

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
BANNU BENCH/ELECTION TRIBUNAL
(Judicial Department)**

Election Petition No.05-B/2018

Haji Malik Adnan Khan

Versus.

Akram Khan Durrani etc.

JUDGMENT

For petitioner: **M/s Muhammad Asghar Khan
Kundi and Bashir Khan Wazir
Advocates.**

For respondent No.1: **Pir Liaqat Ali Shah Advocate**

Date of hearing: **20.11.2018.**

MUHAMMAD NASIR MAHFOOZ, J.- Through this election petition, the petitioner has challenged the elections result in respect of respondent No.1 as returned candidate and prayed that the petitioner be declared as returned candidate for Constituency PK-90 Bannu.

*“It is therefore, most respectfully prayed
that this learned Tribunal may kindly be
pleased to:*

*A. Declare that the election of
respondent No.1 as returned candidate
form PK.90, Bannu-IV is void, illegal,
unlawful and without legal effect; and*

- B. Without prejudice to other grounds, direct, in view of the facts and grounds mentioned herein above, that all ballot papers cast in the whole constituency of PK.90, Bannu-IV be 'fairly, transparently and impartially recounted, a right guaranteed by the statute itself;***
- C. Declare that the petitioner has been successfully elected from Pk.90 and therefore declare the petitioner as returned candidate from PK.90;***
- D. Any other relief as deemed appropriate may also be granted."***

2. The brief facts of the case giving rise to the instant petition are that the petitioner and respondents No.1 to 9 contested elections for Constituency PK-90 Bannu held on 25.7.2018. The petitioner obtained 32628 votes while the respondent No.1 obtained 32801 votes and pursuant to Notification dated 07.8.2018, of Election Commission of Pakistan the respondent No.1 was declared as returned candidate.

3. It has been alleged in the petition that the final count as provisionally compiled on 26.7.2018 (Form 47) showed that a total of 69,708 votes were cast in PK-90 Bannu. The petitioner was shown having secured 32628

votes while respondent No.1 secured 32801 votes. According to said (form 47) 1470 votes were rejected. On 27.7.2018 the petitioner submitted an application to the Returning Officer for recount of ballot papers of whole constituency. The Returning Officer was orally requested for recounting of only six polling stations to each candidate, which has been mentioned by the petitioner in his second application. Accordingly, without any decision on the first application filed by the petitioner, two applications one filed by the petitioner and the other filed by the respondent was submitted for recounting of votes of certain polling stations. The Returning Officer directed for the recount of 13 polling stations and when recounting of 10 out of 13 polling stations was completed, material affect on the outcome of the result was obvious. With the recount of 10 polling stations, the petitioner got a total of 32731 votes and respondent No.1 got a total of 32700 votes. Thus, the petitioner won by 31 votes according to Form 47 issued on 30.7.2018. During recount rejected votes were counted towards respondent No.1, which is alleged to be grave and corrupt practice and on this ground alone, this learned Tribunal may direct to complete fair and transparent recounting. Respondent No.1 submitted application to the effect that he was satisfied with the already count and that further recount of remaining police stations as already agreed upon be stopped while the petitioner

submitted an application that since variation in the count had been observed, therefore, the ends of justice require the counting of all votes cast in the entire constituency, although by then the petitioner had more votes. The Returning Officer rejected the application of respondent No.1 and accepted the application of the petitioner and directed for recount of all remaining police stations i.e. 146-10 (already counted)=137 Polling stations on 29.7.2018. When the recount of the remaining polling stations including the four polling stations as already agreed for recount of polling stations No.56, 82, 353 and 364 was to begin, respondent No.1 submitted application before Returning officer for review of order of recounting ballot papers of entire constituency before the Election Commission on 28.7.2018 and the Election Commission on 29.7.2018 directed that recount be stopped. Recounting was thus stopped but 'consolidation began' i.e. counting of 'postal ballots' and counting of rejected votes. The total votes polled at polling stations were recorded as 32724 for respondent No.1 and 32752 for the petitioner, thus petitioner was winning by 28 votes. The postal ballots were recounted, 71 votes were counted in favour of respondent No.1 and 15 votes in favour of the petitioner. In final count according to Form 48 and Form 49, petitioner secured 32767 votes and respondent No.1 secured 32795 votes, showing

respondent No.1 as winner by 28 votes on 31.7.2018. Hence, failing to get any remedy the instant election petition is filed.

