several documents that had been *'marked'*; that the documents on the record could be looked into; that the learned Election Tribunal erred by not

appreciating that the nature of certain documents was such that they did not need to be formally exhibited; that documents which came within the meaning of public documents were not required to be formally exhibited; that the learned Election Tribunal did not adjudicate upon the admissibility of the documents; and that the learned Election Tribunal concentrated on the preliminary objections raised by respondents No.1 and 2 and failed to adjudicate upon the issue regarding declaration of assets.

10. Learned counsel for the appellants further submitted that the learned Election Tribunal did not adequately dilate on the issue regarding the declaration of assets; that the election of respondents No.1 and 2 was liable to be declared void on account of non-disclosure of assets by respondent No.1 and his wife; that asset declaration is the foundation of all the nomination papers; that a candidate is required not just to declare his own assets but also those of his spouse; that there should be zero tolerance for non-declaration of assets; that if a candidate declares most of his assets but omits to declare certain other assets, he is liable to be disqualified; that the concept of substantial compliance does not apply regarding declaration of assets in the nomination papers; that strict compliance is to be shown with the requirement to declare assets in the nomination papers; that in the impugned judgment, there is a clear admission that respondent No.1 did not declare his inherited/ancestral property; and that the requirement to declare assets has been made applicable to the Local Government elections.

11. Learned counsel for the appellants further submitted that respondent No.1 did not declare six of his bank accounts; that respondent No.1 in his first nomination papers mentioned his inherited share to be 1/11th, whereas in the second nomination papers, he changed the same into 1/10th; that respondent No.1 has not mentioned any rental income in his nomination papers; that respondent No.1 did not declare his ownership of Mehran Plaza and land situated in village Tarnol, Islamabad, in his

nomination papers; that respondent No.1 has a share in three commercial buildings called Mehran, Rizwan and Usman Plazas; and that respondent No.1 did not declare all his assets fearing that he may be held accountable to the tax authorities; that respondent No.1 was a tax evader; that respondent No.1 was not exempt from disclosing of his inherited property in his nomination papers; that respondent No.1 was also under an obligation to have disclosed his wife's assets; that Sections 12 and 76-A of Representation of People Act, 1976 ("R.O.P.A.") have to be strictly construed; that due to non-disclosure of respondent No.1 and his wife's assets, respondent No.1's election was liable to be declared as void; that the impugned judgment is contrary to the law laid down by the Hon'ble Supreme Court; that in the case of Muhammad Ibrahim Vs. Aftan Shaban Mirani (2016 SCMR 722), it has been held that under Section 55 of R.O.P.A., every election petition and schedule annexed to that petition shall be signed by the election petitioner and verified in the manner laid down in Order VI, Rule 15 of the Code of Civil Procedure, 1908("C.P.C."); that the learned Election Tribunal erred by not taking into account documents which were part of the Tribunal's record; and that respondent No.1 was liable to be disqualified under Article 62(2)(f) of the Constitution since he was not sagacious, righteous, non-profligate, honest and *ameen*. Learned counsel for the appellants prayed for the appeal to be allowed, and for the impugned judgment dated 17.10.2016 to be set-aside.

CONTENTIONS OF THE LEARNED COUNSEL FOR RESPONDENTS NO.1 AND 2:-

12. On the other hand, learned counsel for respondents No.1 and 2 submitted that under Section 37(2) of the I.C.T.-L.G. Act, an election petition is to be filed in a *"prescribed manner"*; that Rules 60 and 61 of the 2015 Rules prescribe the manner in which an election petition is to be filed; that Rule 60 of the 2015 Rules obligates the election petitioner to *"serve personally or by registered post with acknowledgment due on each respondent a copy of his petition";* that the employment of the

