

**IN THE HIGH COURT OF SINDH, CIRCUIT
COURT, SUKKUR**

1. Election Appeal No.03 of 2017

[Jam Javed Ahmed Khan Dahar Vs. Haji Muhammad Akbar and 14 others]

2. Election Appeal No.09 of 2016

[Hussain Bux and another Vs. Muhammad Azeem Shambhani and 07 others]

3. Election Appeal No.13 of 2016

[Sadaruddin and another Vs. Province of Sindh and 13 others]

4. Election Appeal No.14 of 2016

[Taj Muhammad and another Vs. Province of Sindh and 07 others]

5. Election Appeal No.05 of 2016

[Muhammad Punhal Khan Vs. Abdul Razzaque and 02 others]

6. Election Appeal No.06 of 2016

[Aftab Hussain and another Vs. Muhammad Hassan and 03 others]

Dates of hearing : 27.11.2017, 08.12.2017, 11.12.2017 and
18.12.2017

Date of Decision : 13.02.2018

Appellants : Through M/s. A.R. Faruq Pirzada, Ghulam
Hyder Daoodpoto, Abdul Rasheed Kalwar,
Irfan Ahmed Balouch, Sajjad Muhammad
Zangejo, Irshad Hussain Dharejo and Shabbir
Ali Bozdar, Advocates.

Respondents : Through M/s. Talib Ali Memon, Raja Iftikhar
Hussain, Sohail Ahmed Khoso, Jaffar Ali Shah,
Manzoor Hussain Ansari, Abdul Rasheed
Kalwar, Liaquat Ali Shar, Nisar Ahmed Abro,
DAG, Oshaque Ali Sangi, Assistant Attorney
General, Jamshed Ahmed Faiz, Assistant
Attorney General, Noor Hassan Malik Assistant
Attorney General, Muhammad Aslam Jatoi,
Assistant Attorney General, Mahboob Ali
Wassan, Assistant Advocate General along with

Muhammad Yousif Majeedano Election Officer
Khairpur and Ali Mutahir Shar, State Counsel.

Case law cited by the Appellants' counsel.

1. 2016 SCMR page-750
(*Feroze Ahmed Jamali Vs. Masroor Ahmad Khan Jatoi and others*)
[Masroor Jatoi Case]
2. 2016 SCMR page-722
(*Muhammad Ibrahim Jatoi Vs. Aftab Shaban Mirani and others*)
[Mirani Case]
3. PLD 2015 Lahore page-272
(*Bilal Akbar Bhatti Vs. Election Tribunal and 15 others*)
4. 2015 SCMR page-1186
(*Ch. Zawwar Hussain Vs. Muhammad Aamir Iqbal*)
[Iqbal Case]
5. PLD 1967 SC page-468
(*Niaz Ahmed Vs. Azizuddin and others*)
[Niaz Case]
6. PLD 2005 SC page-600
(*Sardarzada Zafar Abbas and others Vs. Syed Hassan Murtaza and others*) **[Zafar Abbas Case]**
7. PLD 2004 SC page-570
(*Bashir Ahmed Bhanbhan Vs. Shaukat Ali Rajpur*)
8. 2016 CLC page-1931
(*Mirza Abdul Sattar Baig Vs. Pakistan Railway through Divisional Superintendent*).
9. 1994 SCMR page-2232
(*Mrs. Anisa Rehman Vs. P.I.A.C. and another*)
10. 2013 CLC page-291 [Sindh]
(*Mst. Ishrat Jehan and another Vs. Syed Anis-ur-Rehman and another*)
11. 1982 SCMR page-816
(*Ali Muhammad Vs. Muhammad Hayat and others*)
12. 2000 MLD page-1832
(*Dr. Hamid Khan Achakzai Vs. Behram Khan Achakzai*)
13. 2015 S.L.J. page-555 [Sukkur]
(*Haji Gul Muhammad Vs. Mst. Aasia (Deceased) through legal heirs and others*)

Case law relied upon by Respondents' counsel.

1. 2015 SCMR page-1585
(Ghazanfar Abbas Shah Vs. Mehr Khalid Mehmood Sargana)
[Sargana Case]
2. 2015 SCMR page-1698
(Sardar Muhammad Naseem Khan Vs. Returning Officer PP-12)
3. 2014 SCMR page-1477
(Inayatullah Vs. Syed Khursheed Ahmed Shah)
[Khursheed Shah Case]
4. 2014 SCMR page-1015
(Zia ur Rehman Vs. Syed Ahmed Hussain).
5. PLD 2007 SC page-362
(Malik Umar Aslam Vs. Sumera Malik)
6. 2004 CLC page-77
(Abdul Rahim Khoso Vs. Mir Hazar Khan Bijrani)
7. 2003 CLC page-1896
(Mst. Asif Nawaz Fatiana Vs. Valayat Shah)
8. 2017 YLR page-557
(Jaleel Ahmed Vs. Election Commission of Pakistan)

Other Judicial Precedents.

