

ELECTION TRIBUNAL
HIGH COURT OF SINDH, KARACHI

Election Petition No. 02 of 2024

[Khurram Sher Zaman v. Mirza Ikhtiar Baig & others]

Petitioner : Khurram Sher Zaman son of Sher Zaman through Mr. Muhammad Umer Lakhani, Advocate assisted by M/s. Ishfaq Ahmed and Shahryar Ahmed, Advocates.

Respondent 1 : Mirza Ikhtiar Baig son of (Late) Mirza Mushtaq Baig [**Returned Candidate**] through Chaudhry Atif Rafiq, Advocate, assisted by M/s. Aman Aftab and Mehak Azfar, Advocates.

Respondents 2-37 & 39 : Nemo.

Respondent 38 : Election Commission of Pakistan through Ms. Alizeh Bashir, Assistant Attorney General for Pakistan alongwith Mr. Sarmad Sarwar, Deputy Director (Law), ECP, Karachi.

Date of hearing : 05-08-2024

Date of order : 16-09-2024

ORDER

Adnan Iqbal Chaudhry J. - This order decides CMA No. 1458/2024 by the Respondent No.1 (returned candidate) and the preliminary issue to the same effect settled on 05.08.2024 *i.e.* whether this election petition is to be rejected under section 145(1) of the Election Act, 2017 [**the Act**] which stipulates:

“145. Procedure before the Election Tribunal. – (1) If any provision of section 142, 143 or 144 has not been complied with, the Election Tribunal shall summarily reject the election petition.

2. It was submitted by Barrister Atif Rafiq, learned counsel for the Respondent No.1 that given the consequence of rejection in section 145(1) of the Act, the provisions of sections 142 to 144 of the Act are mandatory, and therefore the doctrine of substantial compliance would not come into play. Reliance was placed on *Ghulam Hassan v.*

Jamshaid Ali (2001 SCMR 1001) and *Sardarzada Zafar Abbas v. Syed Hassan* (PLD 2005 SC 600). The Election Commission of Pakistan [ECP] adopted the submissions of Barrister Atif Rafiq. Those submissions and the reply of Mr. Umer Lakhani, learned counsel for the Petitioner, are discussed in detail *infra*.

Objection on receipt/challan of costs:

3. Section 142(1) of the Act requires *inter alia* the petitioner to deposit security for costs of the petition. It reads:

“142. Presentation of petition.—(1) An election petition shall be presented to the Election Tribunal within forty-five days of the publication in the official Gazette of the name of the returned candidate and shall be accompanied by a receipt showing that the petitioner has deposited at any branch of the National Bank of Pakistan or at a Government Treasury or Sub-Treasury in favour of the Commission, under the prescribed head of account, as security for the costs of the petition, such amount as may be prescribed.

Initially, the head of account prescribed in Rule 139(4) of the Election Rules, 2017 [Rules] for depositing said costs was “C-03 Miscellaneous Receipts, C-038 Other, C-03870–Other (Election Receipts)” [previous head of account]. By notification dated 23.11.2021, the ECP had amended Rule 139(4) to substitute that head of account with “C02-Receipts from Civil Administration and Other Functions, C021- General Administration Receipts-Organs of State, C02166-Receipts of Election Commission of Pakistan under Elections Act 2017” [prevailing head of account]. The treasury receipt dated 21.03.2024 filed along with the petition on 26.03.2024 was for a deposit made in the previous head of account. The office raised an objection. Therefore, the Petitioner made a second deposit in the prevailing head of account *vide* receipt dated 01.04.2024, which was filed in the petition under cover of a statement dated 05.04.2024.

4. Counsel for the Respondent No.1 submitted that since the first deposit was not under the prevailing head of account, it was a non-compliance of section 142(1) of the Act, and therefore rejection of the petition is mandated by section 145(1) of the Act. As regards the

second deposit, he submitted that it did not cure the non-compliance, and in any case it was after the limitation of 45 days prescribed for filing an election petition. Reliance was placed on *Mushtaq Ahmed v. Aftab Akbar Khan* (2019 MLD 1313) and *Lt. Col. (Rtd.) Ghazanfar Abbas Shah v. Khalid Mehmood Sargana* (2015 SCMR 1585).