word *"shall"* in Rule 60 makes the said requirement mandatory; that the appellants did not serve a copy of the election petition on respondents No.1 and 2 (herein after referred to as "the respondents") in accordance with the requirements of Rule 60; that the requirement to serve the respondents with a copy of the election petition either personally or through registered post is obligatory under Rule 60(1); that in his cross-examination, PW-11 (i.e., appellant No.1) admitted that a copy of the election petition had not been served personally or through registered post on the respondents; that even in appellant No.1's affidavit-in-evidence (Ex.PW-11/A), there is no mention of the service of the election petition on the respondents through registered post; that it was also not proved that service of the election petition on the respondents was affected through courier; that although the courier receipt was appended with the election petition, it was not tendered in evidence; that it was not even pleaded in the election petition that a copy of the election petition was sent to the respondents through courier; that even in the election petition, it has not been pleaded that the respondents were served with a copy of the election petition prior to its filing; that under Section 27 of the General Clauses Act, 1897, the presumption of service only applies when service is made through registered post; that the requirement in Rule 60(1) of the 2015 Rules is akin to the framing of a charge; that under Section 265(c) Cr.P.C., the statement of allegations have to be provided to the accused seven days before the framing of the charge; and that Rule 60(1) would be rendered redundant if strict compliance therewith is not ensured.

13. Furthermore, learned counsel for the respondents submitted that the respondents had disclosed all their assets in their nomination papers; that the 2015 Rules did not obligate a candidate to declare his wife's assets in the nomination papers; that the provisions of R.O.P.A. cannot override the provisions of the I.C.T.-L.G. Act or the rules made thereunder; that the provisions of R.O.P.A. have been made applicable only for the purpose of elections; that as per the law laid down in the case of

Election Commission of Pakistan Vs. JavaidHashmi (PLD 1989 S.C. 396), election commences from the date of the issuance of the election schedule till the publication of the notification of the returned candidate; that the conduct of elections ends upon the notification of the returned candidate; that there are three different phases of elections *viz* (i) pre-election phase, (ii) the election itself, and (iii) post-election phase; that Section 17 of the I.C.T.-L.G. Act is with respect to the conduct of elections; that Section 28 of the I.C.T.-L.G. Act provides that the election to a Local Government shall be conducted in a prescribed manner; that by virtue of Section 17(3) of the I.C.T.-L.G. Act, the mechanism provided in R.O.P.A. from the stage of the receipt of the nomination papers till the notification of the returned candidate has been adopted; that the provisions of R.O.P.A. pertaining to the post-election scenario cannot be made applicable by the Election Tribunal constituted under the I.C.T.-L.G. Act; that where there are inconsistent provisions in two separate laws, the special law will prevail over the general law; that the I.C.T.-LG Act is a special law with respect to the local elections; that R.O.P.A applies to the elections for Parliament and the Provincial Assemblies; that Section 76-A of R.O.P.A applies only to an Election Tribunal constituted under Section 57 of R.O.P.A. and not to an Election Tribunal constituted under Section 38 of the I.C.T.-L.G. Act; that the Election Tribunal that passed the impugned judgment was constituted under Section 38 of the I.C.T.-L.G. Act, and not under Section 67 of R.O.P.A; and that a penal provision in R.O.P.A. cannot be applied to anything done under the I.C.T.-L.G. Act. Learned counsel for respondents No.1 and 2 submitted that the impugned judgment passed by the learned Election Tribunal is strictly in accordance with the law. He prayed for the appeal to be dismissed.

14. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance. The facts leading to the filing of the instant appeal

have been set out in sufficient detail in paragraphs 2 to 6 above, and need not be recapitulated.

15. I propose, first, to decide whether the learned Election Tribunal was correct in its findings that the election petition was not maintainable on account of non-compliance by the appellants with Rule 60 of the 2015 Rules and non-verification of the election petition and its annexures in accordance with Section 55(3) of R.O.P.A.

