

ELECTION TRIBUNAL
HIGH COURT OF SINDH, KARACHI

Election Petition No. 30 of 2024

[Muhammad Alamgir Khan v. Election Commission of Pakistan & others]

Petitioner : Muhammad Alamgir Khan son of Dilawar Khan through Mian Shahbaz Ali, Advocate.

Respondents 1-2 : Election Commission of Pakistan through M/s. Abdullah Hanjrah, Deputy Director (Law) and Sarmad Sarwar, Assistant Director (Law), ECP, Karachi.

Respondent 3 : Aamir Rashid through Mr. Muhammad Asif Malik, Advocate.

Respondent 8 : Hassan Sabir through Mr. Usman Tufail Shaikh, Advocate.

Respondents 4-7 & 9-37 : Nemo.

Dates of hearing : 31-10-2024 & 07-11-2024.

Date of order : 03-12-2024.

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.

Objection under section 9(5) of the Act:

2. Prior to this petition, the Petitioner had filed C.P. No. D-701/2024 before the High Court to challenge the consolidation of results. That petition was disposed of by order dated 13.02.2024 by referring the matter to the Election Commission of Pakistan [ECP] to exercise jurisdiction under sections 8 and 9 of the Act. However, the ECP dismissed the complaint with the observation that the

Petitioner's remedy was before the Election Tribunal. Learned counsel for the Respondent No. 8 (returned candidate) submitted that against the dismissal of the complaint by the ECP, the Petitioner should have exhausted the remedy of appeal to the Supreme Court provided by section 9(5) of the Act, and therefore, an election petition was not maintainable.

3. Firstly, the objection above is not a ground provided for rejection of the petition under section 145(1) of the Act. Secondly, as also submitted by learned counsel for the Petitioner, the order passed by the High Court in C.P. No. D-701/2024 was at a time when Election Tribunals had not been constituted under section 140 of the Act. By the time the matter came up before the ECP, the Election Tribunals had been so constituted, and therefore the ECP directed the Petitioner to such Tribunal. Since the Petitioner submitted to the jurisdiction of the Election Tribunal under section 139 of the Act, he had no cause to file an appeal before the Supreme Court under section 9(5) of the Act. The objection taken is misconceived.

Objection to non-joinder of contesting candidate:

4. The other objection to the petition emanates from section 143(1) of the Act which stipulates:

"143. Parties to the petition.—(1) The petitioner shall join as respondents to his election petition all other contesting candidates."

5. Learned counsel for the Respondent No.8 (returned candidate) submitted that one of the contesting candidates was not a respondent to the petition, hence non-compliance of section 143(1) of the Act, for which the petition is liable to be rejected as per section 145(1) of the Act. Learned counsel drew attention to the notification of result dated 13.02.2024 issued by the ECP under section 98(2) of the Act *inter alia* for the constituency NA 236 Karachi East-II, where Mr. Faysal Mujeeb finds mention at serial No. 23 with 454 votes but is not arrayed as a respondent in this petition. He further pointed out that Respondents

10 and 31 are not mentioned in that notification and have been wrongly joined.

6. Since the objection above had not been pleaded in the written statement, learned counsel for the Petitioner was taken by surprise. He submitted that the Petitioner had arrayed as respondents all contesting candidates mentioned in Form 33 dated 13.01.2024 (page 161), which was the prescribed list of contesting candidates for the subject constituency. Apparently, that Form did not include Faysal Mujeeb and included the Respondents 10 and 31. The ECP was therefore asked to clarify the facts.

7. From the documents placed on the record by the ECP under cover of statement dated 06.11.2024, the following facts emerged. The nomination papers of Faysal Mujeeb had been rejected by the Returning Officer and the Appellate Tribunal. Therefore, when the list of contesting candidates in Form 33 was first issued by the Returning Officer on 13.01.2024, it did not include Faysal Mujeeb. On 14.01.2024, another Form 33 was issued for the subject constituency which again did not include Faysal Mujeeb and dropped the Respondent No. 31. Subsequently, the nomination papers of Faysal Mujeeb were accepted in compliance of order dated 16.01.2024 passed by the High Court in C.P. No. D-173/2024. Consequently, another Form 33 was issued on 17.01.2024 including Faysal Mujeeb. On 19.01.2024, yet another Form 33 was issued to drop the Respondent No.10 who had retired from the election.

