

IN THE HIGH COURT OF SINDH AT KARACHI.

Before:

Mr. Justice Khadim Hussain M. Shaikh

Mr. Justice Arshad Hussain Khan

C.P. No.D-4778 of 2018

Muhammad Feroz

V/s.

Election Commission of Pakistan & others

C.P. No.D-4906 of 2018

Muhammad Fareed

V/s.

Election Commission of Pakistan & others

C.P. No.D-4813 of 2018

Asif Saleem

V/s.

Returing Officer PS 117 & others

C.P. No.4936 of 2018

Zaheer Khan

V/s.

Election Commission of Pakistan & others

C.P. No.D-4907 of 2018

Muhammad Ali Khan Sherwani

V/s.

Election Commission of Pakistan & others

C.P. No.D-4905 of 2018

Syed Muhammad Raees Naqvi

V/s.

Election Commission of Pakistan & others

C.P. No.D-4874 of 2018

Mateen Jameel Khan (In person)

v/s.

Election Commission of Pakistan & others

C.P. No.D-4882/2018

Aqeel Anjum

V.

Election Commission of Pakistan & others

Through Mr. Hasnain Ali Chohan

C.P. No.D-4895 of 2018

Saleem Hussain

V/s

Election Commission of Pakistan & others
through Mr. Muhammad Khalid Akhtar, Advocate.

C.P. No.D-4940 of 2018

Akram Khan

V/s.

Election Commission of Pakistan & others
through Mr. Mumtaz Ali Samejo, Advocate

C.P. No.D-4948 of 2018
Sajjad Nadeem
V/s.
Election Commission of Pakistan & others
through Mr. Baqar Mehdi, Advocate.

C.P. No.D-4949/2018
Sajjad Nadeem
V/s.
Election Commission of Pakistan & others
through Mr. Baqar Mehdi, Advocate.

C.P. No.D-4960 of 2018
Muhammad Munawar Raza
V/s.
Election Commission of Pakistan & others
through Mr. Mumtaz Ali Samejo, Advocate

C.P. No.D-4994 of 2018
Haider Abbas
V/s.
Election Commission of Pakistan & others
through Ch. Tassaduq Nadeem, Advocate.

C.P. No.D-4755 of 2018
Syed Muhammad Ishrat Ghazali (In person)
V/s.
Election Commission of Pakistan & others

C.P. No.D-4991 of 2018
Syed Farah Naaz
V/s.
Election Commission of Pakistan & others
through Mr. Farrukh Raza, Advocate.

C.P. No.D-4989 of 2018
Sham Lal
V/s.
Election Commission of Pakistan & others
through Mr. Anand P Kumar, Advocate.

C.P. No.D-4937 of 2018
Muhammad Tahir
V/s.
Election Commission of Pakistan & others
through Mr. Muhammad Ghaffar Khan Kakar, Advocate.

C.P. No.D-5113 of 2018
Mazhar Hussain
V/s.
Election Commission of Pakistan & others

Respondents through: M/s. Salahuddin Khan Gandapur and Miss. Maimoona Nasreen, Advocates for the ECP.
Mr. Zahid Khan, Assistant Attorney General.
Mr. Jawwad Dero, Additional Advocate Sindh.

Date of hearing: 12.07.2018, 13.07.2018, & 17.07.2018

JUDGMENT

Arshad Hussain Khan-J. Through this consolidated judgment we intend to decide the captioned petitions as mixed/common questions of law and facts are involved in these cases. It is not relevant to refer to the individual facts of each constitutional petition, however, suffice it to say that through these petitions, the petitioners have challenged the different orders, passed by the Returning Officers and learned Appellate Tribunals, constituted under Section 63 of the Election Act, 2017, whereby, the nomination papers filed by the petitioners have been rejected on the ground that the proposers and seconders were not from the same constituency from where the petitioners/candidates filed their nomination papers for contesting the forthcoming general elections.

2. Brief facts, which are common in these petitions, are that the petitioners are the candidates who filed their nomination papers for contesting the elections for the post of Member Provincial Assembly (MPA) and Member National Assembly (MNA) from their respective constituencies in the forthcoming General Elections, scheduled to be held on 25th July, 2018, and whose nomination papers have been rejected by the Returning Officers on the ground that the proposers or seconders of the contesting candidates are not the registered voters of the same constituency from which the candidates filed their nomination papers. Appeals were also filed against the said rejection of nominations papers before the learned Appellate Authority provided under Law, however, the orders passed by the Returning Officers on the aforesaid petitions have been maintained and the petitioners being aggrieved by the said orders have filed the captioned petitions with the prayer to set-aside the orders passed by the authorities below and to allow the petitioners to contest the forthcoming general elections. The arguments of the learned counsel for the petitioners as well as the

