

IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.D-4897 of 2018

PRESENT:Mr. Justice Khadim Hussain M. Shaikh
Mr. Justice Arshad Hussain Khan***Muhammad Hassan Bakshi******vs.******The Provincial Election Commissioner of Sindh & another***

Petitioner: Through Ms. Rizwana Ismail, Advocate.

Respondents: M/s. Salah ud Din Khan Gandapur, and
Maimoona Nasreen advocates for Election
Commission of Pakistan along with Mr. Abdullah
Hinjah, Law Officer ECP.Mr. Jawad Dero, Additional Advocate General.
Mr. Zahid Khan, Assistant Attorney General.
Ms. Rukhsana Durrani, State Counsel.

Date of hearing: 10.07. 2018

JUDGMENT

Arshad Hussain Khan, J. The petitioner through instant petition challenging the orders, passed by Returning Officer and learned Election Appellate Tribunal, whereby the nomination paper of the petitioner for contesting the forthcoming general elections-2018 was rejected, has sought the following reliefs:

“It is, therefore, prayed in the interest of justice that this Hon’ble Court may be pleased to set-aside the Impugned Decisions dated 14.6.2018 & 25.6.2018 passed by the learned Returning Officer/Respondent No.2 and Appellate Tribunal and pass any other just, legal and appropriate order. Furthermore, the Respondent No.2 may be directed to accept the Nomination paper of the Petitioner and include his name in the final list of candidates.”

2. Brief facts leading to the filing of present petition as averred therein are that the petitioner filed his nomination paper to contest the forthcoming general elections for the seat of the Member Provincial Assembly for PS-106. On 06.06.2018 applications for obtaining extract of proposer and seconder were submitted by the applicants through petitioner to District Election Karachi East issued Voter Certificate.

Nomination form was submitted on 11.06.2018 to Respondent No.2. Despite no objection was raised against proposer and seconder of the petitioner from any quarters, during scrutiny of nomination papers respondent No.2 rejected the nomination form of the petitioner on the ground that the seconder being not the voter of PS 106, he cannot propose or second a candidate of PS 106. The Petitioner having such information immediately requested to Respondent No.2 to add a new Secunder upon which Respondent No.2 though gave assurance to response to such request after confirming with the Commissioner, however on 19.06.2018 the petitioner came to know that his nomination form has been rejected. On 20.06.2018 the petitioner also filed application under section 62(9)(ii) of Election Act 2017. The petitioner challenged the said decision of the Returning Officer before the learned Election Appellate Tribunal in Election Appeal No. 42 of 2018, however, said appeal was dismissed on 25.06.2018. Thereafter, the petitioner has challenged both the aforesaid orders through instant constitutional petition.

3. Learned counsel for the petitioner during the course of her argument has contended that the orders impugned in the instant proceedings are not sustainable in law and liable to be set aside as the Returning Officer as well as the learned Election Appellate Tribunal while passing the impugned orders have failed to appreciate the law and have incorrectly applied the provisions of the Election Act, 2017. Further argued that both the forums below have failed to consider the material fact that the names of the proposer and seconder were placed in the nomination form on the basis of certificates issued by the District Election Commissioner, therefore, the petitioner is not at fault, thus his nomination form could not be rejected and in the event if the seconder is found to be voter of other constituency, the petitioner may be allowed to substitute the seconder of the constituency from where the petitioner filed his nomination form. It is also argued that petitioner must not be penalized for the mistake of District Election Commissioner Karachi East, as the petitioner mentioned the names of the proposer and seconder in his nomination form on the basis and relying upon the certificate issued by the District Election Commissioner. Further argued that presumption of correctness is attached to Voter certificate issued by the District Election Commissioner Karachi East, in of view Article 129 (e) and 93 of Qanun-e-Shahadat order 1984. Further argued that no proper