16. The I.C.T.-L.G. Act was enacted on 03.08.2015 (i.e., the date on which it received the Presidential assent). On 14.10.2015, the I.C.T.-L.G. Act was amended by the Islamabad Capital Territory Local Government (Amendment) Ordinance, 2015 ("I.C.T.-L.G. Amendment Ordinance."). Through the said Ordinance, Sub-Section (3) was added in Section 17 of the I.C.T.-L.G. Act. The Islamabad Capital Territory Local Government (Amendment) Act, 2016 ("I.C.T.-L.G. Amendment Act") was enacted on 27.07.2016. The I.C.T.-L.G. Amendment Act was said to be in the same terms as the I.C.T.-L.G. Amendment Ordinance. Sub-Section (3) of Section 7 of the I.C.T.-L.G. Act, as amended, reads as follows:-

> ***"(3) Without prejudice to the provisions of this Act and for the purpose of election to the Local Governments under this Act, the provisions of the Representation of People Act, 1976 (LXXXV of 1976) shall mutatis mutandis apply."***

17. Section 1(2) of I.C.T.-L.G. Amendment Act provides that it shall come into force at once and shall be deemed to have taken effect on 14.10.2015. The 2015 Rules were notified on 17.09.2015.

18. As per the election schedule, the last date for filing the nomination papers was 28.06.2015. It is an admitted position that respondents No.1 and 2 filed their nomination papers on 26.06.2015. As mentioned above, the I.C.T.-L.G. Act was enacted on 03.08.2015. After the enactment of the I.C.T.-L.G. Act, the candidates again filed their nomination papers on 28.10.2015. By this time, the 2015 Rules had already been notified. The elections in question were held on 30.11.2015.

19. Now, Section 37(1) of the I.C.T.-L.G. Act provides that an election to an office of a Local Government shall not be called in question except by an election petition. Section 37(2) of the said Act provides that a candidate may, *"in the prescribed manner"*, file an election petition before the Election Tribunal challenging an election under this Act. Section 2(kk) of the said Act provides that the word *"prescribed"* means prescribed by the Rules as defined in Section 2(tt) of the said Act. Section 2(tt) of the said Act provides that *"rules"* means rules under the Capital Development Authority Ordinance, 1960 or *"may be made under this Act".* The 2015 Rules were made by the Federal Government in exercise of the powers conferred by Section 117 of the I.C.T.-L.G. Act. Chapter-X, titled *"Election Petitions"* in the 2015 Rules *inter alia* prescribes the manner in which an election petition is to be filed. Rule 60(1) in Chapter-X of the 2015 Rules reads as follows:-

> ***"The petitioner shall join all contesting candidates as respondents in his election petition and shall serve personally or by registered post with acknowledgment due on each respondent a copy of his petition"***
> **(Emphasis added)**

20. Now, it is an admitted position that the appellants did not serve a copy of the election petition on the respondents in the manner as required by Rule 60(1) *ibid.* The appellants assert that they sent copies of the election petition to the respondents through courier. Section 54(b) of R.O.P.A., although not strictly in *pari materia*, but is similar in nature to Rule 60(1) of the 2015 Rules. Section 54(b) of R.O.P.A. provides that the petitioner shall join as the respondents to his petition any other candidate against whom any allegation of any corrupt or illegal practice is made and *"shall serve personally or by registered post on each such respondent"* a copy of the petition. Section 54(b) of the R.O.P.A. was interpreted by the Hon'ble Supreme Court in the case of Inayat Ullah Vs. Syed Khursheed Shah (2014 SCMR 1477), in the following terms:-

> ***"2. ...Considering the contents of section 54(b) of the Representation of the Peoples Act, 1976 (The Act), the undeniable position which emerges from the record is that the Election Petition was not served on the nineteen (19)***

respondents by the appellant Inayatullah personally. It is also clear from the record and indeed it has not been urged before us that the copy of the petition was served on the respondents through registered post. The question, therefore, which remains is whether the courier service employed by the appellant could be construed as service effected on the respondents by the appellant personally.