petitioners in person in the above petitions can be summarized as follows:-

3. It has been argued by and on behalf of the petitioners that in view of some confusion prevailing on account of delimitation of constituencies and finalization of list of different constituencies, the contesting candidates due to inadvertence, filed their nomination forms through proposers and seconders belonging to the other constituencies than that of the constituencies in which the petitioners wanted to contest the elections, resulting into that cancellation of their nomination forms by the Returning Officers. It has been further argued that such 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 petitioners, such defect could not be cured in time before the Returning Officers as the petitioners were not aware of the legal position, therefore, that may be allowed to be cured by this Court by setting-aside the impugned orders with the directions to the Returning Officers to allow petitioners to remove such defect by bringing other proposers and/or seconders, as case may be, of the same constituencies as a substitution of the earlier proposers and/or seconders, where after the nomination forms of the petitioners may be accepted. Learned Counsel further argued that under similar circumstances, in the case of 2016 MLD 1646, this court allowed the petitions, directing the Returning Officers to allow the petitioners to replace proposers or seconders of the same constituency from which the petitioners were contesting the elections. It has been prayed that the impugned orders whereby the nomination forms of the petitioners have been rejected on the aforesaid grounds may be set-aside and concerned Returning Officers may be directed to allow the petitioners to replace proposers and/or seconders as the case may be and thereafter, the nomination forms of the petitioners may be accepted. It is also argued that the names of the proposers and seconders were placed on the basis of the certificates issued by the Election Commission, therefore, the petitioners are not at fault, thus their nomination forms shall not be rejected and in the event if the proposers and seconders are found to be resident of other constituency, they may be allowed to substitute the proposers and seconders of the constituency from where the petitioners filed their nomination forms. In support of their stance in the case learned counsel have relied upon the following case law:

- (i) 2016 MLD 1464 (MUHAMMAD YOUSUF V. FEDERATION OF PAKISTAN AND OTHERS)
- (II) 2016 MLD 1527 (KHALID AHMED MEMON V. DEEN MUHAMMAD TALPUR AND 2 OTHERS).

4. Conversely, learned Counsel appearing on behalf of the Election Commission of Pakistan and learned Additional Advocate General Sindh have vehemently opposed the above contentions of the learned Counsel for the petitioners and have also raised objections as to the maintainability of instant petitions on the ground 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 Officers and the appellate tribunals, while rejecting the nomination papers of petitioners, as the same were not filed in accordance with the provisions of Election Act, 2017 and the Election Rules, 2017. It has also been contended that petitioners admittedly did not file their nomination forms in terms of Election Act 2017, as the proposers or seconders in the above petitions do not belong to the same constituencies, 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, and the election is to be held on 25th July, 2018. It has been further contended that no confusion whatsoever, as alleged by petitioners, was ever created on account of alleged delimitation by the Election Commission in respect of constituencies of petitioners 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 papers 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 papers of the petitioners were rejected upon the deficiency regarding proposers and seconders, who admittedly belonged to the other constituencies. 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 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 completion. 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 also been submitted that the certificates issued by the Election Commission not indicate that the names of the proposers and seconders are of the same constituencies 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/petitioners mentioning that the said persons in whose names certificates have been issued are the voters of the constituencies from where the candidates filed their nomination forms. It has been prayed that instant petitions are misconceived both on facts and law, which are liable to be dismissed with costs. In support of their contentions, they have placed their reliance on the following case law:

PLD 2016 SC 944 (NADEEM SHAFI V. TARIQ SHUJA BUTT AND OTHERS)

PLD 2016 LAHORE 101 (BARKHURDAR V. APPELLATE TRIBUNAL/ADDITIONAL DISTRICT AND SESSIONS JUDGE AND 3 OTHERS)

PLD 2017 LAHORE 394 (MUZAFAR ABBAS V. Maulana MUHAMMAD AHMED LUDHIANVI AND 31 OTHERS).

5. Learned Assistant Attorney General have also supported the contentions of learned Counsel for the Election Commission of Pakistan as well as the learned Additional Advocate General Sindh and submitted that contentions of the petitioners 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 petitions may be dismissed and the concurrent orders of rejection of nomination papers of the petitioners, 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. Before going into further discussion, it will be appropriate to reproduce hereunder the relevant provisions of the Election Act 2017, necessary for the decision of the present petitions:-

“17. Commission to delimit constituencies.---(1)
The Commission shall delimit territorial constituencies for elections to the National Assembly, each Provincial Assembly and to the local government in accordance with the provisions of the Constitution, this Act, the Rule and the applicable local government law.

(2) The Commission shall delimit constituencies after every census officially published.”

“21. Reports of Commission and list of constituencies.— (1) For the purpose of delimiting constituencies, the Commission may receive and consider representations, hold inquiries, summon witnesses and record evidence, and shall prepare and publish in the official Gazette a preliminary report and list of constituencies specifying the areas proposed to be included in each constituency.

