

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

Mr. Justice Shahid Waheed
Mr. Justice Irfan Saadat Khan
Mr. Justice Aqeel Ahmed Abbasi

Civil Appeal No. 1357 of 2024

Against the order dated 12.09.2024 of the
Election Tribunal, Balochistan, Quetta passed
in EP 07/2024

Mir Hammal Khan

...Appellant(s)

Versus

*Election Commission of Pakistan, thr. Secretary,
Islamabad and others*

...Respondent(s)

For the Appellant(s): Mr. Muhammad Masood Khan, ASC

For ECP: Mr. Muhammad Arshad, Spl. Sec. Law
Mr. Falak Sher, Asst. Dir. Law

Respondent No.1-3: N.R.

For respondent No.4: Mr. Kamran Murtaza, Sr. ASC
Mr. Amanullah Kanrani, ASC
Syed Rifaqat Hussain Shah, AOR

For Respondents 5-18: Nemo

Date of Hearing: 20.11.2024

ORDER

Irfan Saadat Khan, J.- This civil appeal has been filed against the judgment dated 12.09.2024 passed by the Election Tribunal Balochistan, Quetta (hereinafter referred to as “**ETB**”) in Election Petition No. 07 of 2024, whereby the election petition filed by the present appellant, under Section 139 of the Election Act, 2017 (hereinafter referred to as “**Act of 2017**”) was dismissed.

2. Briefly stating the facts of the case, the general elections in the country took place on 8th February 2024 in which, the present appellant, along with fifteen other candidates, contested from PB-28 Kech-IV (having 59742 registered voters). Mr. Muhammad Asghar Rind, who is Respondent No.4 in the present appeal, secured 5450 votes (with a lead of 783 votes over the votes cast in favour of the present appellant) and was thus declared a successful candidate, vide

Notification No.F.2(12)/2024-Cord dated 22nd February 2024 issued by the Election Commission of Pakistan (hereinafter referred to as “ECP”).

3. The appellant, however, was not satisfied with the result announced by the ECP and, thereafter, challenged the said Notification issued by the ECP before the ETB by filing an election petition, primarily on the ground of illegal and corrupt practices adopted during the polling process by the Respondent No.4. The contention of the appellant before the ETB, and now before us is that, the Respondent No.4 (who was Respondent No.1 before the ETB) with the connivance of the polling staff posted at polling stations No.21,¹ 24,² and 39,³ managed to poll fake and bogus votes, which resulted in Respondent No.4 winning the election. According to the appellant the winning of the election by the Respondent No.4 was illegal, uncalled for, void and unlawful, hence, the said result may be nullified and the appellant may be declared as successful or in the alternative, re-polling may be conducted in the above referred three polling stations. The matter proceeded before the ETB, which after detailed deliberations, vide the impugned order dated 12th September 2024, dismissed the election petition filed by the present appellant.

4. The matter was initially taken up on 10th October 2024, on which date Mr. Kamran Murtaza, learned Sr. ASC appeared on behalf of the Respondent No.4 and waived notice on his behalf. On the said date notices were directed to be issued to the ECP, as well as, the other respondents. The matter was then taken up on 23rd October 2024, when the office was directed to repeat notice on rest of the respondents; as Mr. Kamran Murtaza, counsel for the Respondent No.4, was in attendance and had already accepted the notice on his behalf. It was also noted on the said date that the record of the case, had been received, hence, the learned counsel for the parties would go through the same and would assist the Court on the basis of the original record of the ETB by referring to the page marking number from the said record and, thereafter, the matter was adjourned for two weeks.

5. Mr. Muhammad Masood Khan, ASC appeared on behalf of the appellant and has vehemently argued that the Respondent No.4 managed to manipulate the polling results with the connivance of the polling staff posted at the said

¹ Government Boys Primary School Dazain

² Government Boys High School Tump Primary Section for Male-II

³ Government Girls High School Nazirabad/Nokiabad (For Females)

three polling stations. He argued, that since corrupt and illegal practices took place during the election process, therefore, it could not be said that it was conducted in a transparent manner. Hence, he prayed that either fresh elections may be re-administered in the said constituency or in the alternative, re-polling may be organized, at least, in these three polling stations, namely, No.21, 24 and 39 (mentioned supra). According to the learned counsel the polling was a managed one as the total registered voters in these three polling stations were; 4265 whereas the total votes cast there were 3247, which makes the turnout to be more than 70% of the total registered voters of these three polling stations. The learned counsel further stressed that it is beyond comprehension for the turnout of the voters in these three polling stations to be more than 70% when compared with the rest of the 47 polling stations of the same constituency, which as per him on the face of it was unusual and unnatural. The learned counsel urged that in the past, the turnout in these three polling stations never stood more than 5% of the registered voters in the same, which smacks of corrupt and illegal practices on the part of the Respondent No.4.