plan/map of constituency PS 106 was prepared or available on the site of election commissioner. Further argued that the nomination form of the petitioner has been rejected on technical ground which can be rectifiable by allowing the substitution of another seconder which has already been applied for. It has also been argued that the subject defect is not substantial in nature and could be cured by the Returning Officers in terms of 2nd proviso to sub-section (9) (d) of Section 62 of the Elections Act 2017. According to learned Counsel for petitioner, previously, the area where the seconder resides was the part of constituency however recently it was separated from previous united constituency to which the petitioner was not aware of the said fact nor he was informed by District Election Commissioner Karachi East even when the petitioner filed application for voter certificate in respect of proposer and seconder. It is also argued that the impugned orders are in violation of fundamental rights of the petitioner as guaranteed under the Constitution of Pakistan. Failure on the part of the forums below to give an opportunity to rectify and amend any infirmity within his nomination form as provided in Section 62 (9) (d) (ii) of the Election Act 2017 is in violation of the law. Per learned such defect of the nature is purely technical in nature and could be rectified by this court by setting-aside the impugned orders with the directions to the Returning Officers to allow petitioner to remove such defect by bringing other seconder of the same constituency as a substitution of the earlier seconder, where after the nomination form of the petitioner may be accepted. Learned counsel in support of her stance in the case relied upon following case law:

- (i) **2016 MLD 1527** *KHALID AHMED MEMON v. DEEN MUHAMMAD TALPUR and 2 others*
- (ii) **2016 MLD 1464** *MUHAMMAD YOUSIF v. FEDERATION OF PAKISTAN through Election Commission of Pakistan, Islamabad and another*
- (iii) **2004 SCMR 964** *FAYYAZ HUSSAIN v. AKBAR HUSSAIN and others*
- (iv) **2017 CLC 495** *MUHAMMAD AKRAM QURESHI and another v. PAKISTAN DEFENCE HOUSING AUTHORITY*
- (v) **2017 YLR 2197** *Syed SAJID RAZA through Registered Attorney v. CITY DISTRICT GOVERNMENT (K.D.A wing) through District Coordination Officer and 5 others*

(vi) **2017 CLC Note 139** *DAIM KHAN v. Messrs KARACHI WATER AND SEWERAGE BOARD through Managing Director*

(vii) **PLD 2017 High Court (AJ & K) 23** *Syed TASAWAR Hussain Shah v. AZAD GOVERNMENT OF THE STATE OF JAMMU*

(viii) **Unreported tribunal decisions:**

Order dated 23.06.2018 passed in Election Appeal No. 33 of 2018 (Khawaja Izharul-Hassan vs. Returning Officer NA-242 & Others)

Order dated 15.04.2013 passed in Election Appeal No. 145 of 2013 (Akram Khan vs. The Returning Officer and another)

4. On the other hand, learned Counsel appearing on behalf of the Election Commission of Pakistan and learned Additional Advocate General Sindh while supporting the impugned orders have vehemently opposed the petition. It has been argued that the impugned orders passed by the forums below do not suffer from any error or illegality, whereas, relevant legal provisions and the rules relating to election laws have been properly invoked by the Returning Officer and the learned appellate tribunals, while rejecting the nomination form of the petitioner, as the same were not filed in accordance with the provisions of Election laws 2017. It has also been contended that petitioner admittedly did not file his nomination form in terms of Election Act 2017, as the seconder of the petitioner does not belong to the same constituency from where the petitioner filed his nomination form, whereas, any violation in this regard is substantial in nature and cannot be ignored or condoned at this stage when the names of validly nominated and contesting candidates have already been published. It has been further contended that no confusion whatsoever, as alleged by petitioner, was ever created on account of alleged delimitation by the Election Commission in respect of constituency of petitioner and final voter lists were also published and uploaded on the website as per law well within specified time period, where after, the election schedule was announced and all the candidates desirous of participating in the forthcoming elections, filed their nomination forms on the basis of such final electoral voter lists, the nomination papers of the candidates, who had complied with all codal/requisite formalities were accepted. And whereas the nomination form of the petitioner was rejected upon the deficiency in respect of seconder, who admittedly belonged to the other