Opinion:

8. As regards the Respondents 10 and 31, the documents placed on the record by the ECP reflect that they retired from the election and ceased to be 'contesting candidates'. Nevertheless, since the requirement of section 143(1) of the Act is to 'join' contesting candidates, the misjoinder of the Respondents 10 and 31 does not become a ground for rejection of the petition under section 145(1) of the Act.

9. Regards Mr. Faysal Mujeeb, he was indeed a contesting candidate who was not impleaded as a respondent in this petition as required by section 143(1) of the Act. The question is whether the case attracts the penal consequence of rejection of the petition under section 145(1) of the Act ?

10. Learned counsel for the Petitioner had submitted that in arraying contesting candidates as respondents to the petition the Petitioner relied on Form 33 dated 13.01.2024 which did not include Faysal Mujeeb; that the Petitioner was unaware that Form 33 was subsequently revised to include Faysal Mujeeb inasmuch as the Returning Officer never supplied him a copy and the ECP did not upload the revised Form 33 onto its website as required by section 68 of the Act and Rule 56 of the Election Rules, 1997 [Rules]. Thus, the submission was that the omission to implead Faysal Mujeeb as a respondent resulted due to non-compliance by the Returning Officer and the ECP with the provisions of section 68 of the Act and Rule 56 of the Rules.

11. Learned counsel for the Respondent No.8 acknowledged that the revised Form 33 was not uploaded to the website of the ECP, however, he submitted that even so, the fact that Faysal Mujeeb was a contesting candidate was apparent from Forms 45, 47 and 49, and then from the declaration of result *vide* notification dated 13.02.2024 issued under section 98(2) of the Act.

12. To appreciate the submissions of learned counsel, it is necessary to examine the provisions cited by them. These are reproduced under:

“Section 68. List of contesting candidates.—(1) The Returning Officer, after allotment of symbols to contesting candidates, under section 67 shall—

- (a) publish the names of the contesting candidates arranged in Urdu alphabetical order specifying against each the symbol allotted to him; and
- (b) give public notice of the day and hours of the poll.

(2) The Returning Officer shall supply a copy of list of contesting candidates to each candidate and shall exhibit the list at a prominent place in each polling station on the day of poll.

(3) The Returning Officer shall send a copy of the list of contesting candidates with their respective symbols to the Commission which shall upload it for display on its website.

Rule 56. List of contesting candidates.—(1) The list of contesting candidates prepared under sub-section (1) of section 68 shall be drawn up in Form-33.

(2) The names on the list shall be entered in Urdu alphabetical order indicating against the name of each contesting candidate the symbol allocated to him.

(3) The Returning Officer shall publish the list of contesting candidates with their respective symbols at some conspicuous place in his office and furnish a copy thereof to the contesting candidates, District Election Commissioner, Provincial Election Commissioner and to the Commission, which shall upload it for display on its website.

Section 98. Declaration of results.—(1) On receipt of the Final Consolidated Result from the Returning Officer, the Commission shall, within fourteen days from the date of the poll, publish in the official Gazette the name of the contesting candidate who has received the highest number of votes and stands elected.

(2) The Commission shall also publish in the official Gazette the name of each contesting candidate and the total number of votes received by him as in the Final Consolidated Result.”

13. Thus, Form 33 prescribed by Rule 56(1) under section 68 of the Act is a list of contesting candidates going into the election, which list is issued by the Returning Officer for each constituency. The legislative intent appears to be that given any number of candidates that may be contesting in a constituency (34 candidates in this case), it was imperative to compile a list of contesting candidates in a prescribed Form for information to all, including the contesting candidates even though those names may be apparent elsewhere. Hence, section 68 of the Act and Rule 56 of the Rules specifically require the Returning Officer to supply Form 33 to each contesting candidate and the ECP to upload it for display on its website.