6. The learned counsel further stated that if Form 45 and 46 of these three constituencies are examined, it would reveal that the original results have been changed/manipulated with the connivance of the polling staff by the polling agents of the Respondent No.4, with the reverberation that the final result declared on Form-47 has been doctored/tampered. The learned counsel contended that the ETB was also not correct in observing that only the photocopies of the affidavits were presented to the ETB, he argued that since cross-examination was made on the basis of those photocopies hence the appeal ought not to have been dismissed on account of this technicality, which aspect has been ignored by the ETB. The learned counsel finally stressed that the order dated 12th September 2024 needs to be vacated and the ECP may be directed to conduct fresh polling either in the whole constituency or at least in these three polling stations.

7. Mr. Kamran Murtaza, Sr. ASC, Mr. Amanullah Kanrani, ASC and Syed Rifaqat Hussain Shah, AOR appeared on behalf of the Respondent No.4 and have vehemently opposed the submissions made by the learned counsel for the appellant. The learned counsel stated that the parameters as enshrined under Section 144 and 145 of the Act of 2017 were not fulfilled by the present appellant. The learned counsel submitted that under Section 144(2) of the Act of 2017, it is clearly mentioned that a complete list of witnesses and their statement on

affidavits, shall be attached with the petition. They stressed that it is an admitted position that these statements on original affidavits were never produced by the appellant, which was a mandatory requirement of law. The learned counsel stated that the witnesses were examined solely on the basis of verified photocopies of the affidavits, as the original affidavits were never produced or placed on record rather only photocopies of the same were made available. The learned counsel stressed that even if the witnesses were cross-examined on the basis of photocopies of the affidavits the same would not cure the legal deficiency which according to them was a mandatory requirement of law. The learned counsel further stated that an elaborate discussion regarding this aspect has been made by the ETB in para 18-19 of the impugned judgment.

8. The learned counsel further argued that the officials/witnesses appearing before the ETB not only produced complete record but also successfully went through the rigors of cross-examination, hence, it was not established on the part of the appellant that any corrupt or illegal practices were made by these officials/witnesses. They, in this regard, invited our attention to para 12 to 17 of the impugned judgment.

9. The learned counsel submitted that the votes in the three alleged polling stations were counted in the presence of the polling agents of all the candidates and interestingly no candidate, except the present appellant, has come before this Court to support the version of the present appellant, which amply proves that no corrupt or illegal practice took place during the election process in the entire constituency including the alleged three polling stations. They further stated that it is worthwhile to note that no Presiding Officer of the said polling stations has ever made any written complaint about any alleged corrupt or illegal practice being made in respective polling stations. They argued that the witnesses have affirmed that the polling took place in a congenial atmosphere and no untoward or unhappy incident took place before, during or after the polling in the respective polling stations, which according to them continued peacefully uptill the allotted time of 05:00 pm and thereafter, counting process of the votes started in the presence of the polling agents of the respective candidates.

10. The learned counsel finally submitted that the decision of the ETB is based on factual as well as legal aspects of the *lis* before it and no perversity has been pointed out by the learned counsel appearing for the appellant in the said order

of the ETB. It was thus prayed that this appeal, being bereft of any merit, may therefore be dismissed with cost.

11. Mr. Muhammad Arshad, Special Secretary Law and Mr. Falak Sher, Asst. Director Law appeared on behalf of the ECP and have adopted the arguments of Mr. Kamran Murtaza, Sr. ASC, thereby praying for dismissal of the instant civil appeal.

12. Nobody has appeared on behalf of the Respondents No.5 to 18, despite service of notices.

13. We have heard all the learned counsel for the parties at considerable length and have also gone through the impugned judgment of the ETB along with the record of the case and the law on the subject.

14. From the objections raised by the learned counsel appearing on behalf of the appellant two propositions emerged: Firstly, that the elections in the said constituency were not conducted in a transparent manner and smacks of corrupt and illegal practices on the part of the Respondent No.4 and secondly, the original affidavits were not produced which was a mandatory requirement of the law.