3. Considering the provisions of the various statutes including the Civil Procedure Code (C.P.C.) the distinction between personal, service/appearance etc. and appearance/service etc. through an agent is well recognized. The courier service can at best be treated as an agent of the appellant. Service through an agent, keeping in mind the similar provisions of the Civil Procedure Code (C.P.C.) and other statutes will not constitute service effected personally. As far as service through registered post is concerned, that has not even been claimed by the appellant. In any event, the Postal Service of Pakistan has been created under the Post Office Act, 1898. There are a number of courier services operating in Pakistan. Our research staff has accessed reports which show that legislative efforts are a foot to regulate the services of couriers. As a result, the Pakistan Private Courier Regulatory Bill, 2012, was prepared. However, the said Bill has not become a law. In any event, service through registered post raises statutory presumptions in the ordinary course. No such presumption attaches to service through courier. Learned counsel for the appellant made a feeble attempt to argue that service through courier could be considered valid on the ground of practice and usage. This plea is not legally tenable in view of the express wording of the Act."

21. The requirement to serve a copy of the election petition on the respondents personally or by registered post is mandatory under Section 54(b) of R.O.P.A. This is because the consequence of non-compliance with the said requirement is provided in Section 56 of R.O.P.A., which provides *inter alia* that if the Commissioner finds that any provision of Section 54 has not been complied with, the petition shall be dismissed forthwith. No such consequence or penalty is provided in the I.C.T.-L.G. Act or the Rules made thereunder for non-compliance with the requirement of Rule 60 of the 2015 Rules. Rule 67 of the 2015 Rules provides that an Election Tribunal may dismiss an election petition if the provisions of Rules 64 and 65 of the 2015 Rules are not complied with or where the allegations contained in the election petition are vague or do not disclose the commission of any corrupt practice, material irregularity or any other illegal act. Rule 67 of the 2015 Rules does not empower the learned Election Tribunal to dismiss an

election petition for non-compliance with the requirements of Rule 60 of the 2015 Rules. This being so, I am of the view that the penal provision in R.O.P.A. (i.e., Section 56 of R.O.P.A.) will not be attracted if the election petitioner does not serve a copy of the election petition personally on the respondents or does not send the same to the respondents through registered post.

22. Even though Section 1(2) I.C.T.-L.G. Amendment Act provides that the amendments made in the I.C.T.-L.G. Act will be deemed to have taken effect on 14.10.2015, it is well settled that penal provisions in a statute cannot be inserted with a retrospective effect. Furthermore, the provisions of R.O.P.A. have been made applicable *mutatis mutandis "for the purpose of election"* to the Local Governments under the I.C.T.-L.G. Act. The term *"for the purpose of election"*, in my view, is relatable to the conduct of an election, which is catered for in Chapter-IV of R.O.P.A.

23. Additionally, the provisions of R.O.P.A. have been made *mutatis mutandis* applicable for the purpose of election to the Local Governments under the I.C.T.-L.G. Act, *"without prejudice to the provisions of the [I.C.T.-L.G. Act]"*. Therefore, if the provisions of the I.C.T.-L.G. Act or the Rules made thereunder cater for a certain situation or an eventuality, resort to the provisions of R.O.P.A. is not necessary. In the event of a conflict between the provisions of R.O.P.A. and the provisions of the I.C.T.-L.G. Act or the Rules made thereunder, the latter shall prevail as regards the elections of Local Governments. Therefore, it is my view that the learned Election Tribunal erred by holding that the election petition filed by the appellants was not maintainable due to the appellants' failure to have shown compliance with Section 54(b) of R.O.P.A. and Rule 60 of the 2015 Rules.