1. **2009 CLC page-1**
(Fakhar Imam Vs. Muhammad Raza Hayat)
[Fakhar Imam Case]
2. **1983 CLC page-2965**
(Muhammad Hanif Vs. District Judge/Election Tribunal Multan)
[Hanif Case]
3. **1982 CLC page-929**
(Sardar Saleem Haider Vs. Muhammad Afzal)
[Sardar Case]
4. **2016 SCMR page-875**
(Muhammad Nawaz Chandio Vs. Muhammad Ismail Rahu)
[Rahu case]

- Law under discussion :**
- (1) Sindh Local Government Act, 2013
(the “**Election Law**”),
 - (2) Sindh Local Councils (Election) Rules, 2015 (the “**Election Rules**”).
 - (3) The Representation of People Act, 1976.
(**ROPA**)

(4). Civil Procedure Code (CPC)

Books referred:

- (1) Understanding Statutes 'Cannons of Construction' by Mr. S. M. Zafar, Second Edition (2002)
- (2) NS Bindra's Interpretation of Statutes Ninth Edition

JUDGMENT

Muhammad Faisal Kamal Alam, J: The above mentioned Election Appeals were heard on different dates and finally learned counsel for the parties have concluded their arguments on 18.12.2017.

2. The commonality in these tiled Election Appeals is that the earlier Election Petitions filed by the present Appellants were decided at the preliminary stage, either on the ground that said Petitions did not contain the proper verification clause, or, non-production of the evidence/witness on the date of hearing.

3. In addition to the above, in these Election Appeals, the Appellants have taken the stance that those Respondents who are returned candidates, have resorted to the corrupt and illegal practices for winning the Local Bodies Elections and undue influence was used on the Polling Staff for changing the Election results. The common grievances of all the Appellants are that the official Respondent (Election Commission) has failed to discharge its statutory mandate as the Elections were not held in a fair and transparent manner. The thrust of the arguments from the learned counsel representing various Appellants is that instead of deciding Election Petitions on merits and after giving the present Appellants an opportunity to lead the evidence, the learned Election Tribunal has dismissed the same on technical grounds. It has been further averred that the allegations contained in various Election Petitions justified a detailed scrutiny and a proper trial

by the learned Election Tribunal, which was not done and impugned orders were passed, which are now subject matter of these titled Appeals.

4. Looking at the controversy involved in title Election Appeal No.03 of 2017, the same is taken up first. In this Appeal, the Appellant contested the Local Government Election on the General Seat for Town Committee Daharki and has challenged the result of returned candidate-Respondent No.1 by way of Election Petition No.03 of 2016 instituted in the Election Tribunal at Daharki, which was dismissed for non-prosecution, on the ground that Plaintiff and his counsel were called absent on 07.10.2016. The present Appellant, as is also evident from the record and proceeding of present case, moved an application under Order IX Rule 9 of CPC (*Restoration Application*) through his present counsel on the same day, which was supported by an Affidavit of present learned counsel of Appellants as well as four other persons, who according to Appellant's side, were those witnesses who were to be examined on that day (when the above Election Petition was dismissed). The said Restoration Application was contested by the present Respondent No.1, who filed his Counter-Affidavit and primarily averred that on 07.10.2016 when the Election Petition No.03 of 2016 was dismissed, neither the present Appellant nor the persons, who have filed their supporting Affidavits, were present.

5. Mr. Abdul Rasheed Kalwar, the learned counsel for Appellant has vehemently argued that when admittedly the evidence of present Appellant and his other witnesses were recorded then the Petition could not have been dismissed for non-prosecution but at the most, side of witnesses of present Appellant to lead further evidence could have been closed. On the other hand, Mr. Talib Ali Memon, learned counsel representing the Respondent No.1, has opposed the present Appeal and supported both the impugned orders, keeping in view the special status of the Election Laws.

6. Arguments heard and record perused.

7. The diary sheet placed on record in the present proceeding confirms that the evidence of present Appellant was concluded on 30.05.2016 and for further evidence of Appellant's witnesses, the matter was fixed on 06.06.2016, when though the Petitioner was absent but his witnesses including those who have filed their supporting Affidavits with the Restoration Application were present as mentioned in the diary of that day (06.06.2016), available at Page-167 of the present Court file. On 07.10.2016 when the first impugned order for dismissal of Election Petition for non-prosecution was passed, on that day no one appeared, including from the Respondent's side. Though the late diary of the same day further confirmed that the present counsel appeared and filed the Restoration Application.