15. Dealing first with the issue of corrupt and illegal practice, it is a settled proposition of law that whenever a charge of illegal and corrupt practices is levelled, the onus is always on the person who alleges it. The person alleging corrupt and illegal practices has to prove the allegations with cogent material/evidence, be it direct or circumstantial. It has to be pointed out with strong, weighty and plausible grounds that the exercise carried out was false and while levelling such charges there is no room of any intendment or hypothesis. As per Justice A.R. Cornelius in the case of Muhammad Saeed⁴ "A charge of a corrupt practice is a *quasi-criminal* charge". An extract from the said judgment is reproduced here-in-below:

"A charge of a corrupt practice is a quasi-criminal charge and, as the Tribunal has stated in its report, the great volume of authority in the corpus, of election law is to the effect that such an allegation must be treated, for

⁴ Muhammad Saeed versus Election Petitions Tribunal, West Pakistan and others (PLD 1957 SC (Pak.) 91) followed by Khan Muhammad Yousaf Khan Khattak versus S.M. Ayub and 2 others (PLD 1973 SC 160)

the purposes of evidence, on the principles applicable to the trial of criminal charges. One such principle is that in a case of doubt raised upon the evidence, the benefit of such doubt must go to the accused person”.

It was also held in the said judgment that benefit of doubt in such eventuality should go to the accused. Since the allegation of corrupt and illegal practices is a criminal charge the standard of proving the same, in our view, has to be quite credible in every aspect and respect and should be of substantial well founded standard. Bald and unproved allegations, in our view, do not stand the test of a valid ground of allegation until and unless proved beyond any shadow of doubt. The decision given in the case of Muhamamd Saeed (supra) was followed in a number of decisions subsequently by this Court and in the decision given in the case of Usman Dar⁵ an elaborate discussion is available at para-17 of the said judgment.

“Reference may be made to Muhammad Saeed v. Election Petitions Tribunal, West Pakistan, etc. (PLD 1957 SC (Pak.) 91) wherein it was held that, “The law relating to the trial of elections petition, though volumes have been written on it, in so far as it is relevant to the present case, is so simple that it can be summed up in one sentence, namely, where an election is sought to be set aside on the ground of commission of corrupt practices, the party, challenging its validity must specify in the petition the corrupt practices committed, giving in the list attached to the petition or in his statement before the settlement of issues full particulars of those corrupt practices; that no fresh charge or instance of a corrupt practice can be added at the trial, that the burden of proof of corrupt practices is on the petitioner; that the evidence in proof of such practices must be restricted to the charges or instances mentioned in the petition and the particulars; 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”. Reference may also be made to the case of Hafeezuddin v. Abdul Razzaq (PLD 2016 Supreme Court 79) in which this Court held that, ‘Before we embark upon an analysis of the evidence and a determination about the correctness or otherwise of the findings of the learned Tribunal, it is pertinent to mention that the rules of proof

⁵ Usman Dar versus Khawaja Muhammad Asif (2017 SCMR 292)

for the grounds challenging the election which are founded on corrupt and illegal practices are quite strict and stringent and the allegations in this regard must be absolutely proved through positive evidence without accepting any inferences and if there is any doubt, the benefit must go to the person against whom corrupt or illegal practices are being alleged, as held by this Court in the cases reported as Muhammad Saeed and 4 others v. (1) Election Petitions Tribunal, West Pakistan, (2) Mehr Muhammad Arif Khan, (3) Ghulam Haider and (4) West Pakistan Government and others (PLD 1957 SC (Pak.) 91); Mian Jamal Shah v. (1) The Member Election Commission, Government of Pakistan, Lahore, (2) The Returning Officer, Constituency of the National Assembly of Pakistan No. NW-II, Peshawar II, and (3) Khan Nasrullah Khan (PLD 1966 SC 1); Khan Muhammad Yusuf Khan Khattak v. S. M. Ayub and 2 others (PLD 1973 SC 160)".