24. As regards the findings of the learned Election Tribunal that the election petition was not maintainable, because the appellants had not verified the election petition and the documents annexed therewith in accordance with the requirements of Section 55(3) of R.O.P.A. and Rule 61(3) of the

2015 Rules, I am of the view that since Rule 61(3) of the 2015 Rules provided as to how every election petition and every schedule or annex to that petition was to be verified, recourse to the requirements of Section 55(3) of R.O.P.A. was not necessary. It may be mentioned that Rule 61(3) of the 2015 Rules and Section 55(3) of R.O.P.A. are in *pari materia.* Rule 61(3) of the 2015 Rules provides that 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 C.P.C. for the verification of pleadings. Unlike the 2015 Rules, Section 63 of R.O.P.A. provides that the learned Election Tribunal shall dismiss an election petition if the provisions of Section 55 of R.O.P.A. are not complied with. Since neither the I.C.T.-L.G. Act nor the 2015 Rules provide a penalty for non-compliance with the requirements of 61(3) of the 2015 Rules, I am of the view that the learned Election Tribunal erred by holding that the appellants' election petition was not maintainable for want of verification in accordance with Section 55(3) of R.O.P.A. or Rule 61(3) of 2015 Rules.

25. The manner in which pleadings are required to be verified is set out in Order VI, Rule 15 C.P.C., which is reproduced herein below:-

> ***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 pleading, 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.***
> ***(4) The person verifying the pleading shall also furnish an affidavit in support of his pleadings.***

26. Under Section 63(a) of R.O.P.A., an election petition can be dismissed by the learned Election Tribunal if the same is not verified in accordance with Section 55(3) of R.O.P.A. There is no provision in the I.C.T.-LG. Act in *pari materia* with Section

63(a) of R.O.P.A. Therefore, if an election petition is not verified in accordance with Rule 61(3) of the 2015 Rules, the I.C.T.-L.G. Act or the said Rules do not impose a penalty similar in nature as can be imposed under Section 63(a) of R.O.P.A. Under Rule 67 of the 2015 Rules, an Election Tribunal has been empowered to dismiss an election petition during trial only if the provisions of Rules 64 and 65 of the 2015 Rules have not been complied with or if the allegations contained in the election petition are vague or do not disclose the commission of any corrupt practice, material irregularity or any other illegal act.

27. The learned Election Tribunal erred by not specifying as to which requirement in Order VI, Rule 15 C.P.C. the appellants had not shown compliance with. The learned Election Tribunal also erred by holding that the verification was not in accordance with the law, because although the Oath Commissioner had affixed his stamp, he had not signed the certificate at the end of the election petition and other documents annexed therewith. I do not see how this would amount to a violation of the requirements of Order VI, Rule 15 C.P.C. Requirements which are not expressly provided in Order VI, Rule 15 C.P.C., cannot be read into it.

28. Ordinarily, when a Court or a Tribunal comes to the conclusion that the petition before it is not maintainable, it should not proceed further and give a finding on the merits of the case. In the case at hand, the learned Election Tribunal, after holding that the appellants' election petition was not maintainable, went ahead and also gave a finding on the merits of the case. Since I have held that the appellants' election petition was maintainable, and since the learned counsel for the contesting parties also made detailed submissions on the merits of the case, I now propose to decide the appeal on merits as well.

29. Section 117(1) of the I.C.T.-L.G. Act empowers the Federal Government to make rules for the purpose of carrying out the said Act. Section 117(2) provides that such Rules may provide for all or any of the matters specified in part-I of Eighth

Schedule to the said Act.Item No.1 in part-I of the Eighth Schedule is *"Local Government (Conduct of Elections)"*. Rule 12(4) of the 2015 Rules reads thus:-

> ***"Every nomination paper shall be accompanied by a declaration, in Form-XVII, of assets and liabilities of the candidate, which shall be open to inspection."***
> **(Emphasis added)**

30. Form-XVII requires the candidate to give a statement of assets and liabilities of himself *"or any member of [his] family and dependents"*. Furthermore, the verification in Form-XVII requires a candidate to declare that the statement of assets and liabilities of his own self, his spouse and dependents is correct and complete to the best of his knowledge and belief. The statement of the candidate and the verification required under Form-XVII is almost in the same terms as the one required under Form-I for *"Statement of Assets and Liabilities"* under the Representation of the People (Conduct of Election) Rules, 1977, which have been made by the E.C.P. in exercise of the powers conferred under Section 107 of R.O.P.A.

