

IN THE SUPREME COURT OF PAKISTAN
(REVIEW JURISDICTION)

PRESENT:

MR. JUSTICE MIAN SAQIB NISAR, HCJ
MR. JUSTICE GULZAR AHMED
MR. JUSTICE MUNIB AKHTAR

CIVIL REVIEW PETITION NO. 420 OF 2013 IN
CIVIL APPEAL NO. 669-L OF 2013

(To review the judgment dated 28.10.2013 passed by this Court in Civil Appeal
No. 669-L/2013)

Mst. Sumaira Malik

... Petitioner

vs.

Malik Umar Aslam Awan and others

... Respondents

For the Petitioner: Mr. Mubeen Uddin Qazi, ASC

For the Respondents: Mr. Hamid Khan, Sr. ASC

For the Federation: Mr. Asim Mansoor, DAG

Date of Hearing: 09.06.2018

ORDER

Munib Akhtar, J.: The petitioner seeks review of the judgment dated 28.10.2013 in CA 669-L/2013. (The judgment is reported as *Malik Umar Aslam v. Mrs. Sumaira Malik and others* 2014 SCMR 45.) Briefly stated, the facts are that the petitioner and the respondent No. 1 were candidates in the contest for NA-69 (Khusab-I) in the General Election of 2008. The petitioner was the candidate returned by the constituency. The respondent No. 1 challenged her election by means of an election petition. Various grounds were taken of which only one is relevant for present purposes, namely that the petitioner did not have a graduate degree, which was then a mandatory requirement for all candidates. The B.A. degree, from Punjab University, that the petitioner presented along with her nomination papers was challenged as fake, and ultimately the ground resolved into an allegation that it had been obtained by impersonation, i.e., that some person other than the petitioner had sat for the examination. It may be noted that the degree was in fact obtained in 2002 in the period prior to the General Election held in that year, when the requirement of being a graduate was introduced for the first time. The petitioner and the respondent No. 1 had even then been opposing candidates for the same constituency and the former had won the seat. The respondent No. 1 had challenged the petitioner's election by means of an election petition, which was dismissed on technical grounds. The respondent No. 1's

appeal to this Court had failed (the judgment being reported at PLD 2007 SC 362).

2. Reverting to the case at hand, the respondent No. 1's election petition was ultimately dismissed by the Election Tribunal by judgment dated 05.04.2013 (the decision being reported at 2013 CLC 984). The learned Tribunal concluded, inter alia, that no case of obtaining a degree by impersonation had been made out. The respondent No. 1 appealed to this Court which reversed, and by means of the Judgment under review held that the degree was indeed obtained in such manner. Resultantly the petitioner's election was set aside and it was also declared that she was disqualified from being elected as a member of Parliament. This led to the filing of the present review petition.

3. It is clear from the judgment under review that the Court concluded that the allegation of impersonation stood established on two grounds. Firstly, the Court itself examined and compared the two photographs that formed part of the University's record (being those affixed to the application form that had been submitted for taking the B.A examination and the "admit card", i.e., Roll No. Slip, that was issued for such purpose) with the petitioner's photographs on her CNIC (as well as earlier, manually prepared, identity cards) and an image on an election poster used by her. On such visual comparison, the Court concluded that the photographs in the University record were different from those on the CNIC and the election poster. Secondly, the Court itself examined and compared the signatures appearing in the University record with the petitioner's signature on her identity card as well as with a sample of the petitioner's handwriting. Again on a visual comparison, the Court concluded that they were discrepant. The key paragraphs of the judgment under review, where these conclusions were arrived at, are as follows (pp. 69-70):

"40. A comparison of all the three I.D. Cards of respondent No.1 with the naked eye makes it abundantly clear that her photograph on I.D. Card showing her date birth to be 1964 bearing No.128-64-180716 is identical with the photographs on Admission Form as well as Roll No. Slip. Whereas, there is quite a noticeable difference between the above said photographs and the photographs appearing on her manually prepared I.D. Card bearing No.128-63-180716 as well as her computerized I.D. Card bearing No.61101-0176307-6 wherein again her date of birth has been shown as 1963. Similar is the position of her photographs appearing in the newspaper filed by the appellant. Likewise, photograph appearing on posters used for the election campaign is not identical with the photographs appearing on the Admission Form and Roll No. Slip as well as I.D. Card showing her date of birth to be 1964.