5. Per the Petitioner's counsel, the challan under the previous head of account was issued by the bank itself, who accepted the deposit in that account and issued receipt; that when the office raised an objection, the Petitioner went back to confront the bank, who then issued another challan under the prevailing head of account, which too was deposited by the Petitioner. He submitted that since the Petitioner acted *bonafide* he could not be deprived of a statutory remedy due to the fault of the bank; that in any case the deposit in the previous head of account fulfilled the requirement of security for costs and no prejudice was caused to the Respondent No.1. Reliance was placed on a judgment of the Supreme Court of India in *Kaushalendra Prasad Narain Singh v. Nand Kishore Prasad Singh* (22 E.L.R. 484 = MANU/SC/0373/1960).

6. Before addressing the objection, I note here that this is not the only election petition where the National Bank of Pakistan [NBP], acting as the Government treasury, issued a challan/receipt under the previous head of account. Several election petitions have come up before this Tribunal with identical challans/receipts and are faced with the same objection.

7. It appears that despite the amendment in Rule 139(4) of the Rules, the NBP continued to maintain the previous head of account, continued to issue challans thereof and accepted deposits therein. That is manifest in the first receipt dated 21.03.2024 issued by the NBP to the Petitioner. Therefore, it is important to highlight at the outset that while the first deposit by the Petitioner was not in the prevailing head of account, it was nonetheless a deposit in a treasury head of

account intended for election receipts. It is not the case here that the first deposit was in any unrelated account of the Government.

8. For the present purposes, the deposit requirements in section 142(1) of the Act can be identified as follows:

- (a) prior to presenting the petition, a deposit at any branch of the National Bank of Pakistan or at a Government Treasury or Sub-Treasury;
- (b) in favour of the ECP;
- (c) under the prescribed head of account; and
- (d) such amount as may be prescribed.

Requirements (a), (b) and (d) were clearly intended for the Petitioner, and it is not disputed that the deposit made by the Petitioner fulfilled those requirements. Requirement (c), however, appears to be a different matter.

9. The form of challan for an election deposit is prescribed as 'T.R. 6' in the Treasury Rules of the Federal Government. The column of that challan that requires mention of the head of account reads: "*To be filled in by the departmental officer or the treasury*". Rule 431 of the Treasury Rules also stipulates that it is the responsibility of the bank to ensure that the head of account in a treasury challan is correctly mentioned before accepting deposit from the public. The first receipt dated 21.03.2024 issued to the Petitioner also manifests that the head of account was pre-printed on the challan and filled-in by the NBP, not by the Petitioner. Indeed, the public is not expected to verify the head of account already printed on a treasury challan. Given that scheme of things, it is apparent that requirement (c) of section 142(1) of the Act is essentially that where a deposit is made by the public "in favor of the ECP", it is to be credited to the account specified in Rule 139(4) of the Rules, and which can only be intended for the receiving bank/treasury, not for the public/petitioner. Requirement (c) is obviously for purposes of book-keeping by the bank/treasury and the ECP, and that is why the description of the head of account is left to the rule-making power of the ECP. This aspect was not considered by

the Tribunal at Lahore in the case of *Mushtaq Ahmed v. Aftab Akbar Khan* (2019 MLD 1313), and therefore that case is of no help to the Respondent No.1.

10. While it is correct that the presence of a penal consequence for non-compliance is usually indicative of a mandatory provision, the settled law is that the ultimate test lies in ascertaining the legislative intent,¹ and in doing so, the Court must scrutinize the pith and substance of the provision and not be swayed by its form.² Now, a provision may have different parts to it, some mandatory and some directory. That aspect was discussed in the case of *The State v. Imam Bakhsh* (2018 SCMR 2039) as follows:

"It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. "In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured." Crawford opined that "as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory." In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man."
(Underlining supplied for emphasis)

Remington Rand of India Ltd. v. The Workmen (AIR 1968 SC 224) illustrates how a single provision can have a mandatory part as well as a directory part. There, the question was whether the provision in the Industrial Disputes statute requiring the Government to publish an award within 30 days was mandatory or directory. It was held that while the part requiring publication was mandatory, the time-frame fixed for the same was only directory.