8. One of the main grounds of Objection of Respondent No.1 is, that the Restoration Application was not supported by the personal Affidavit of present Appellant/Petitioner of the said Election Petition, instead, the present learned counsel has filed his supporting Affidavit along with other persons. In this regard, the arguments of learned counsel for the Appellant as well as his present pleadings in Appeal has substance, that since evidence of the present Appellant was already stood recorded, therefore, it was not necessary for him to appear on each and every date, particularly, when he was represented by a counsel. The perusal of subsequent order of 14.02.2017, whereby, the Restoration Application was dismissed, shows the factor that weighed with the learned Election Tribunal for not restoring the Election Petition of present Appellants were, **(i)** that the persons, who have filed their supporting Affidavits, their names have not been mentioned in the list of witnesses, and **(ii)** the Appellant should have preferred the Appeal as mentioned in Section 54 of the Election Law.

9. The reason mentioned in the impugned orders is not plausible. The above finding of the learned Election Tribunal that the persons, who have filed their supporting Affidavits were not witnesses in the proceeding, is contrary to record, as the name of deponents of the supporting Affidavits (to the Restoration Application) have been mentioned in the list of witnesses, which is available at Page-145 of the present Court file. The witnesses namely (i) Fiaz Hussain, (ii) Ali Akbar, (iii) Mai Noreen, (iv) Lal Khatoon and (v) Shabeeran are mentioned in the list of witnesses at Serial No.13, 15, 46, 61 and 63 respectively. The other ancillary finding of learned Election Tribunal is also contrary to record, as the above named persons have also filed their separate Affidavit-in-Evidence, details whereof is; (i) Fiyaz Hussain at Page-109, (ii) Ali Akbar Chana at Page-133, (iii) Mai Noreen at Page-445, (iv) Lal Khatoon at Page-623 and (v) Shabeeran at Page-639. These Affidavits are in Part-II of the R&P.

10. Adverting to the other grounds for refusal to restore the Election Petition; that the present Appellants should have preferred an Appeal, in my considered view, is also not tenable, as final order as mentioned in Section 54 of the Election Law, relied upon by the learned Election Tribunal, is to be read with Sections 49, 50, 51 and 52 of the same Act of 2013 (*Election Law*), *inter alia*, when after conclusion of trial (***underlined for emphasis***), the Election Tribunal can pass a decision on an Election Petition, declaring the Election of a returned candidate as void and / or pass such orders as mandated in the aforementioned statutory provisions, whereas, in the present case, the impugned orders were passed before the conclusion of trial.

11. The other interesting aspect of the case is the Counter-Affidavit of present contesting Respondent No.1. Admittedly, he was called absent on 07.10.2016 when the first impugned order dismissing the Election Petition for non-prosecution was passed. If the Respondent No.1 was himself absent

on that day then he cannot testify, that too on oath, that other witnesses of the Appellant's side were not present. This runs contrary to the plea of Respondent No.1. Lastly, it is a misconceived plea that an Election Petition of the nature cannot be restored, if dismissed for non-prosecution; Civil Procedure Code is applicable as envisaged in Section 48 of the Election Law. More so, same question was decided in the affirmative by the learned Division Bench of the Lahore High Court in the afore-referred reported decisions of *Hanif case*; similarly, *Fakhar Imam* and *Sardar* cases (*ibid*) reiterate the above principle.

12. Consequently, I allow this Election Appeal No.03 of 2017 and set-aside both the impugned orders dated 14.02.2017 and 07.10.2016 and remand the case to the learned Election Tribunal, which will decide the Election Petition No.03 of 2016 on merits and preferably within six (06) weeks from the date of receipt of record and this Order. The learned Election Tribunal can proceed on day to day basis and learned counsel for the parties will extend their full cooperation in this regard. List of witnesses should also be curtailed by the present Appellant so that the evidence be concluded expeditiously and decision can be announced within the specified time as mentioned hereinabove. It is further clarified that proceeding will commence from the pre-dismissal stage, when partly evidence was already recorded.

Election Appeal No.09 of 2016

13. In Election Appeal No.09 of 2016, the Appellants have earlier filed an Election Petition No.13 of 2015, which was dismissed vide an impugned order dated 31.03.2016. The allegations against the successful candidates (Respondents No.1 and 2) are that they have committed illegalities and corrupt practices in league with the official Respondents, in order to get the desired results. Both the Appellants and private Respondents have

contested the Election for the seat of Chairman and Vice Chairman of Union Counsel-35 Lal Jurio Khan Shambhani Taluka Salephat District Sukkur.