41. Now turning towards the handwriting, it is to be noted that she had allegedly given sample of her handwriting, extract of a para, which has

been produced before this Court. A plain comparison of the signature on the I.D. Card bearing No.128-64-180716, handwritten samples and the signatures on the Admission Form clearly indicates that there is lot of difference. We consider it appropriate to hold, with due deference, that the learned Tribunal had a duty to compare all these documents in juxtaposition to ascertain whether respondent No.1 appeared in the examination. Respondent No. 1's oral evidence has also not supported her contention as after going through her cross-examination one can conveniently note that she failed to furnish correct version of her stance, which she has taken before the Tribunal as well as before the Election Tribunal. Therefore, on deep appreciation of evidence, both documentary and oral, made by the parties and also going through the judgment of the learned Tribunal we have no option except to hold that University authorities failed to arrive at a correct conclusion in view of the evidence produced before them. It is clear that in order to make herself qualified for contesting elections in the year 2002 she arranged a B.A. degree by way of impersonation to fulfill the requirements of Article 8-A of the Conduct of General Election Order, 2002. Otherwise, after having passed Intermediate in the year 1981 there was no necessity for her to obtain B.A. degree.”

4. In the review petition, on 09.12.2015 and 13.01.2016, orders were made for a forensic examination of the petitioner's photographs as referred to above by the Punjab Forensic Science Agency (“Agency”) (a statutory body created under the Punjab Forensic Science Agency Act, 2007). The petitioner duly appeared before the Agency, which compared the two photographs appearing in the University record with the petitioner's photograph in the NADRA database (i.e., in relation to the CNIC) as well as a photograph of the petitioner taken by the Agency itself at its facility. The Agency's report was placed before the Court on 16.02.2016. According to this report, the Agency concluded that all the photographs were of the same person, i.e., of the petitioner. Thus, in particular, (as per the Agency's findings) the photographs appearing in the University record of the person who had appeared for the B.A examination in 2002 were of the petitioner. The respondent No. 1 filed objections to the Agency's report. The petitioner filed a reply to the said objections.

5. Before us learned counsel for the petitioner, narrating the facts substantially as above, submitted that a case for review had been made out. It was submitted that the Agency's report conclusively established that the B.A degree had not been obtained by any impersonation since the photographs in the University record had been found to be those of the petitioner herself. It was the petitioner who had sat for the examination in 2002 and had obtained a valid B.A. degree. It was submitted that the Court had come to an erroneous conclusion on its own examination and visual comparison of the record, which (it was respectfully submitted) ought not to have been done. The Court ought to have referred the matter for expert consideration. Thus, there was a clear error apparent on the face of the record, and the judgment under review merited being set aside

and the order of the Election Tribunal restored. Learned counsel for the respondent No. 1 submitted that no ground for review was made out. The Agency's report was dishonest and had been wrongfully procured by the petitioner. No reliance could be placed on such a report. The Court had full powers to itself carry out a visual comparison of both the photographs and the signatures. In this regard reference was made to Article 84 of the Qanun e Shahadat Order, 1984 ("QSO"), which was also relied upon in the judgment under review (at para 37, pg. 69). It was prayed that the review petition be dismissed.

6. After having heard learned counsel for the parties, we concluded that the review ought to be allowed. We begin by referring to a point of fundamental importance, namely, the standard of proof applicable in election matters. The law in this regard is well settled, based on judgments of this Court going back several decades. We may note that a specific query in this regard was put to learned counsel for respondent No. 1 during the course of the hearing. The position was recently reaffirmed in *Muhammad Siddique Baloch v. Jehangir Khan Tareen and others* PLD 2016 SC 97, from which the following passages are relevant:

"15. The law regarding the quality of evidence necessary to prove an allegation of corrupt and illegal practices committed by a candidate during his election is by now well settled.... In view of the severe consequences following the proof of corrupt and illegal practices in particular by a returned candidate, different pronouncements by this Court adopt a cautious stance towards a defending incumbent of elected office. The earliest case on the subject is *Muhammad Saeed vs. Election Petitions Tribunal, West Pakistan, etc.* (PLD 1957 SC 91) which holds that each ingredient of the misdemeanor of corrupt or illegal practices must be affirmatively proved by direct or circumstantial evidence. Circumstantial evidence is to be believed if all reasonable hypotheses which are consistent with the non-commission of corrupt or illegal practices have been excluded. The said rule has been reiterated with approval in *Muhammad Yusuf vs. S.M. Ayub* (PLD 1973 SC 160) and in *Muhammad Afzal vs. Muhammad Altaf Hussain* (1986 SCMR 1736)." (pp. 111-2)

"29. At this juncture, it is important to emphasize that in cases involving a finding of fact about the disqualification of a returned candidate in election matters, such finding must be based on affirmative evidence and not on presumptions, inferences and surmises. That does not mean that proceedings in an election petition before an Election Tribunal are strictly criminal proceedings. It is settled law that even in civil proceedings, a finding of fact must be based on positive and affirmative evidence. This requirement rests in the basic principles of the Qanun-e-Shahadat Order, 1984 and is articulated in *Allah Din vs. Habib* (PLD 1982 SC 465). For that reason and the serious consequences that follow a finding of disqualification under Article 62(1)(f) of the Constitution, an additional evidentiary safeguard is adopted by the Court, namely, that any reasonable hypothesis available in the recorded evidence to avoid the disqualification of the returned candidate ought to be adopted by the Court of law. The foregoing safeguards have already been laid down in relation to the proof of corrupt practice by a candidate in an election. Section 78(3)(d) of the

ROPA treats a false statement by a candidate about his educational qualification to be a corrupt practice.