4. The instant order is meant to decide an application under section 145 of the Election Act, 2017, read with Order 7 rule 11 of Code of Civil Procedure for dismissal of the election petition summarily.

5. I have heard arguments of learned counsel for the applicant/respondent No.1 and the petitioner and with their able assistance record of the case gone through.

6. Learned counsel for the applicant/respondent No.1 requested for dismissal of the instant election petition on various grounds, detailed as under:-

(1) Verification on the election petition is not in accordance with order-6 rule 15 of the Code of Civil Procedure and consequently under section 144 (4) of the Election Act, 2017.

(2) Oath on the election petition is not in accordance with Oaths Act, 1873.

(3) Annexures to the election petition are not signed by the petitioner.

(4) Affidavits of the witnesses attached with the election petition are not in the prescribed oath and is not attested by oath commissioner.

(5) Necessary parties against whom allegations of having committed illegal act or involved in corrupt or illegal practice have not been impleaded.

(6) Copies of the election petition along with annexures were not sent to the respondents before filing of election as provided by section 143(3) of the Election Act, 2017

In support of his contention he relied on judgments reported as 2014 SCMR 1477, 2015 SCMR 1585 and 2016 SCMR 1312 and requested for dismissal of the instant petition.

7. Learned counsel for the petitioner out-rightly rejected the arguments of learned counsel for the respondent/applicant and submitted that the election petition has been submitted in accordance with the provisions as contained in the Election Act and submitted that the affidavit, verification are in proper form and all the annexures have been signed by the petitioner. In support of his arguments he relied on judgment reported as PLD 2017 Peshawar 111, 2010 SCMR 1877, 2016 SCMR 750 and PLD 2005 SC 600. He also submitted that relevant provisions of section 143 and 144 are not mandatory in nature under the repealed Act non-verification was fatal for the election petition under the repealed Act of 1976 but not under the new Election Act, 2017.

8. The instant election petition is filed on 22.9.2018 while the result of general election 2018 were declared and notified on 07.8.2018, it is supported by an affidavit firstly signed by the oath commissioner District Bannu but without any date and secondly affidavit before the Addl: Registrar of the High Court on 22.9.2018, identified by his counsel.

9. Before appreciating the arguments of learned counsel for the parties it may be relevant to quote an excerpt from the judgment of Hon'ble Supreme Court titled **“Muhammad Ismail Vs. The State (PLD 1969 SC 241, 247 A)** the interpretation approach to be adopted is now as follows:

“The purpose of construction or interpretation of a statutory provision is no doubt to ascertain the true intention of the legislature, yet that intention has, of necessity, to be gathered from the words used by the Legislature itself. If those words are so clear and unmistakable that they cannot be given any meaning other than that which they carry in their ordinary grammatical sense, then the Courts are not concerned with the consequences of the interpretation however drastic or inconvenient the result for, the function

of the Court is interpretation, not legislation.”

It would require reference to section 55 subsection 3 of the repealed Representation of People Act, 1976 which is quoted below:-

Sec.55. Contents of petition.- (1) -----

(a)-----

(b)-----

(c)-----

(2)-----

(a)-----

(b)-----

(c)-----

(3) Every election petition and every schedule or annex to that petition shall be signed by the petitioner and verified in the manner laid down in Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings.

10. Section 143, 144 and 145 of the Election Act, 2017 are quoted below for ready reference.

143. Parties to the petition.—(1)

The petitioner shall join as respondents to his election petition all other contesting candidates.

(2) The Election Tribunal may direct the petitioner to join any other person as respondent against whom any specific allegation of

contravention of this Act has been made.

(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. Contents of petition.—(1) *An election petition shall contain—*

(a) a precise statement of the material facts on which the petitioner relies; and

(b) full particulars of any corrupt or illegal practice or other illegal act alleged to have been committed, including names of the parties who are alleged to have committed such corrupt or illegal practice or illegal act and the date and place of the commission of such practice or act.

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

(a) complete list of witnesses and their statements on affidavits;

(b) documentary evidence relied upon by the petitioner in support of allegations referred to in para (b);

(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; and

(d) the relief claimed by the petitioner.