¹ *Collector of Sales Tax Gujranwala v. Super Asia Mohammad Din & Sons* (2017 SCMR 1427); *Province of Punjab v. Murree Brewery Company Ltd.* (2021 SCMR 305); and *Commissioner Inland Revenue, Zone-II, RTO, Rawalpindi v. Sarwaq Traders* (2022 SCMR 1333).

² *Tri-Star Industries (Pot.) Ltd. v. Trisa Burstenfabrik AG Triengen* (2023 SCMR 1502).

11. The observation in *Imam Bakhsh* that a single provision may have a mandatory as well as a directory part, is apt to the deposit-provision in section 142(1) of the Act, which comprises of requirements (a), (b), (c) and (d) as discussed above. The intent of the legislature there is of course to secure at the outset some amount towards costs that may be imposed by the Tribunal on the Petitioner under various provisions of the Act. That compliance was made by the Petitioner by fulfilling requirements (a), (b) and (d) *i.e.* by producing a receipt at the time of presenting the petition which reflected the prescribed deposit of Rs. 20,000/- in a treasury head of account in favor of the ECP. Requirement (c), which required the NBP/treasury to credit the prevailing head of account, was only directory, as it is only a matter of making a book-entry to debit one treasury account and credit the other. The underlying principle here is in the following oft cited passage from *Maxwell on Interpretation of Statutes*:

“Where the prescription of a statute relates to the performance of a public duty and where the invalidation of the acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and Government of those on whom the duty is imposed, or in other, words as directory only. The neglect of them may be penal indeed but it does not affect the validity of the act done to disregard of them.”³

12. Counsel for the Respondent No.1 had submitted that the jurisprudence of election laws is different, in that a provision that entails a penal consequence for non-compliance is always construed strictly. That is not entirely accurate. The correct statement of the law, as articulated in the case of *Col. (Retd.) Syed Mukhtar Hussain Shah v. Wasim Sajjad* (PLD 1986 SC 178), is that: “so far as election laws are concerned the requirements of law in so far as officers conducting the

³ Maxwell on the Interpretation of Statutes – Eleventh Edition, cited in *Col. (Retd.) Syed Mukhtar Hussain Shah v. Wasim Sajjad* (PLD 1986 SC 178). A similar view was taken in *Chief Commissioner, Karachi v. Jamil Ahmed* (PLD 1961 SC 145); and *Province of Punjab through Conservator of Forest v. Javed Iqbal* (2021 SCMR 328).

election are concerned are usually taken to be directory and so far as these requirements concern the voter they are usually taken to be mandatory.”

13. The case of *Kaushalendra Prasad Narain Singh v. Nand Kishore Prasad Singh* relied upon by the Petitioner’s counsel, was also a case where dismissal of an election petition was sought on the ground that the challan for costs of the petition was deposited in favor of “*security, Election Commission*” instead of “*Secretary, Election Commission*”. There too a dismissal was provided by the statute for non-compliance. However, the Supreme Court of India held that such requirement for deposit was only directory, not mandatory as the essence of the provision was to ensure that a deposit is available at the disposal of the Election Commission.

14. Therefore, in view of the foregoing, the first receipt dated 21.03.2024 produced by the Petitioner at the time of presenting the petition was in compliance with the mandatory part of section 142(1) of the Act. Since the requirement for crediting the prescribed head of account was for the NBP/treasury and at best directory, the penal consequence of rejection of the petition in section 145(1) of the Act is not attracted. Having concluded so, I do not examine the point whether a subsequent compliance could cure the defect. The subsequent deposit made by the Petitioner is hereby taken as an additional deposit. Let the record reflect that the Petitioner has deposited a total of Rs. 40,000/- as security for costs.

Objection to oath on verification clause:

15. The second objection is that the Assistant Registrar of the Identification Section of the High Court was not authorized to administer oath on the verification clause of an election petition; and therefore, the petition was not on oath and a non-compliance of section 144(4) of the Act. Reliance was placed on *Lt. Col. (Rtd.) Ghazanfar Abbas Shah v. Khalid Mehmood Sargana* (2015 SCMR 1585).

On the other hand, the Petitioner's counsel submitted that a similar objection was examined and dismissed by this Tribunal in E.P. No. 04/2024, *Irfanullah Khan Marwat v. Election Commission of Pakistan*.