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

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

31. A case directly pertaining to disqualification of a returned candidate was heard by this Court in Mohammad Yusuf's case (PLD 1973 SC 160) wherein whilst adopting the view taken in Muhammad Saeed's case (PLD 1957 SC 91) this Court has observed that finding of disqualification must be based on positive evidence and should not be rendered inferentially on mere surmises; that since a disqualification was penal in nature, therefore, the terms thereof were subject to strict interpretation; and the benefit of doubt was to be extended in favour of a returned candidate. The later judgments of this Court rendered in Saeed Hassan's case (PLD 1976 SC 6) and Muhammad Afzal's case (1986 SCMR 1736) approve the principles enunciated in the afore-noted two judgments.” (pp. 119-20)

7. In our view, the foregoing passages encapsulate the bedrock principles that apply in relation to the standard of proof required in election matters. It will be seen that the standard is much higher than the well-known civil standard (balance of probabilities) though short of the criminal standard (beyond reasonable doubt). However, one thing is clear. If there be a (notional) halfway point between the civil and criminal standards, the standard laid down for election matters is well above and beyond that. Any evidence tendered in an election matter must be considered and “appreciated” by adhering to this standard, and not otherwise. Applying the correct standard of proof is crucial and goes to the very root of the decision. This brings us to the nub of the matter, i.e., the visual examination by the Court itself of the photographs and the signatures. As noted, in this regard reference was made in the judgment under review to Article 84 of the QSO in para 37, where three earlier decisions of the Court were also cited. With respect, all three decisions were in relation to civil matters, where the standard of proof is substantively different. Had the Court been properly assisted, and the record examined in the perspective of the requisite standard, we are in no doubt that the matter would have been referred for expert consideration and analysis. Once such report was received, then the totality of the record would have been dealt with by applying the standard of proof required of election matters. That situation has now come about. With respect, the objections taken to

the Agency's report by learned counsel for respondent No. 1 are not at all convincing. The report unequivocally concludes that all the photographs are those of the petitioner. Most crucially, that includes the photographs taken from the University record in relation to the B.A degree. That at once puts paid to the respondent No. 1's case that the degree was obtained by impersonation. No other conclusion is possible on an application of the requisite standard.

8. Insofar as Article 84 is concerned, we are of the view that keeping in mind the requisite standard of proof it is unsafe for the Court (which would here include an election tribunal) to itself carry out a visual examination and comparison of the record. In election matters, if at all such an exercise has to be carried out, it must be referred to expert opinion (which would here include the opinion of any relevant regulatory body or authority such as NADRA). The totality of the evidence must be considered only while taking such report into account and applying the requisite standard. This is however subject to one exception, namely that if the result of the Court's own examination and comparison would be in favor of the returned candidate then such an exercise may be permissible. This exception is consistent with, and indeed an aspect and application of, the requisite standard which, as the passages cited above establish, operates strongly in favor of the returned candidate. In the present case therefore, the recourse had by the Court to Article 84 was, with respect, contrary to the dictates of the requisite standard. Even if the error could be regarded as being *sub silentio* it was nonetheless so fundamental and had effect at such a basic level in, and on, the facts and circumstances of the case that it amounted, within the meaning of law, to an error apparent on the face of the record.

9. Before concluding, a word of caution may be added. Nothing in this decision should be regarded as an invitation to disappointed litigants allowing them to seek to reopen decided matters by trawling through the record and presenting this or that conclusion or observation in the judgment sought to be reviewed as being contrary to some principle of law presented as bedrock. Bedrock principles in respect of any area or branch of the law are those for which there is clear and consistent authority, invariably at the highest level and usually of long standing, which are recognized as such. Or, a bedrock principle is one that is accepted as part of the ABC's of that branch of the law. Even if a bedrock principle has been correctly identified, its putative non- or mis-application in the judgment sought to be reviewed must operate and have effect at a fundamental and basic level in the facts and circumstances of the case, and such that the only possible outcome, had the principle been correctly appreciated and applied, would have been a decision contrary to the one actually arrived at.

10. For the foregoing reasons, the review was allowed and the judgment under review was set aside. It follows from what has been said herein above that the appeal, CA 669-L/2013, stands dismissed. The short order made on 09.06.2018 was as follows:

“For the reasons to be recorded later, this review petition is allowed, the judgment under review is set aside and the petitioner shall be entitled to file her nomination papers, if she intends to contest in any of the future elections including the general elections to be held in 2018.”

CHIEF JUSTICE

JUDGE

JUDGE

Karachi, the
9th of June, 2018
Approved For Reporting
Saeed Aslam/*