31. Section 12(2)(f) of R.O.P.A. requires every nomination paper to be accompanied by a candidate's statement of assets and liabilities *"and those of his spouse and dependents on the prescribed form".* Such prescribed form finds its place in the Schedule to Representation of the People (Conduct of Election) Rules, 1977. Now, unlike Section 12(2)(f) of R.O.P.A., there is no requirement in Rule 12(4) of the 2015 Rules for a declaration of the assets and liabilities of the candidate's spouse and dependents. Had the legislature or the rule-making authority intended to require a candidate for the local government elections to make a declaration as to the assets and liabilities of the candidate's spouse and dependents, Rule 12(4) of the 2015 Rules would have been couched in the same or similar terms as Section 12(2)(f) of R.O.P.A. This the legislature or the rule making authority consciously did not do while making the 2015 Rules. This conscious omission cannot be supplied by making the provisions of Section 12(2)(f) of R.O.P.A., applicable to elections under the I.C.T.-L.G. Act.

32. Given the apparent conflict in the requirement as to the declaration of assets in Rule 12(4) of the 2015 Rules and Form-XVII, I am of the view that Rule 12(4) being a substantive provision will prevail over Form-XVII, which finds its place in the Schedule to the said Rules. In the case of District Bar Association, Rawalpindi Vs. Federation of Pakistan (PLD 2015 S.C. 401), it has been held that a schedule to a statute was always subservient to the substantive provisions of the law and could not operate independently. It may be reemphasized that had it been the intention of legislature that a candidate must declare his own assets as well as those of his spouse, the language of Section 12(2)(f) of R.O.P.A. could have been adopted in Rule 12(4). Unlike Rule 12(4) of the 2015 Rules, Section 12(2)(f) of R.O.P.A. requires a candidate to declare in his nomination papers *"a statement of his assets and liabilities and those of his spouse and dependents on the prescribed form as on the preceding thirtieth day of June".* Accordingly, I am of the view that respondent No.1 did not commit any mis-declaration by not mentioning his spouses' and dependents' assets and liabilities in his nomination papers.

33. Section 17(3) of the I.C.T.-L.G. Act cannot be interpreted such that provisions of the I.C.T.-L.G. Act are overridden in their entirety by the provisions of R.O.P.A. It is only when a certain scenario or process or eventuality is not specifically provided for in the I.C.T.-L.G. Act or the 2015 Rules that the provisions of R.O.P.A. will apply "*for the purpose of election*" to the Local Governments by dint of Section 17(3) of the I.C.T.-L.G. Act. An appeal under the I.C.T.-L.G. Act is filed under Section 45 thereof, whereas an appeal under R.O.P.A. is filed under Section 67(3) thereof. Under Section 67(3) of R.O.P.A. an appeal lies to the Hon'ble Supreme Court, whereas under Section 45 of I.C.T.-L.G. Act, an appeal lies before the High Court. Under Section 37(2) of the I.C.T.-L.G. Act, an election petition is to be filed directly before an Election Tribunal, whereas under Section 53 of R.O.P.A., an election petition is not filed directly before an Election Tribunal but before the Election

Commission, which transmits it to an Election Tribunal. The grounds on which the election of a returned candidate under the I.C.T.-L.G. Act can be questioned are different from the grounds under which an election can be questioned under the provisions of R.O.P.A. The meaning given to *"corrupt practice"* in Section 78 of R.O.P.A. is different from the meaning given to *"corrupt practice"* in Section 46 of the I.C.T.-L.G. Act. There is no provision in the I.C.T.-L.G. Act or the 2015 Rules which gives the learned Election Tribunal *suo moto* powers, like the ones given by Section 76-A of R.O.P.A. to the learned Election Tribunal to, on its own motion, take cognizance of an incorrect statement of assets and liabilities of a candidate. There is no denying the fact that the provisions of R.O.P.A. are different from the those of the I.C.T.-L.G. Act on several subjects or issues. Could by virtue of Section 17(3) of the I.C.T.-L.G. Act, could the provisions of the I.C.T.-L.G. Act which are inconsistent with those of R.O.P.A. be permitted to be overridden by provisions of R.O.P.A.? I would say, certainly not.