constituency. It has also been argued that the certificates issued by the District Election Commission do not indicate that the proposer and seconder are of the same constituency but it was only to facilitate the persons, who have obtained the said certificates, to show that their names are available in the voter lists. However, there is nothing in the certificates which could show that the certificates were issued to the applicants and/or the petitioner mentioning that the said persons in whose names certificates have been issued are the voters of the constituency from where the candidate filed his nomination form. It has also been argued that it is the duty of each candidate to file complete and correct nomination form along with requisite documents after complying with all codal formalities in accordance with election laws/rules, as per schedule announced by Election Commission for such purpose, within the prescribed time limit, so that the election process shall be completed in time and in a transparent manner. It has been further argued that the entire process of filing of nomination papers, their scrutiny by the Returning Officers, hearing of the appeals by the Appellate Tribunals, have been completed, and even the printing of the ballot papers is near to complete. Per learned Counsel such plea could not be accepted by the forums below as the above defects being substantial in nature could not be allowed to be cured at the subsequent stage. It has been prayed that instant petition is misconceived both on the facts and law, which is liable to be dismissed with costs. In support of their contentions, they have placed their reliance on the following case law:

1. PLD 2016 SC 944 (NADEEM SHAFI V. TARIQ SHUJA BUTT AND OTHERS)
2. PLD 2016 LAHORE 101 (BARKHURDAR V. APPELLATE TRIBUNAL/ADDITIONAL DISTRICT AND SESSIONS JUDGE AND 3 OTHERS)
3. PLD 2017 LAHORE 394 (MUZAFAR ABBAS V. Maulana MUHAMMAD AHMED LUDHIANVI AND 31 OTHERS).

5. Learned Assistant Attorney General has also supported the arguments of the learned Counsel for the Election Commission of Pakistan as well as the learned Additional Advocate General Sindh and submitted that contentions of the petitioner are contrary to law and the judgments of the Hon'ble Supreme Court of Pakistan, and full Bench Decision of the Lahore High Court, referred to hereinabove. It has been prayed that the above petition may be dismissed and the

concurrent orders of rejection of nomination paper of the petitioner, passed by both the forums below, may also be maintained.

6. We have heard the learned Counsel for the parties, perused the record and the orders of both the forums below, and also examined the relevant provisions of the Elections Act 2017, and the Election Rules 2017, as well as the case law relied upon by the learned Counsel for the parties.

7. From the perusal of the record, it appears that the petitioner in his nomination form for contesting the forthcoming general elections from constituency of PS-106 District East, Karachi, placed the name of the seconder who admittedly belongs to the other constituency. The Returning Officer at the time of scrutiny of the nomination form of the petitioner upon finding such deficiency, rejected his nomination form of the petitioner. The petitioner challenged the said decision of the Returning Officer before the learned Election Appellate Tribunal in Election Appeal No. 42 of 2018, however, the said appeal was also dismissed by the learned Appellate Tribunal. The petitioner after having aggrieved by the orders of the both the forums below filed the present petition.

8. The case of the petitioner precisely is that the names of the proposer and seconder were placed in the petitioner's nomination form on the basis of voter's certificates issued by the District Election Commissioner Karachi East on the application of the applicant voters through petitioner. It is also the case of the petitioner that since the voter's certificates were issued by the District Election Commissioner Karachi East, therefore, at the time of scrutiny if it was found that the seconder of the petitioner does not belong to the same constituency as required under the law, it was not the fault of the petitioner. Conversely, it is the error on the part of the District Election Commissioner for which the petitioner should not be made responsible and liable to suffer. Furthermore, such deficiency can be cured by allowing the petitioner to replace the seconder from the another one who belongs to the same constituency as that of the constituency from where the petitioner filed his nomination form.

9. Learned counsel appearing on behalf the respondents have vehemently disputed the fact that firstly; subject voter's certificates were issued on the applications, copies whereof are filed with the

memo of petition, filed by the applicant voter as there is no endorsement on the said application which could show that the said applications were received by the District Election Commissioner and further such voter's certificate can be issued at the oral request of the any voter whose name is appearing in the voter's list. Secondly; the subject voter's certificates, also do not show that the said certificates were issued on the application filed by the petitioner and/or the applicant voter is a voter of the particular constituency and thirdly; such type of voter certificate, invariably, attached with every nomination form of the candidates, who intended to contest the forthcoming General Elections 2018, which clearly reflect that such type of certificate issued without any proper application. Perusal of the record substantiates the stance of the respondents. Furthermore, the perusal of the voter's certificate shows that it only provides the detail of the voter vis-a-vis his name, his father's name, CNIC, residence, name of the electoral area, district, tahsil, etc and there is no column in the certificate, which could reflect that the voter in whose name the said certificate has been issued belongs to any particular constituency, hence in the circumstances, the petitioner cannot claim any right in his favour on the basis of the subject voters certificate. Furthermore, the plea of the petitioner that the said certificate has been issued on the application filed by the applicant through the petitioner, in presence of specific denial of the respondent of such fact and in absence of any endorsement of district election commissioner on the subject application such fact has become disputed one, which cannot be decided in this extraordinary jurisdiction which is intended primarily, for providing an expeditious remedy in a case where the illegality of the impugned action of an executive or other authority can be established without any elaborate enquiry into complicated or disputed facts. Controverted questions of fact, adjudication on which is possible only after obtaining all types of evidence in power and possession of parties cannot be determined by this Court in constitutional petition. Reliance is placed on the case of Anjuman Fruit Arhtian and others v. Deputy Commissioner, Faisalabab and others (2011 SCMR 279).

