ELECTION TRIBUNAL
HIGH COURT OF SINDH, KARACHI

Election Petition No. 13 of 2024
[Faheem Khan v. Muhammad Moin Aamer Pirzada & others]

Petitioner	:	Faheem Khan son of Humayoun Khan through Mr. Muhammad Umer Lakhani, Advocate, assisted by M/s. Ishfaq Ahmed and Shaharyar Ahmed, Advocates.
Respondent 1	:	Muhammad Moin Aamer Pirzada through Mr. Obaid-ur-Rehman Khan, Advocate, assisted by M/s. Sabih Ahmed Zuberi, Saleem Raza Jakhar Muhammad Akbar Khan and Muhammad Mudasir Abbasi, Advocates.
Respondents 2-18	:	Nemo.
Respondent 19	:	Election Commission of Pakistan through M/s. Sara Malkani & Alizeh Bashir, Assistant Attorney General for Pakistan alongwith M/s. Riaz Ahmed Director (Law) and Sarmad Sarwar, Assistant Director (Law), ECP, Karachi.
Respondent 20	:	Returning Officer, NA-234, Korangi-III, Karachi, through Mr. Ahmed Nafees Osmani, Advocate.
Dates of hearing	:	15-07-2024 & 13-08-2024
Date of order	:	10-10-2024

O R D E R

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. Learned counsel for the Respondent No.1 (returned candidate) submitted 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 thus must be construed strictly. The submissions of learned counsel for both sides are discussed *infra*. The Election Commission of Pakistan **[ECP]** adopted the submissions of counsel for the Respondent No.1.

Objection on the 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 26.03.2024 filed along with the petition 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 04.04.2024.

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). As regards the second deposit, he submitted that compliance made after expiry of limitation for filing an election petition could not be accepted.

5. In identical circumstances, the objection that a deposit in the previous head of account was a non-compliance of section 142(1) of the Act, has been rejected by this Tribunal by order dated 16.09.2024 in the case of *Khurram Sher Zaman v. Mirza Ikhtiar Baig* (E.P. No. 02/2024) excerpted as follows:

> "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.
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> 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.
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> 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.
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> 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.

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

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[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 (Pvt.) Ltd. v. Trisa Burstenfabrik AG Triengen* (2023 SCMR 1502).

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 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

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[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).

> 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."

The same order is passed in this petition as well.

Objection to the affidavit of service:

6. The objection under this head arises from sections 143(3) and 144(2)(c) of the Act, which 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;"

7. The petition was presented during office hours on 26.03.2024. However, the affidavit of service required by section 144(2)(c) of the Act was filed the next day on 27.03.2024. The courier receipts attached thereto show that copy of the petition was dispatched to the Respondent No.1 on 26.03.2024 at 22:32 hours *i.e.* after presentation of the petition in the first part of the day.

8. Learned counsel for the Respondent No.1 submitted that since the copy of the petition was not dispatched to the Respondents before presenting the petition, and since the affidavit of service too was filed the next day, that was a non-compliance of sections 143(3) and 144(2)(c) of the Act and Rule 139(3) of the Rules, for which the petition is liable to be rejected under section 145(1) of the Act. He added that even if the affidavit of service could be filed after presenting the petition, it could not have been accepted after the period of 45 for filing the petition had lapsed.

On the other hand, learned counsel for the Petitioner submitted that section 143(3) of the Act deals only with service of the petition, not with the affidavit of service; that while section 144(2) of the Act lists documents that are to be 'attached' with the petition, it does not stipulate that those documents have to be 'presented' along with the petition.

9. Under section 142(1) of the Act, an election petition can be presented to the Election Tribunal within 45 days of publication in the official gazette of the name of the returned candidate. The notification declaring the Respondent No.1 as returned candidate was published in the official gazette on 15.02.2024. Therefore, the period of 45 days for presenting the petition was uptill 31.03.2024. The petition was presented well before on 26.03.2024, and the affidavit of service filed on 27.03.2024 was also within that period of 45 days. The question thus posed is whether copy of the petition required to be served on the Respondents under section 143(3), and affidavit of service required to be filed by section 144(2)(c) of the Act, can be done after presenting the petition while remaining within the period of 45 days.

10. It will be seen that the documents required to be served on the respondents under section 143(3) of the Act are only the petition and its annexures. However, by implication of the contents of the affidavit of service provided in 144(2)(c), those documents also include "list of witnesses, affidavits and documentary evidence". Further, while section 143(3) requires the petitioner to 'serve' those documents on the respondents, from section 144(2)(c) it appears that it would suffice to show that those documents 'have been sent' to the respondents. There is clearly an overlap between said provisions and therefore those must be read together.

11. Reading sections 143(3) and 144(2)(c) of the Act together, the requirement is that the copy of the petition, its annexures, the list of witnesses, affidavits and documentary evidence, are to be sent to the

respondents "before **OR** at the time of filing the election petition". The words 'at the time of filing' are disjunctive and are intended to have a different meaning from the words 'before filing'. Now, the 'filing' of a petition has a connotation that goes beyond the mere 'presentation' of a petition. That is why the Act makes a distinction between the two in using 'presentation' in section 142(1), and 'filing' in section 143(3). 'Presentation' is used primarily for the pleading/memo of petition, whereas 'filing' is inclusive of all documents that go to complete the petition. Though the filing of the petition commences with the presentation of the memo of petition, the filing of other documents may or may not be complete at the same time. For example, it may be difficult to gather all witnesses to swear affidavits on the same day. It is therefore not uncommon for the filing process to stretch beyond the date of presentation as the petitioner goes about to complete ancillary documents. That is the period envisaged by the words 'at the time of filing'. Therefore, the fact that the instant petition was presented on 26-03-2024, that did not *ipso facto* indicate that its filing was complete on the same day. The first endorsement by the office of the Tribunal is also dated much after on 01-04-2024. Consequently, the copy of the petition dispatched to the Respondents on the night of 26-03-2024 was 'at the time of filing' the petition and permissible under section 143(3) of the Act. As regards the affidavit of service filed the next day on 27-03-2024, that of course could only be filed after dispatching copies to the Respondents. The affidavit of service completed the filing process, and since that was done within the period of 45 days, the question of non-compliance of section 144(2)(c) of the Act does not arise. That being so, this case does not raise the question whether the affidavit of service can be accepted after 45 days.

Objection to the oath administered on the petition:

12. The objection under this head was that the Assistant Registrar of the Identification Section of the High Court was not authorized to administer oath on 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).

13. The same objection has been rejected by this Tribunal by order dated 16.09.2024 passed in the case of *Khurram Sher Zaman v. Mirza Ikhtiar Baig* (E.P. No. 02/2024), excerpted as follows:

> "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. 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.
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> 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.
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> 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 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.
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> 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."

The same order is passed in this petition as well.

14. In view of the foregoing, none of the objections succeed for rejecting the petition under section 145(1) of the Election Act, 2017. Therefore, the preliminary issue is answered in the negative.

JUDGE

Karachi
Dated: 10-10-2024