34. Section 78(3)(d) of R.O.P.A. provides that a person shall be guilty of corrupt practice if he makes a false statement or submits a false or incorrect declaration in respect of his assets and liabilities. Section 99(IA)(l) of R.O.P.A. provides that a person shall be disqualified from being elected as, and from being, a member of an Assembly *"if he is found guilty of corrupt or illegal practice"* under any law for the time being in force, unless a period of five years has elapsed from the date on which that order takes effect.

35. Under the scheme of R.O.P A., a candidate who makes a false statement or submits a false or incorrect declaration in respect of his assets and liabilities can be found guilty of corrupt practice by the learned Election Tribunal and can consequently be disqualified from being elected as, and from being, a member of an Assembly. Now, it needs to be determined whether under the scheme of the I.C.T.-L.G. Act or the 2015 Rules, a candidate making such a false statement or incorrect declaration could be disqualified. *"Corrupt practice"*

has not been defined in the definition section of either in the I.C.T.-L.G. Act or the 2015 Rules. However, Section 46 of the I.C.T.-L.G. Act reads thus:-

> ***"46. Corrupt practice.-A person guilty of bribery, personating or undue influence shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to one hundred thousand rupees or with both."***

36. It is an admitted position that respondents No.1 was not alleged to have been guilty of bribery, personation or undue influence. Respondents No.1 was also not alleged to have committed any *"illegal practice"* in terms of Section 50 of the I.C.T.-L.G. Act. Although the I.C.T.-L.G. Act and the 2015 Rules do not contain provisions in *pari materia* to Sections 78(3)(d), 76 and 99(IA)(l) of R.O.P.A., Section 41(a) of the I.C.T.-L.G. Act provides that the learned Election Tribunal shall declare the election of a returned candidate to be void if it is satisfied that the nomination of the returned candidate was invalid. Concealment of assets in the statement as to the declaration of assets filed by the returned candidate along with his nomination papers would, in my view, render the nomination of such a candidate invalid. Furthermore, Rule 14(3)(c) of the 2015 Rules empowers the Returning Officer to reject the nomination papers of a candidate if he is satisfied that any provision of Rule 12 of the 2015 Rules had not been complied with. As mentioned above, Rule 12(4) requires the nomination papers of a candidate to be accompanied with a declaration of his assets and liabilities. This being so, it needs to be determined whether respondent No.1, in his statement as to the declaration of his assets, did not make a disclosure of his assets or concealed the same.

37. Respondent No.1's assets which as per the appellants' pleadings in their election petition were not disclosed in the statement filed by respondent No.1 along with his nomination papers were as under:-

> ***"i. Respondent No.1's share in plot measuring 2 marlas and 96 square feet purchased by respondent No.1's father and uncle through registered sale deed dated 01.01.1990.***

ii. ***Respondent No.1's share in the three shops purchased by respondent No.1's father and uncle through registered sale deed dated 08.04.1990.***

iii. ***Property inherited by respondent No.1 from his father through inheritance mutation sanctioned on 29.01.1999.***

iv. ***Usman Arcade situated on main Fateh Jang Road, District Rawalpindi."***

38. Other than the above, the appellants, in their election petition, had pleaded that respondent No.1, in his nomination papers, had declared his share in 70 plots in Jammu & Kashmir Cooperative Housing Society to be 1/10th, which according to the appellants, came to 7 plots but respondent No.1 in fact had 8 plots. It was also pleaded that in the earlier nomination papers, respondent No.1 had declared his share in the said plots to be 1/11th. The appellants, in their evidence, produced registered sale deeds as Exh.F(1-8), Exh.PG(1-6), Bank Statements Exh.PA(1-2), Exh.PB(1-3), Exh.PC(1-2), Exh.PD(1-2), Exh.PE(1-19), periodical Record of Rights Revenue Estate Tarnol for the years 2004-05, Exh.PG(1-16), copy of Assessment Register issued by Excise and Taxation Officer, Property Tax, Rawalpindi Exh.PH, Inheritance mutation of Ghulam Dastagir deceased Mark-A(1-2), Inheritance mutation of Ghulam Fareed deceased Mark-B, and Jammu and Kashmir Cooperative Housing Society allotment letters photocopy Mark-C(1-11). No document was brought by the appellant to show that respondent No.1 was the owner of Usman Arcade.