(3) A petitioner may claim as relief any of the following declarations—

(a) that the election of the returned candidate is void and petitioner or some other candidate has been elected; or

(b) that the election of the returned candidate is partially void and that fresh poll be ordered in one or more polling stations; or

(c) that the election as a whole is void and fresh poll be conducted in the entire constituency.

(4) An election petition and its annexures shall be signed by the petitioner and 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.

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) If an election petition is not rejected under sub-section (1), the Election Tribunal shall issue notice to each of the respondents through—

(a) registered post acknowledgement due;

(b) courier service or urgent mail service;

(c) any electronic mode of communication, which may include radio, television, email and short message service (sms);

(d) affixing a copy of the notice at some conspicuous part of the house, if any, in which the respondent is known to have last resided or at a place where the respondent is known to have last carried on business or personally worked for gain;

(e) publication in two widely circulated daily newspapers at the cost of the petitioner; and

(f) any other manner or mode as the Tribunal may deem fit.

11. Perusal of the record reveals that in paras No.13 and 14 of the election petition allegations of collusions of presiding officer specifically naming one Zareen Taj, presiding officer of polling station No.59, Bannu for being in collusion with the returned candidate in turning the success

of the petitioner into failure due to their illegal acts and corrupt and illegal practice but she has not been impleaded as party.

12. The affidavit at the foot of election petition is not in accordance with the laid down procedure as held by Hon'ble Supreme Court of Pakistan in case "**Lt.-Col. (Rtd.) Ghazanfar Abbas Shah Vs. Mehr Khalid Mehmood Sargana and others**" (2015 SCMR 1585). Verification on foot of the election petition is also not in accordance with the order 6 rule 15 of the Code of Civil Procedure that provides that the person verifying shall specify, by reference to the number paragraphs of the pleadings, what he verified of his own knowledge and what he verifies upon information received and believe to be true. It also provides in sub rule-3 that the verification shall be signed by the person making it and shall state the date and place on which it was signed. It is also *sine qua non* that the pleadings shall be verified on oath or solemn affirmation at the foot by the parties or by one of the parties or by some other person who is acquainted with the facts of the case. The words "*on oath or solemn affirmation*" were inserted by amendment through Ordinance XII of 1972.

13. Hon'ble Supreme Court in case of Ghazanfar Abbas Shah has dilated upon the same and came to the conclusion that in future the election petitioner shall insist

and shall ensure that the oath has been actually, physically and duly administered to the election petitioner/deponent, therefore, on this score alone the instant petition requires to be dismissed under section 145 of the Election Act, 2017.

14. In addition it may be mentioned that the copy of notification dated 07.8.2018, whereby the respondent No.1 has been declared as returned candidate by the Election Commission of Pakistan has not been appended with the election petition. When there is a specific prayer for declaring the election of the returned candidate in constituency PK.90, Bannu-IV is void, illegal, unlawful and without any effect, then annexing copy of notification is essential pre-requisite.

15. It is also pertinent to mention that the affidavits of petitioner and six affidavits of six witnesses appended with the petition are not on oath and no stamp of the oath commission is present at the foot.

16. As regards the requirements of rule 139 sub rule-3 of the Election Rues, 2017, every petitioner shall file the election petition with the Election Tribunal concerned in triplicate and shall be accompanied by the documents mentioned in section 144. The office report at the time of filing of the petition reveals that certain objections were raised and the same was returned but again only one copy of the original was submitted at the time of re-filing of the

election petition which is also violation of the relevant provisions. There is no affidavit of service with the petition which has now been made pre-requisite after promulgation of the Act of 2017 to expressly show that 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.

17. Learned counsel for the applicant/respondent No.1 has also raised this objection that the copies of the election petition including annexures and documents have not been sent by post except the grounds of election petition, otherwise the expenses of a registered post would have been much higher, keeping in mind the bulk of the file of election petition consisting of about more than 80 pages. He also referred to pages No.65, 66 and 67 of the election petition and submitted that being annexures these should have been signed and its non-signing has violated section 144(4) of Election Act, 2017.