14. The Elections of Respondents No.1 and 2 were called in question through the above mentioned Election Petition No.13 of 2015. The main reason weighed with the learned Election Tribunal for passing the impugned order is the non-verification of Election Petition in the prescribed format and on account of this non-compliance of Rule 62 (3) of the Election Rules, it was held that since it is a non-curable defect, therefore, the Election Petition was liable to be dismissed.

15. Mr. Irshad Hussain Dharejo, the learned counsel representing the Appellants has questioned the impugned order on the ground that the same was passed in a slipshod manner as the Election Petition was properly filed along with list of witnesses and their Affidavits-in-Evidence. He further stated by referring to the record of above Election Petition No.13 of 2015 that even notices of said Election Petition were sent to the Respondents as mentioned in Rule 61 of the Election Rules (*ibid*). He has placed reliance on the same reported decisions, which have been mentioned in the opening part of this Judgment and particularly the case of (i) **Zafar Abbas** reported in PLD 2005 SC page-600 and (ii) **Masroor Jatoi** case reported in 2016 SCMR page-750. On the other hand, the arguments of Appellants' counsel have been rebutted by Mr. Sohail Ahmed Khoso, the learned counsel representing the Respondents No.1 to 3, who argued that apart from non-compliance of prescribed verification clause, there is another inherent defect in the said Election Petition filed by the present Appellants. In support of his arguments, he has referred to **paragraph-12 of the Election Petition No.13 of 2015** and stated that the present Appellants have made a categorical allegation against the SHO P.S. Januji, namely, Muhammad

Ismail Bozdar, that he was also involved in illegality, while the election process was going on, but the present Appellants did not implead the above named SHO as one of the Respondents as required under Rule 61 of the Election Rules.

16. Record of Election Petition No.13 of 2015 has been examined, which leads to the conclusion that the Election Petition has been supported by the Affidavits of both the Appellants, who were Petitioners in the said Election Petition. The supporting Affidavit is in the prescribed form, as in vogue in the Province of Sindh, wherein, at the right side, a photo of the Petitioner is mentioned, besides, mentioning CNIC and contact number of person, which in the present case, is the present Appellant. It also contains the thumb impression which has been duly verified by National Database and Registration Authority (**NADRA**).

17. The list of witnesses is available at Page-61 of the Court file together with the Affidavits-in-evidence of witnesses, therefore, to this extent, the impugned order is erroneous. In this respect, the case law relied upon by the Appellants' counsel is of relevance here and particularly the reported decisions of *Masroor Jatoi* and *Zafar Abbas cases*; it has been held in the latter reported case that practically there is no difference between a verification clause mentioned at the bottom of the pleadings or if pleadings are confirmed by way of a separate supporting Affidavit.

18. The submissions of Appellants' counsel is that the impugned order is passed in a slipshod manner, carries weight, but the present Election Appeal has a further controversy going to the root of the case, that requires a resolution. Admittedly, as mentioned hereinabove, specific allegations have been levelled against the area SHO by name but he was not impleaded as Respondent. Rule 61 of the Election Rules is quite specific in this regard,

that any person against whom an allegation of corrupt or illegal practice is made shall be joined as Respondent and be served personally or through courier service or registered post with a copy of the Election Petition. Subsequent Rule 64 of the Election Rules provides a consequence of dismissal of Petition if preceding Rules are not complied with. The question is, that will this Rule 64 be considered as mandatory. Almost similar question was raised in number of Election Appeals, leading being Election Appeal No.07 of 2016 (*Muhammad Amin and another Versus Javed Ali and five others*), filed at the Circuit Bench (Hyderabad) and were decided by a common Judgment dated 28.03.2017.

19. After thoughtfully considering this legal aspect, it was held that like a statute, if the statutory rules also provide a consequence, then they should also be interpreted as mandatory. Relevant portion of the referred unreported Judgment is mentioned herein under:

“11. I have given a thoughtful consideration to the above proposition of law. Undoubtedly, afore-referred Election Rules have been framed under the statute; SLGA 2013. Going through different treatises on the Interpretation of Statutes, the position, which emerges is that if the Rules are framed under an enabling clause of a main statute then such Rules become Statutory Rules and are to be considered part and parcel of the Statute; consequently, such Statutory Rules then deserve to be governed by same principle of interpretation which is applicable to the Enactment itself. Meaning thereby that if a Rule provides a penalty or punishment for its non-compliance, then that Rule shall be interpreted as a mandatory Rule. It is also necessary to give reference of well-known commentaries on the above point of law (i) **Understanding Statutes ‘Cannons of Construction’ by Mr. S. M. Zafar, Second Edition (2002), relevant pages-783 and 784**, and the relevant paragraphs whereof are reproduced hereunder: -

“ *Statutory rules stand on a different footing. Though a byelaw must not be repugnant to the statute or the general law, byelaws and rules made under a rule-making power conferred by a statute do not stand on the same footing as rules are part and parcel of the statute. Parliament or Legislature instead of incorporating them into the statute itself ordinarily authorizes Government to carry out the details of the policy laid down by the Legislature by framing rules*

under the statute and once the rules are framed, they are incorporated in the statute itself, and become part of the statute and the rules must be governed by the same rules as the statute itself. Hence, a statutory rule cannot be challenged as unreasonable.”