16. Now if the facts of the present case are examined minutely, it would reveal that as many as nine witnesses appeared in the instant matter, who not only produced the complete record but were also cross-examined by the counsel appearing for the appellant before the ETB and it is apparent from the record that the petitioner has failed to point out a single instance of any result being doctored/tampered, and even before us, the learned counsel has failed to demonstrate any such eventuality of corrupt or illegal practice, as alleged. It is an admitted position that the polling agents of the appellant were present at all the polling stations, including the three alleged polling stations; there was no complaint either by the Presiding Officers or by any other responsible officer associated in the election process in the said constituency which, as stated above, took place in a congenial atmosphere and continued peacefully uptill the allotted time of 05:00 pm. Hence, so far as allegation of the learned counsel with regard to the massive rigging, corrupt and illegal practices, in our view, since has not been proved with credible and convincing grounds, we do not deem it appropriate to interfere with the judgment passed by the ETB which, in our view, has dealt with this issue in an elaborate and articulate manner.

17. Apropos, the issue of non-submission of original affidavits is concerned, this issue too has been quite elaborately discussed by the ETB vide para 18-19 of its judgment which, for the sake of brevity are reproduced here-in-below:

"18. Since, the original affidavits of all witnesses were not produced and exhibited in the Tribunal rather the learned counsel for petitioner has

mainly relied upon the photocopies of their affidavits, while serious objections with regard to admissibility of said photocopies have been taken by the learned counsel for the respondent No.1, while there are series of pronouncements of the Courts that the affidavits should have been exhibited in original and in case if any document cannot be exhibited due to any restrain or bar and reliance has been placed on photocopy of said document, then under such circumstances the original of the said document should have been shown and compared with the photocopy before the Court in order to establish that the said document is in existence, but in the case in hand the affidavits of all the witnesses have neither been exhibited nor were shown for the satisfaction of this Tribunal as well as for the satisfaction of contesting party. Thus, the photocopies of the said affidavits are not proved and it is presumed that the petitioner has not produced any single witness in order to establish the case of rigging in the election process, because under Order XIII, Rule 4 of CPC the marked documents have no legal value and sanctity in the eyes of law and it has remained the consistent view of the superior courts that when a document is not brought on record through witness(s) and is not duly exhibited, the same cannot be taken into consideration by the court. The Hon'ble Supreme Court of Pakistan in the case of Federation of Pakistan through Secretary Ministry of Defence and another v. Jaffar Khan and others, PLD 2010 Supreme Court 604, has held that, "The document which has not been brought on record through witnesses and has not duly exhibited, cannot be taken into consideration by the Court." In the case of State Life Insurance Corporation of Pakistan and another v. Javaid Iqbal, 2011 SCMR 1013, the Hon'ble Apex Court i.e. has held that, "We are not convinced that, such document, which has not been produced and provided in evidence but only "marked" can be taken into account by the Courts as a legal evidence of a fact." Similar law point has been dealt with by the Hon'ble Lahore High Court in the case of Azhar Abbas other vs. Haji Tahir Abhas and another, reported in 2021 CLC 1351, wherein it was held as under:

6. Mere marking of a document as an exhibit would not dispense with requirement of proving the same and the same cannot be exhibited unless it is proved. In the present case the situation remained the same, but the learned Courts below have not considered and dilated upon the requirement of law because admitting photocopy of a document in evidence and reading the same in evidence without observing legal requirements of Article 76 of the Qanun-e-Shahadat Order, 1984 would be illegal. Reliance is placed on Feroz Din and others v. Nawab Khan and others (AIR 1928 Lahore 432) Fazal Muhammad v. Mst. Chohara

and others (1992 SCMR 2182) and Abdul Rehman and another v. Zia-Ul-Haque Makhdoom and others (2012 SCMR 954). Neither authors of the documents nor the witnesses nor such documents in original have been produced in Court for inspection purposes. Thus, such documents, without formal proof, cannot be relied upon; reliance is placed on Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others (PLD 1973 SC 160), but as against this, the learned Courts below placing reliance on such documents have proceeded to pass the impugned judgments and decrees, which cannot be allowed to hold field."