16. With the implementation of the Identification Section Management System (ISMS) in the High Court of Sindh in the year 2012, which linked the Identification Section to NADRA's data-base, the Assistant Registrars of that Identification Section were appointed *ex-officio* oath commissioners by the High Court.⁴ Since then, all pleadings for use in the High Court are brought to the Identification Section for administering oath on the verification clause. The submission of counsel for the Respondent No.1 was that since the Judge of the High Court acts *persona designata* as Election Tribunal and not as the High Court, the oath commissioner appointed by the High Court has no authority to administer oath on an election petition - in other words, the High Court does not have authority to appoint an oath commissioner for an election petition intended before the Election Tribunal.

17. Section 144(4) of the Act provides that "..... the petition shall be verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings." Order VI Rule 15 CPC then sets out the manner of verification and oath, whereas section 139 CPC provides that oath may be administered by any officer or other person "whom a High Court may appoint in this behalf". Therefore, even though the Judge of the High Court acting as Election Tribunal is not the High Court, the authority of an officer appointed by the High Court to administer oath on an election petition emanates from section 144(4) of the Act itself by way of adopting section 139 CPC.

The fallback argument was that the High Court should have then issued a special notification appointing the Assistant Registrars of the Identification Section as oath commissioners also for election

⁴ Circular No.HC/I.T./SA/290 dated 02.07.2012, and Notification No. Admin/X.B.9(b)(1) dated 11.09.2012.

petitions. If that argument is taken to its logical end, all staff of the High Court dealing with election petitions would require fresh appointment as staff of the Election Tribunal, which would then defeat the purpose having a sitting High Court Judge act *persona designata* as Election Tribunal.

18. In view of the foregoing, the objection to the authority of the Assistant Register of the Identification Section of the High Court to administer oath on the election petition has no force. The case of *Lt. Col. (Retd.) Ghazanfar Abbas Shah* is not attracted as the petition was duly verified as per section 144(4) of the Act.

Objection to affidavit of service:

19. Counsel for the Respondent No.1 submitted that the affidavit of service presented with the petition was sworn on 22.03.2024 at 09:13 a.m., whereas the courier's receipt annexed thereto shows that notice was dispatched to the Respondent No.1 later in the day at 04:04 p.m.; therefore, the affidavit of service was false; and absence of prior notice was non-compliance of section 143(3) of the Act. However, as correctly pointed out by the Petitioner's counsel, the time mentioned on the courier receipt is in the 24-hour format *i.e.* '04:04' hours denotes 'a.m.' not p.m., which means that notice was dispatched prior to presenting the petition at 09:13 a.m. and section 143(3) of the Act was complied with.

Objection on non-disclosure of full particulars:

20. Learned counsel for the Respondent No.1 submitted that the petition does not give full particulars of the 'corrupt and illegal practice' as required by section 144(1)(b) of the Act. Reliance was placed on the case of *Usman Dar v. Khawaja Muhammad Asif* (2017 SCMR 292).

21. As highlighted by the Petitioner's counsel, the foremost ground taken by the Petitioner is that the Respondent No.1 was disqualified from contesting the election under Article 63(1)(c) of the Constitution

as he was a dual national. In that regard he has relied on documents annexed to the petition. The Petitioner has also pleaded that Forms 45 issued to him by the Presiding Officers showed that he had won the election by a long margin; that later on Forms 45 of specified polling stations were fabricated and forged to change the result in favor of the Respondent No.1; that the Returning Officer was changed just before the consolidation proceedings, who made sure that the Petitioner or his polling agent are not informed of the date, time and venue of the consolidation proceedings. To support of these allegations the Petitioner relies on documents, including the Forms 45 issued to him by the Presiding Officers and affidavits of polling agents. Therefore, it cannot be said that the petition does not give full particulars of the offending acts. Whether those acts amount to 'corrupt practice', 'illegal practice' or 'other illegal act' within the meaning of section 144(1)(b) of the Act, that can only be examined in due course of these proceedings. Since the petition gives full particulars, the case of *Usman Dar* is not attracted.

22. In view of the foregoing, none of the objections succeed for rejecting the petition under section 145(1) of the Election Act, 2017. CMA No. 1458/2024 is therefore dismissed and the preliminary issue is answered in the negative.

JUDGE