“Mandatory and Directory rules:

A rule is mandatory if violation thereof entails any penalty or punishment. If non-compliance of a rule entails no penalty, rule is directory. Act done in disregard of a mandatory provision of law or rule is only invalid and unlawful. Such is not the case where only some rule of directory nature has been violated.”

(Underling is to add emphasis)

and (ii) NS Bindra’s, Interpretation of Statutes, Ninth Edition, the relevant paragraph whereof is reproduced hereunder: -

“ The right to hold an election, to stand in an election, and to be elected thereto as commissioner, are all rights which spring under the statute. There is no common law right which is involved. Therefore, the provisions of the Act and the rules made thereunder must be strictly followed in constituting the municipality and in regulating the functions thereof. Similarly, a disqualifying or disabling provision of law, for instance election rules, must be subject to strict construction.”

(Underling is to add emphasis)

12. Secondly, the Honourable Supreme Court of Pakistan in one of its reported Judgments, viz. P L D 1985 SC 282 (*Shah Muhammad Vs. Election Tribunal, Urban Local Council, Chishtian and others*), after taking into account various case laws, has interpreted the provisions of Punjab Local Council (Election) Rules, 1979 to be mandatory in nature and held as under: -

“ Thus there is no escape from the conclusion that the law requires that every ballot-paper must be signed by the Presiding Officer, and when the ballot-boxes are opened for the purpose of counting the ballot-papers, all these ballot-papers which do not bear the signatures of the Presiding Officer must be excluded. These provisions are express and categorical and there is no scope for considering these provisions to be of a directory nature.” (Underlining is to add emphasis)”

13. Thirdly, even in the above mentioned reported case of *Zia-ur-Rehman Vs. Syed Ahmed Hussain and others* (2014 SCMR 1015), the Honourable Supreme Court in paragraph-7 has held, that when the law prescribed certain form for Election Petition and its verification on oath and entails a penal consequence for its noncompliance, the provision is to be interpreted as mandatory. It is also a settled Rule that the term “Law” is of wide import and it does include the Statutory Rules. Fourthly, the relevant law in the instant case is the

SLGA 2013 and its Section 46 pertains to Election Petitions. It would be advantageous to reproduce Section 46 of SLGA 2013 as under: -

“46. Election petition.- (1) Subject to this Act, an election to an office of a council shall not be called in question except by an election petition.

(2) A candidate may, in the prescribed manner, file an election petition before the Election Tribunal challenging an election under this Act.”

14. From the above, it is not difficult to ascertain the mandate of law, that is, the governing statute SLGA, which enjoins that Election Petitions are to be filed in the “**Prescribed Manner**”. This term ‘Prescribed’ is mentioned in the definition clause of the said SLGA 2013; Section 2 (lii), which means Prescribed by Rules. It means that the Election Petitions are to be filed as mentioned in the relevant Election Rules, which have already been referred to in the preceding paragraphs. If the main Statute-SLGA 2013 had contained the provisions about verification of Petitions / Pleadings without a consequence or penalty, then the arguments of learned counsel for the Appellants would have been sustained, that if the main Statute is not providing a penal consequence then the Rules governing the same subject cannot travel beyond the express statutory provisions. But here the undisputed factual and legal position is altogether different. It is basically the Election Rules, which regulate the proceedings at the Election Tribunals and the Rule 65 in an unequivocal term has provided a penalty / penal consequence of dismissal of petition if the same is not filed in compliance of Rules 60 to 63 of the Election Rules 2015. The above legal position with regard to the status of Statutory Rules is further reinforced by another learned Division Bench Judgment of this Court reported in P L D 1984 Karachi 426 (*Shahenshah Humayun Co-operative Housing Society Ltd., and 2 others Vs. House Building Finance Corporation and another*), wherein, it has been held, *inter alia*, that if the rule-making authority validly frames / makes Regulations then such Regulations which are *intra vires*, be regarded as part of the enactment itself. In a subsequent decision of this Court reported in PLD 1992 Karachi Page-302 (*Saeeduddin Versus Third Senior Civil Judge, East, Karachi*), the above principle relating to the mandatory nature of the statutory rules has been reiterated.”