14. Upon the declaration of result, the ECP issues a notification under section 98(2) of the Act to publish the name of each contesting candidate along with the votes obtained, hence the submission of the

Respondent No.8's counsel that the name of Faysal Mujeeb should have been apparent to the Petitioner from documents issued after the Form 33. However, the names of contesting candidates in subsequent documents i.e. Forms 45, 47, 49 and the notification under section 98(2) of the Act are not intended to be at variance with those in Form 33. The facts narrated in para 7 *supra* demonstrate that where a candidate retired from the election or was added to the race after Form 33 had been issued, the Returning Officer issued a revised Form 33 and the same list of names carried forward in all Forms leading to the notification under section 98(2) of the Act. Given the foregoing scheme, the Petitioner was entitled to presume that the Form 33 provided to him would list all contesting candidates, and the fact that he did not look beyond that while arraying respondents to the election petition cannot be said to be negligence on his part.

15. Admittedly, the Form 33 dated 13.01.2024 provided to the Petitioner was subsequently revised by the Returning Officer to include Faysal Mujeeb as a contesting candidate. The provisions of section 68 of the Act and Rule 56 of the Rules for supply of copy to all contesting candidates and display on ECP's website applied equally to any revised Form 33 issued by the Returning Officer. Per the Petitioner, he never received any revised Form 33. There was no other reason for the Petitioner to omit Faysal Mujeeb from the petition. It was not disputed by the ECP or the counsel for the Respondent No.8 that the revised Form 33 was also not displayed on ECP's website. Therefore, *prima facie*, the Returning Officer and the ECP did not comply with the provisions of section 68 of the Act and Rule 56 of the Rules, which in turn led to the non-compliance of section 143(1) by the Petitioner.

16. In my humble view, the words "has not been complied with" in section 145(1) of the Act envisage the penal consequence of rejection of the petition where the non-compliance is attributable exclusively to the petitioner, not where that non-compliance can be attributed to the failure of a public functionary to perform his/it's statutory obligation.

17. While discussing the principle that the act of a public functionary shall prejudice no one, it has recently been held by the Supreme Court of Pakistan in the case of *Sunni Ittehad Council v. Election Commission of Pakistan*, C.A. No. 333 and 334 of 2024 (majority opinion dated 23.09.2024) that:

“95. We find that the said principle is not only premised on two maxims: (i) *actus curiae neminem gravabit* (an act of court [public functionary] shall prejudice no one) and (ii) *ex debito justitiae* (as a debt of justice), but are also rooted in the constitutional provisions of Article 4 of the Constitution. Under Article 4, it is an inalienable right of every citizen, and of every other person for the time being within Pakistan, to enjoy the protection of law and to be treated in accordance with law. This constitutional inalienable right casts a corresponding constitutional inalienable duty on all public functionaries of Pakistan to treat every citizen and every other person for the time being within Pakistan in accordance with law. From this constitutional right and the corresponding constitutional obligation, the principle emerges, in our opinion, that no person should be made to suffer or be prejudiced by an unlawful act or omission of public functionaries. If any person suffers the loss of any right or benefit because of an unlawful act or omission of a public functionary, he is entitled, by reason of an obligation of justice, to be restored to that right or benefit and put in the same position, insofar as is possible, as he would have been if such unlawful act or omission had not been made by the public functionary.”

The above principle of law (underlined for emphasis) is apt for this case as well.

18. In the forgoing circumstances, the petition cannot be rejected under section 145(1) of the Election Act, 2017. The preliminary issue is answered in the negative. In exercise of powers under section 149 of the Act, I allow the Petitioner to amend the petition to add Faysal Mujeeb as a respondent. An amended title shall be filed accordingly in 7 days, whereafter notice be issued to Faysal Mujeeb in the manner set-out in the order dated 29-04-2024.

JUDGE

Karachi
Dated: 03-12-2024