19. *Since, the petitioner has failed to annex and exhibit the original affidavits of the witnesses and only the photocopies of such affidavits were produced and were marked, thus no reliance could be placed upon marked documents until and unless the same are exhibited in the Court or at least the same are shown for perusal of the Court or compared with the photocopy, thus it is presumed that no evidence at all has been produced by the learned counsel for the petitioner to establish the allegations of massive rigging. Even otherwise, the concerned Oath Commissioner, before the oath was administered by the witnesses has also not been produced to establish the contents of the said affidavits and as such, the said affidavits are kept out of consideration. Even otherwise, nothing has come on record on the part of petitioner that as to why such affidavits were not exhibited during trial of the case. Thus, the issues No.2 to 4 are answered in negative and no relief can be granted to the petitioner".*

The requirement of the furnishing affidavits is a mandatory requirement as clearly spelt out under Section 144(2)(a) of the Act of 2017 which stipulates that submission of "complete list of witnesses and their statements on affidavits". The wording used under this section makes it a mandatory requirement that while presenting the election petition some documents, which include the statements on affidavits have to be filed otherwise the said petition would be considered as deficient or lacking and as per sub section 1 of section 145 of the Act of 2017, if provisions under Sections 142, 143 and 144 of the Act of 2017 have not been complied with then the Election Tribunal shall summarily reject the election petition. Though in the case before us, the ETB has not summarily rejected the petition but has drawn adverse inference on non-fulfillment of this mandatory requirement and has categorically observed that by not furnishing the original affidavits the framed issues No.2 and 3, were answered in negative i.e. against the appellant.

18. It is an admitted position that the affidavits were not solemnized-on oath through oath Commissioner rather the same were notarized only. A question in this regard was posed to Mr. Khan though he tried to wriggle out of the situation by stating that it was only a technical lapse, as “marked” or “identified affidavits” were presented on which cross-examinations were duly conducted. However, he conceded that original affidavits were not produced by the appellant. It is again a settled proposition of law that if a document is produced as evidence but was only categorized as “marked” or “identified”, it cannot be considered as valid evidence as mandatory requirements of the law have to be fulfilled and in case of non-compliance the person presenting those documents has to face the brunt of non-compliance ⁶.

19. This Court in the case of Lt. Col. (Rtd.) Ghazanfar Abbas Shah⁷ has categorically observed that if the affidavits filed by a party are flawed in any way and are not verified on oath, it will be considered that the same have not been attested on oath and the election petition is liable to be, *inter alia*, dismissed on this basis alone. Needless to state that there are plethora of judgments on this issue observing that when anything is prescribed to be done in a particular manner, it needs to be done in that manner, otherwise, it will be considered to be *non-est* in the eyes of law⁸.

20. We were able to lay our hands upon the decision given in the case of Amirzada Khan⁹ wherein it was observed that:

“We were amazed to find that instead of original document a photostat copy was exhibited in evidence without the leave of the Trial Court to lead secondary evidence, after the proof of loss or destruction of the original one. Since the respondents did not plead loss or destruction of the original agreement, we would be legally justified in presuming that they are guilty of withholding best available primary evidence”.

⁶ State Life Insurance Corporation of Pakistan and another versus Javaid Iqbal (2011 SCMR 1013)

⁷ Ltd. Col. (Rtd.) Ghazanfar Abbas Shah versus Mehr Khalid Mehmood Sargana (2015 SCMR 1585) also Engr. Iqbal Zafar Jhagra and others versus Khalil ur Rehman and 4 others (2000 SCMR 250)

⁸ Attaullah Khan versus Ali Azam Afridi, (2021 SCMR 1979) also Muhammad Anwar and others versus Mst. Ilyas Begum and other (PLD 2013 SC 255) Malik Umar Aslam versus Sumera Malik (PLD 2007 SC 362)

⁹ Amirzada Khan and others versus Ahmad Noor and others (PLD 2003 SC 410)

In the case of Allah Rakha¹⁰ it was held that:

“The original agreement to sell dated 06.04.1957 executed in favour of Daulat Ali by vendors was admittedly not produced. This fact was noted significantly by the learned Courts below also. As the original agreement to sell executed by Allah Baksh and Ghulam Muhammad in favour of Daulat Ali on 06.04.1957, was not produced, therefore, the suit for specific performance was held to be not competent and rightly so by the learned Courts below.”

21. Therefore, in view of the above uncontroverted facts, we do not find any legal justification to interfere with the judgment passed by the ETB which, in our view, has dealt with the *lis* before it in an eloquent manner. This appeal thus is found to be without any merit, and is therefore, dismissed. There shall, however, be no order as to costs.

22. Above are the reasons of our short order dated 20.11.2024, whereby we have dismissed the instant appeal.

Islamabad
20.11.2024
Naseer

Approved for Reporting

¹⁰ Allah Rakha versus Muhammad Riaz (2009 SCMR 1045)