20. In view of the above, since Rule 64 of the Election Rules is mandatory in nature, therefore, non-compliance of Rule 61 by not impleading the above named SHO against whom specific allegations were levelled, the Election Petition No.13 of 2015 suffered from a non-curable defect and is not maintainable. Despite giving an adverse observation about the impugned order in the foregoing paragraphs, the present Appeal cannot

be accepted, in view of the above discussion, therefore, the present Appeal No.09 of 2016 is also dismissed.

Election Appeal No.13 of 2016

21. In Election Appeal No.13 of 2016, the Impugned Order is of 04.08.2016, whereby the Election Petition No.24 of 2015, filed by the present Appellants, was dismissed on the ground that the present Appellants failed to produce and lead the evidence. The Appellants have contested the Local Bodies Elections for the seat of Chairman and Vice Chairman, respectively, of Union Council Kot Mir Muhammad, Taluka Kingri, District Khairpur.

22. Respondents No.5 and 6 are the returned candidates in the said election. The main grievance of the Appellants is that the learned Election Tribunal erred in law and on facts by not allowing recounting and rechecking of the votes as according to them, Respondents No.5 and 6 won the elections by employing corrupt and illegal practices.

23. Present Election Appeal has been opposed by the counsel for the contesting Respondents; above mentioned No.5 and 6.

24. Record of Election Petition No.24 of 2015, has been examined, in which the impugned order is passed. The Appellants have placed on record the case diary of different dates of the said Election Petition No.24 of 2015, in order to show that Petitioner vigilantly pursued the matter. However, the case diary of 15.06.2016, reflects that by a Statement of same date, the Petitioner unilaterally withdrew its prayer clauses / relief(s) sought, except the one relating to recounting / 'rechecking' of the votes. This particular aspect has been further scrutinized by looking at the record and proceeding of Election Petition No.24 of 2015; at page-79, the Statement dated

15.06.2016 of the present Appellants is available, whereby they withdrew their other prayers except for recounting and rechecking.

25. The other aspect of the case is that an application under Rule 46 of the Election Rules, *inter alia*, for inspection of packets of counter foils and recounting of ballot papers, was heard and dismissed on 30.06.2016, which order has been challenged, as per the pleadings of the present Appellants, in the Constitutional Petition No.D-3173 of 2016, which is *sub judice*. The above order of dismissal thus has not been challenged here, therefore, this Issue cannot be the subject matter of present Election Appeal, which has been filed on 03.09.2016. The only relief remaining with the present Appellants, has already been decided by the learned Election Tribunal, which order has not been impugned in the present Appeal as such, but the present Appeal is directed against the order dated 04.08.2016, whereby the above mentioned Election Petition was dismissed for the reasons that present Appellants did not lead the evidence. Subject to any positive outcome in favour of present Appellants in the above Constitutional Petition No.D-3173 of 2016, for all practical reasons, the afore-mentioned Election Petition of Appellants has become infructuous, because the Appellants have withdrawn the other prayer / relief. Accordingly, the grounds mentioned in the present Election Appeal are not convincing and I find no reason to interfere in the impugned order of 04.08.2016. Accordingly, present Election Appeal No.13 of 2016 is dismissed being devoid of merits.

Election Appeal No.14 of 2016

26. In Election Appeal No.14 of 2016, the Impugned Order is of 04.08.2016, whereby the Election Petition No.25 of 2015, filed by the present Appellants, was dismissed on the ground that the present Appellants failed to produce and lead the evidence. The Appellants have

contested the Local Bodies Elections for the seat of Chairman and Vice Chairman, respectively, of Union Council Mohil, Taluka Kingri, District Khairpur.

27. Respondents No.5 and 6 are the returned candidates for the said election. The main grievance of the Appellants is that the learned Election Tribunal erred in law and on facts by not allowing recounting and rechecking of the votes as according to them, Respondents No.5 and 6 won the elections by employing corrupt and illegal practices.

28. Present Election Appeal has been opposed by the counsel for the contesting Respondents; above mentioned No.5 and 6.

29. Record of Election Petition No.25 of 2015, has been examined, in which the impugned order is passed. The Appellants have placed on record the case diary of different dates of the said Election Petition No.25 of 2015, in order to show that Petitioners vigilantly pursued the matter. However, the case diary of 15.06.2016, reflects that by a Statement of same date, the Petitioner unilaterally withdrew its prayer clauses / relief(s) sought, except the one relating to recounting / rechecking of the votes. This particular aspect has been further scrutinized by looking at the record and proceeding of Election Petition No.25 of 2015, at page-79, the Statement dated 15.06.2016 of the present Appellants is available, whereby they withdrew their other prayers except for recounting and rechecking.

