

ELECTION TRIBUNAL
HIGH COURT OF SINDH, KARACHI

Election Petition No. 28 of 2024

[Abdul Qadeer v. Election Commission of Pakistan & others]

Petitioner : Abdul Qadeer son of Abdul Shakoor through Mr. Ali Tahir, Advocate.

Respondent 1 : Election Commission of Pakistan through Mr. Sarmad Sarwar, Assistant Director (Law), ECP, Karachi.

Respondent 24 : Najam Mirza [**Returned Candidate**] through M/s. Obaid-ur-Rehman, Sabih Ahmed Zubairi, Saleem Raza Jakhar, Advocates.

Respondents 2-23, 25, 26 : Nemo.

Date of hearing : 04-12-2024

Date of order : 18-12-2024

ORDER

Adnan Iqbal Chaudhry J. - This order decides the preliminary issue settled on 13-06-2024 raising the question whether this election petition is liable 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. On 11-07-2024, when submissions were first made by learned counsel for the Respondent No.24 (returned candidate), the objections raised were: (a) that oath administered on the verification of the petition was by an unauthorized person; and (b) that an affidavit of service was not filed. Since then, while seized of other election petitions, this Tribunal has already declined objection (a) and accepted objection (b) in similar circumstances. Therefore, presently, learned counsel for the Respondent No.24 presses objection (b) only.

Objection to the affidavit of service:

3. The facts are that the petition was presented on 27-03-2024 without the 'affidavit of service' required by section 144(2)(c) of the Act. Instead, a 'statement of service' was filed which was not on oath. Copy of the petition required to be served on the Respondents before or at the time of filing the petition under section 143(3) of the Act, was also dispatched on 28-03-2024 *i.e.* after presenting the petition. After these defects were highlighted on 11-07-2024, the Petitioner filed an affidavit of service on 30-10-2024.

4. Learned counsel for the Respondent No.24 submitted that even if the affidavit of service could have been filed after presenting the petition, the defect cannot be cured once the period of 45 for filing the petition had lapsed. He submitted that the failure to file affidavit of service within limitation was fatal, and the petition is liable to be rejected under section 145(1) of the Act. On the other hand, learned counsel for the Petitioner submitted that courier receipts on the record demonstrate that copies of the petition were dispatched to the Respondents before expiry of the period of 45 days, thus making substantial compliance with section 143(3) of the Act; and that, in any case, the affidavit of service subsequently filed on 30-10-2024 had cured the defect.

5. As discussed by this Tribunal in the case of *Faheem Khan v. Muhammad Moin Aamer Pirzada* (E.P. No. 13/2024), section 144(2)(c) of the Act is to be read with section 143(3) of the Act. Said provisions read:

"143(3). The petitioner shall serve a copy of the election petition with all annexures on each respondent, personally or by registered post or courier service, before or at the time of filing the election petition."

"144(2). The following documents shall be attached with the petition—

(c) affidavit of service to the effect that a copy of the petition along with copies of all annexures, including list of witnesses, affidavits and documentary evidence, have been sent to all the respondents by registered post or courier service;"

6. The requirement of section 144(2)(c) of the Act is that after serving the respondents with a copy of the petition and annexures under section 143(3), the Petitioner shall also file an affidavit to affirm that he has done so. Therefore, the compliance required by section 144(2)(c) is separate and in addition to the compliance required by section 143(3). That being so, nothing less than the affidavit of service will suffice to raise the presumption that the respondents have been served with copies of the petition and annexures before or at the time of filing the petition. With the consequence of rejection provided in section 145(1) of the Act, the requirement of an affidavit of service in section 144(2)(c) appears to be mandatory. No argument was advanced to construe it differently. Resultantly, I am not convinced with the submission of the Petitioner's counsel that production of courier receipts was sufficient compliance with section 144(2)(c) of the Act.

7. This Tribunal has already held in other petitions that non-compliance with section 144(4)(c) of the Act cannot be cured after expiry of the period of 45 days prescribed for filing an election petition. To cite from the case of *Ghulam Qadir v. Election Commission of Pakistan* (E.P. No. 57/2024) this Tribunal held :

"11. The question now is whether the affidavit of service subsequently filed by the Petitioner on 12.07.2024 can be accepted as compliance of section 144(2)(c) of the Act ?

12. *Albeit* for rectifying a defect in the verification of an election petition, a similar question came up before the Supreme Court in the cases of *Malik Umar Aslam v. Sumera Malik* (PLD 2007 SC 362) and *Hina Manzoor v. Ibrar Ahmed* (PLD 2015 SC 396). The *ratio* of those decisions seems to be that once the period of limitation for filing an election petition expires, the petitioner cannot be allowed to make amends for not complying with a mandatory provision of the statute, because by that time a valuable defense has arisen to the respondent. Applying that *ratio* to the instant case, the affidavit of service eventually filed by the Petitioner on 12.07.2024 was much after the 45 days prescribed for filing the petition, and therefore cannot be accepted as compliance of section 144(2)(c) of the Act.

8. In view of the foregoing, the affidavit of service filed on 30-10-2024 does not cure the defect of non-compliance with section

144(2)(c) of the Act which is a mandatory provision. Therefore, the petition is rejected under section 145(1) of the Act. Pending applications become infructuous.

JUDGE

Karachi
Dated: 18-12-2024

**PA/SADAM*