39. Learned counsel for respondents No.1 and 2 had contended before this Court as well as the learned Election Tribunal that inherited property of the said respondents does not fall within the definition of assets. It was further asserted that the said respondents had not made an intentional mis-description of assets or omission to declare assets. The impugned order dated 07.10.2016 also shows that a submission had been made on behalf the respondents that *"inherited property is quite different from the property self-acquired".* It was also submitted before the learned Election Tribunal that respondent No.1 and his wife had not purchased any property and that the property was given to them through inheritance

and if any property was purchased by them, it was with the consideration from the inherited property.

40. Under Rule 12(4) of the 2015 Rules, a candidate is required to make a disclosure as to his assets. The law does not absolve a candidate from making a disclosure as to assets which have been inherited by him. All properties whether purchased by a candidate or inherited by him or gifted to him, form a part of his assets, which he is under an obligation to disclose in his statement along with his nomination papers. A candidate is also under an obligation to disclose his share in the property jointly owned by him. The non-mention of the assets inherited by a candidate would be tantamount to a mis-declaration.

41. It ought to be borne in mind that respondent No.1, in his nomination papers, gave a declaration as to ownership of 1/10th share in 160 shops at Tarnol valuing Rs.18,00,00,000/-, 1/10th share in 70 plots in Jammu & Kashmir Cooperative Housing Society valuing Rs.50,00,00,000/-, 1/10th share in 1070 *kanals* of land at Tarnol valuing Rs.30,00,00,000/- and half share in 1350 *kanals* of land at Fateh Jang and Taxila valuing Rs.15,00,00,000/-. It was also declared that respondent No.1's owned prize bonds worth Rs.1,00,00,000/-, 30 *tolas* of gold, one vehicle (Toyota KG-786-2007), Rs.95,00,000/- as proceeds from the sale of land, furniture and fittings worth Rs.3,00,000/-. The appellant also made a disclosure as to his five bank accounts with deposits of more than Rs.17,00,000/-.

42. Respondent No.1, in his cross-examination, clearly deposed that compensation in the form of 121 plots had been given to respondent No.1's whole family by the Jammu & Kashmir Cooperative Housing Society. He could not tell as to the number of plots that were allotted to him individually. He had clearly deposed that *"[t]he plots were allotted to us as a joint property",* and that *"the allotment letter was issued jointly and not individually".* The said testimony appears to be in consonance with the declaration of his assets in the statement

filed along with his nomination papers, which mention his share in immovable property.

43. Be that as it may, there is no admission on the part of respondent No.1 as to the non-disclosure of the assets inherited by him in his nomination papers. Heavy onus lies on the election petitioner to provide through cogent evidence that the returned candidate was the owner of the property which was not declared in the statement of assets filed along with the nomination papers. The appellants in the instant case did not produce any document to show that respondent No.1 was the owner of the property which was purchased by his father and uncle in the year 1990 or that at present a share in the said property vested in respondent No.1. As regards the plots in the Jammu and Kashmir Society, it is well settled that documents have to be formally exhibited in evidence and a 'Mark' has no evidentiary value. Reference in this regard may be made to the law laid down in the case of State Life Insurance Corporation of Pakistan etc Vs. Javaid Iqbal (2011 SCMR 1013).

44. In view of the above, the instant appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2019

(JUDGE)

APPROVED FOR REPORTING

*Qamar Khan**