30. The other aspect of the case is that an application under Rule 46 of the Election Rules, *inter alia*, for inspection of packets of counter foils and recounting of ballot papers, was heard and dismissed on 30.06.2016, which order has not been challenged as such, but the present Appeal is directed against the impugned order of 04.08.2016. For all practical reasons, the afore-mentioned Election Petition of Appellants has become infructuous

because the Appellants have already abandoned their other relief(s) / prayers. Accordingly, the grounds mentioned in the present Election Appeal are not convincing and I find no reason to interfere in the impugned order of 04.08.2016. Accordingly, present Election Appeal No.14 of 2016 is also dismissed.

Election Appeals No.5 and 6 of 2016

31. Adverting to the Election Appeals No.5 and 6 of 2016 filed by Muhammad Punhal Khan and Aftab Hussain and others, respectively. Through these appeals, the impugned orders dated 18.03.2016, dismissing the Election Petitions No.5 and 6 of 2015, have been challenged. The above Election Petitions were filed challenging the Elections (held on 31.10.2015) of private Respondents as returned candidates for the post of District Council Member, Chairman and Vice Chairman, respectively. In the present Appeals as well as well as in the afore-referred Election Petitions, the Appellants have averred illegal and corrupt practices committed by the Respondents in league with official Respondents. However, the claim of present Appellants is disputed through the reply / written statement submitted by the returned candidates, the present private Respondents.

32. Mr. A. R. Farooq Pirzada, learned counsel for the Appellants, has argued that both impugned orders have been passed by overlooking the record and thus resulted in grave injustice. Learned counsel further submitted that when the Appellants realized their bonafide error about filing of above Election Petitions and annexures without containing the prescribed verification clause, the present Appellants forthwith moved an appropriate application under Section 151 C.P.C., seeking permission to file documents and annexures afresh bearing due verification and attestation. It is further contended about the second portion of the impugned

order for non-service of notices on the Respondents at the time of filing of Election Petitions, that the relevant Rule 61 of the said Election Rules do not specify about the stage of service of notice and if the Rules are silent that when the notice of a Election Petition should be served on the Respondents / Opponents, then the same can be served personally or sent through courier or registered post, even after filing of Election Petitions. To augment his arguments, learned counsel for the Appellants has cited Order 43, Rule 3 of C.P.C., as analogy, that since the said provision specifically requires a prior notice before filing an appeal, hence, in such cases only a prior notice is a pre-requisite and not in the present case. Argued further, that learned Election Tribunal itself issued notice to Respondents, without objecting to the fact that earlier the present Appellants did not send the notices through courier service. With regard to the first limb of his arguments about dismissal of Petitions, learned counsel for the Appellants has relied upon number of Judgments, which have already been mentioned hereinabove. Main argument is that the learned Election Tribunal instead of deciding the matter on merits as required by Section 49 of the Election Law, the Election Petitions were dismissed on mere technicalities; the learned Tribunal should have also allowed the Appellants to amend their pleadings.

33. On the other hand, Mr. Rasheed Ahmed Kalwar, counsel representing the private Respondents (successful candidates), raised defence that both the Election Petitions were filed in utter deviation of the statutory Election Rules and same were rightly dismissed through the impugned orders, which have been passed after application of judicial mind. On facts also, the Respondents' side refuted the claim of the present Appellants.

34. Submissions on fact and law have been taken into the account.

35. In the reported Judgments handed down in *Zia-ur-Rehman* and *Khar cases (ibid)*, it has been laid down that when the objection with regard to maintainability of election petition is raised, the same is to be addressed first by the Court or the Election Tribunal. Hence, the learned Election Tribunal in the present case, has adopted the correct course by first deciding the preliminary objections with regard to maintainability of the Election Petitions.

Secondly, the Respondents were neither personally served by the present Appellants (who were Petitioners) nor copies of the Election Petitions were sent either through courier service or registered post. Both these deficiencies have been addressed in number of judicial pronouncements. Record and proceeding of the above Election Petitions were summoned and have been examined in order to appreciate the arguments of the parties to the proceeding. By now, it is a settled and established rule that any deficiency in a verification clause of a civil litigation is curable, but the same is incurable in the case of an Election Petition. Honourable Apex Court in the reported cases of (i) *Masroor Jatoi*, (ii) *Khursheed Shah*, (iii) *Rahu*, (iv) *Ghazanfar Shah*, (v) *Zafar Abbas and* (vi) *Sargana (supra)*, *inter alia*, has held, that if an Election Petition does not contain a verification clause in the prescribed form, keeping in view the provision of Order VI, Rule 15 of CPC, then it is liable to be dismissed. For reference and guidance the relevant portions of the Judgments in (i) *Rahu*, (ii) *Zafar Abbas and* (iii) *Sargana* cases are reproduced herein under_

Rahu case (2016 SCMR page-875)

“We have examined the Election Petition, a copy whereof is available on the record. It bears verification on solemn affirmation that what has been stated therein is true to the best of knowledge

and belief of the Election Petitioner. It bears the stamp and signature of the Oath Commissioner. The place (Hyderabad) whereat the contents of the Election Petition were verified is also stated therein. The date is also mentioned by the Oath Commissioner.”