The law propounded on the subject is now made clear by august Supreme Court as mentioned below. In case reported “Inayatullah Vs. Syed Khursheed Ahmed Shah” (2014 SCMR 1477) the Hon’ble Supreme Court has held as under:-

The verification on the petition itself, for whatever it is worth,

also states in its body that the verification was made on 17th June, 2013, but this verification is also incorrect bearing in mind that the copy of the Election Petition was sent to the respondents on the following day i.e. 18-6-2013. The affidavit of service which has been signed by the appellant states on oath "that before filing of petition [appellant] [sic] have served it to the respondents through notice by courier, the receipts of those are appended herewith". This statement has been verified on 17-6-2013 and the attestation has also been made on 17-6-2013. This affidavit of service is itself belied and rendered false by the courier receipts which show that the copy of the petition was sent on 18-6-2013 and not on 17-6-2013.

In case titled "Lt.-Col.(Rtd.) Ghazanfar Abbas Shah Vs. Mehr Khalid Mehmood Sargana and others" (2015 SCMR 1585), Hon'ble Supreme Court held as under:-

We have applied our mind to this aspect of the matter and hold that in order to meet the real object and the spirit of the

election laws which require verification on oath, in an ideal situation, the Oath Commissioner at the time of verification of the petition etc. and also the affidavit, must record and endorse verification/ attestation that the oath has been **actually, physically and duly administered** to the election petitioner/deponent. But as the law has not been very clear till now, we should resort to the principle of presumption stipulated by Article 129(e) *ibid* in this case for avoiding the knock out of the petition for an omission and lapse on part of the Oath Commissioner. **But for the future** we hold that where the election petition or the affidavit is sought to be attested by the Oath Commissioner, the election petitioner shall insist and shall ensure that the requisite endorsement about the administration of oath is made, otherwise the election petition/affidavit shall not be considered to have been attested on oath and thus the election petition shall be liable to be, *inter alia*, dismissed on the

above score. We consciously and deliberately neither apply this rule to the instant case nor any other matter pending at any forum (election tribunal or in appeals).

(underlining is for emphasis)

In case titled **“Sultan Mahmood Hinjra Vs Malik Ghulam Mustafa Khar” (2016 SCMR 1312)**, Hon’ble Supreme Court, dilated in detail on the form in which an affidavit is to be made on oath, as under:-

When the affidavit at hand is examined in the light of the above it transpires that certain essential requirements are missing therefrom. Firstly, it has not been mentioned whether the Respondent No.1 was administered oath by the Oath Commissioner before the attestation was made. Secondly, it has not been specified whether the Respondent No.1 was duly identified before the Oath Commissioner. In this regard, it has simply been stated at the foot of the affidavit that the Respondent No.1 was present before the Oath Commissioner in

person, however, the details of the person identifying the Respondent No.1 have not been mentioned whereas according to the above quoted provisions, the Oath Commissioner is bound to specify at the foot of the affidavit the name and description of the person by whom identification of the deponent was made and in this regard a certificate has to be appended. Furthermore, it is also not clear from the affidavit that the Respondent No.1 was identified with reference to his ID card and in this regard, no ID card number is given, as such the identification does not seem to have been made. There is yet, another aspect to the matter. The affidavit in question does not make any reference to the numbered paragraphs contained therein which the Respondent No.1 verifies on his own knowledge and what he verifies upon information received and believed to be true. Further, the affidavit in question also does not make any reference to the verification of the annexures appended along with the petition, which although have

been mentioned in the said affidavit.

18. Having considered the wordings of section 55 sub-section 3 of the Representation of People Act, 1976, in comparison with section 144 sub-section 4 of the Election Act, 2017, conclusion can easily be drawn that with the omission of words “*and every schedule*”, in section 144(4) of the Election Act, 2017 remaining provision is *pari materia*, and, therefore, has the same legal and binding effect and could be construed similarly as held by the august Supreme Court in Ghazanfar Abbas Shah’s case and its non-compliance has rendered rejection of the election petition essential, in view of section 145 of the Election Act, 2017. Furthermore, section 144 sub-section 2 (c) has also made it pre-requisite that the election petition must contain affidavit of service to the effect that a copy of 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 but simple affidavit before the Additional Registrar of this Court signed on the day of filing of the petition does not fulfill the requirements as laid down. Non-signing of annexures is also fatal for the election petition which could not be allowed to proceed.

19. For what has been discussed above, the application is accepted and the election petition is rejected.

Announced.
20.11.2018.

*Ihsan/**

JUDGE
Election Tribunal.

(S.B.)

Hon'ble Mr. Justice Muhammad Nasir Mahfooz.