10. Learned counsel for the petitioner during the course of arguments also referred to sub-section (9) (ii) of Section 62 of the Election Act 2017, for the convenience's sake the same are reproduced as under:

“62. Scrutiny.---(1) Any voter of a constituency may file objections to the candidature of a candidate of that constituency who has been nominated or whose name has been included in the party list submitted by a political party for election to an Assembly before the Returning Officer within the period specified by the Commission for the scrutiny of nomination papers of candidates contesting election to an Assembly.

- (2)-----
- (3)-----
- (4)-----
- (5)-----
- (6)-----
- (7)-----
- (8)-----

(9) Subject to this section, the Returning Officer may, on either of his own motion or upon an objection conduct a summary enquiry and may reject a nomination paper if he is satisfied that _

- (a)-----
- (b)-----
- (c)-----

(d) the signature of the proposer or the proposer or the seconder is not genuine:

provided that _

- (i) the rejection of a nomination paper shall not invalidate the nomination of a candidate by any other valid nomination paper; or
- (ii) the Returning Officer shall not reject a nomination paper on the ground of any defect which is not of a substantial and may allow any such defect to be remedied forthwith including an error in regard to the name, serial number in the electoral roll or other particulars of the candidate of his proposer or seconder so as to bring them in conformity with the corresponding entries in the electoral roll.

[emphasis supplied]

A perusal of the above provision indicates that the powers of the Returning Officer have been controlled for not rejecting the nomination papers on any defect, which is not of substantial nature and the defect, which may be remedied forthwith. Furthermore, this bench recently decided the issue relating to proposers and seconders in the case of Muhammad Feroz V. ECP & others (CP No.D-

4778/2018) alongwith 18 other constitution petitions, wherein while relying upon the judgments of Honorable Supreme Court of Pakistan, we have held that the above provisions are mandatory in nature and the defect is of a substantial nature, which could not be left to the discretion of the Returning Officer to remedy. Relevant portion of the judgment for convenience's sake is reproduced as under:-

“12. In view of the above discussion and by respectfully following the ratio of judgments of Hon'ble Supreme Court, we are of the considered view that the provisions relating to proposer and seconder of a candidate in the Election Act 2017 are mandatory in nature, and any defect in respect thereof in nomination, is a defect of substantial nature, which cannot be cured at subsequent stage, and the nomination papers being invalid on this account, could not be allowed to be validated afterwards in exercise of powers either by the Returning Officer or even by the Appellate Tribunals. And thus, the orders rendered by the two forums below impugned in these petitions are legal, unexceptionable, apt to the facts and circumstances of the case and they do not call for any interference by this Court in exercise of its Constitutional jurisdiction. Accordingly, the present petitions being devoid of merit are dismissed with no order as to costs along with all the pending applications.”

11. Reverting to the case in hand, we have examined the orders rendered by the two forums below and find that the impugned orders are legal, unexceptionable, apt to the facts and circumstances of the case, which suffer from no jurisdictional defect, do not call for any interference by this Court in exercise of its Constitutional jurisdiction.

12. The case law cited by learned counsel for the petitioner have been perused and considered with due care and caution but are found distinguishable from the facts of the present case and hence the same are not applicable to the present case.

13. The upshot of the above, we are of the view that the present petition is devoid of merit, thus, we are constrained to dismiss the petition with no order as to costs alongwith the pending applications.

JUDGE

JUDGE