Zafar Abbas case (PLD 2005 Supreme Court page-600)

“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.”

Sargana case (2015 SCMR page-1585)

“The format of an affidavit is as has been mentioned in the law reproduced supra. But in the affidavit in question, it is conspicuous that the following essential elements are missing: --

- (a) date on which and the place where the verification was made, have not been specified;*
- (b) no date has been mentioned on the stamp(s) of attestation fixed by the Oath Commissioner;*
- (c) it has also not been mentioned that the appellant was administered oath by the Oath Commissioner before the attestation was made;*
- (d) whether the appellant was duly identified before the Oath Commissioner is another important question the answer to which is also not clear from the said verification;*
- (e) it does not appear from the affidavit that appellant was identified when reference to his ID card which is the*

ordinary, usual and general course for identification of a person or even by an Advocate; and

(f) no ID Card Number is given; the identification does not seem to have been made; the particulars of the identifier are also conspicuously missing.

This affidavit, therefore, can hardly be considered to be verification of the election petition in terms of the law. To reiterate the reasons, neither have the date and place of attestation been specified nor was the appellant property identified.”

(Underlined to add emphasis).

36. On scrutiny of record and proceedings of the Election Petitions No.5 and 6 of 2015, undisputedly two Memo of Petitions are available in each file of these Election Petitions. In the first Memo of Election Petition neither there is any date in the verification clause nor any stamp of the Oath Commissioner, but only three signatures are available; that of present Appellant as deponent, his Advocate and the third one is purportedly of the Oath Commissioner as it has been signed at the place where usually an Oath Commissioner puts his signature. The date mentioned with the alleged signature of the Oath Commissioner is 12.12.2015, **whereas**, no date has been mentioned with the verification paragraph, but, the month is mentioned as November, 2015. The second Memo of Petition though does contain a stamp of Oath Commissioner but again there is a glaring anomaly in the dates. The verification paragraph of this petition states that it has been verified in the month of November 2015 but the stamp of the Oath Commissioner bears a date of 23.12.2015. If these two formats of both Election Petitions are compared with the relevant portions of the reported decisions handed down by Hon'ble Supreme Court in various cases as referred above, it is not difficult to conclude and hold that in fact both the Election Petitions do not contain any verification clause as such. It is a basic rule that two set of pleadings / petitions having same number between

the same parties cannot be allowed to exist at the same time, though, an earlier petition may be amended, but, after seeking permission of the Court. All this is lacking in the present Election Appeals.

37. About the non-service of notice by the Appellants, the same issue has already been answered by the Honourable Supreme Court in the case of Khursheed Shah (*supra*), wherein, *inter alia*, the Petitioner of the reported case, at the time of filing Election Petition couriered the same to the Respondents, but that was not considered as a good service, though primarily for the reason that the mode of 'courier service' at the relevant time was not mentioned in Section 54 of the ROPA, *whereas*, the same is available in the present Election Rules, hence, under the present Election Rules, a Petitioner can serve Respondent(s) a copy of Petition through courier service also. However, from the above reported decision, one thing is quite clear, that the service of Election Petition as mentioned in Rule 61 of the Election Rules, should be made at the time of filing of Election Petitions. The notices subsequently issued by the Court to the Respondents, in the instant case, cannot overcome the deficiency, for the reason already mentioned hereinabove, as the Rule 64, which provides a consequence of dismissal of Election Petitions, makes, particularly Rules 60 to 63, relating to filing of Election Petitions in the prescribed manner, as mandatory also. The stance of the Appellants cannot be accepted and violation of Rules 61 and 62 of the Election Rules in these circumstances cannot be condoned.

38. To conclude, both the impugned orders in the present Appeals have been passed after considering the undisputed facts and law, including reported decisions relating to the subject and point in law involved and thus, these impugned orders do not suffer from any illegality or any irregularity, which can justify interference. Resultantly, both these Appeals are dismissed.

39. Accordingly, except for Election Appeal No.03 of 2017, which is remanded, all other Election Appeals are dismissed.

40. Parties are left to bear their own costs.

Dated: _____

M.Javid.P.A.

JUDGE