(2) The Commission shall invite representations in respect of the preliminary report within a period of thirty days from the date of publication.

(3) A voter in a constituency may, within the period specified in sub-section (2), make a representation to the Commission in respect of the delimitation of that constituency proposed in the preliminary report.

(4) The Commission shall, after hearing and considering the representations, if any, received by it, make such amendments, alterations or modifications in the preliminary list of constituencies published under sub-section (1) as it thinks fit or necessary, and shall, within a period of thirty days from the last date fixed for making representation under sub-section (2), publish in the official Gazette and on its website, the final report and list of constituencies showing the areas included in each constituency.”

Section 60 of the Election Act, 2017 reads as follows:

“60. Nomination for election.— (1) Any voter of a constituency, may propose or second the name of any qualified person to be a candidate for Member for that constituency:

Provided that no voter shall subscribe to more than one nomination papers either as proposer or seconder.

(2) Every nomination shall be made by a separate nomination paper on Form A signed both by the proposer and the seconder and shall, on solemn affirmation made and signed by the candidate, be accompanied by—

- (a) a declaration that he has consented to the nomination and that he fulfils the qualifications specified in Article 62 and is not subject to any of the disqualifications specified in Article 63 for being elected as a Member;
- (b) a declaration that he has opened an exclusive account with a scheduled bank for the purpose of election expenses;
- (c) an attested copy of his National Identity Card; and
- (d) a statement of his assets and liabilities and of his spouse and dependent children as on the preceding thirtieth day of June on Form B.

(3) Every nomination paper shall be delivered to the Returning Officer by the candidate or his proposer or seconder or if so authorized in writing by the candidate, by his nominee and the Returning Officer shall acknowledge receipt of the nomination paper specifying the date and time of receipt.

(4) A person may be nominated in the same constituency by not more than five nomination papers.

(5) The Returning Officer shall assign a serial number to every nomination paper and endorse on the nomination paper the name of the person presenting it, and the date and time of its receipt, and inform such person of the time and place at which he shall hold scrutiny.

(6) The Returning Officer shall cause to be affixed at a conspicuous place in his office a notice of every nomination paper received by him containing the particulars of the candidate as shown in the nomination paper.

- (7) The Returning Officer shall—
 - (a) make the nomination papers along with annexures open to inspection by the public; and
 - (b) issue certified copies of these documents in such manner and on payment of such fee as may be prescribed. ”

Section 62 of the Election Act, 2017 reads as follows:

“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) the proposer or the seconder is not qualified to subscribe to the nomination paper
- (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.

- (10)-----
- (11)-----

whereas the 'Constituency' and 'voter' are defined in definition clause of the Elections Act 2017 as under:

'Constituency' means the constituency delimited under this Act."

'Voter' means---- (a) In relation to an Assembly or a local government, a person who is enrolled as a voter on the electoral roll of any electoral area in a constituency."

8. The questions before us in these petitions are that the power of the Returning Officer to remedy the defect of the nature which is

involved in these petitions, that is, if the proposer and/or seconder, as the case may be, are not the registered voters of the same constituency, then, can the Returning Officer, in exercise of his discretion, permit the substitution thereof? And whether this is a defect of substantial in nature or not?

9. From plain reading of Section 60 (1) of the Elections Act 2017, it appears that the voter, who proposes or seconds the name of a duly qualified person to be a candidate for an election of a member of National Assembly or Provincial Assembly, as the case may be. It further appears that upon receipt of the nomination paper of the candidate duly proposed and seconded by the voters of the same constituency, the Returning Officer shall assign a serial number to every nomination paper and endorse on the nomination paper the name of the person presenting it, and the date and time of its receipt, and inform such person of the time and place at which he shall hold scrutiny and shall cause to be affixed at a conspicuous place in his office, a notice of every nomination paper received by him containing the particulars of the candidate as shown in the nomination papers, it is not that a candidate 'files' his nomination paper and merely mentions the names of proposer and seconder as a formality, which in fact is the essence and foundation of the whole process. And thus, if the nomination is duly made by the proposer and seconder of a candidate and it is only then that the nomination paper is received by the Returning Officer. Thus, in the circumstances, a defect with respect to the proposer and/or seconder, not being a voter of the same constituency, would go to the core of his qualification, to be a proposer or seconder, as the same was the only qualification required of such person and the same was not amenable to rectification.

10. From the perusal of above provisions, it is clear that the provisions of the Election Act, 2017 under discussion, are the same as that of the provisions of Sections 12 and 14 of the Representation of the People Act, 1976 [repealed], which provisions have already been interpreted by a full bench of Lahore High Court in case of Mudassar Qayyum Nahra v. Election Tribunal Punjab Lahore, [2003 MLD 1089], wherein, it has been held that:-

"8. Section 12(1) of the Representation of the People Act, 1976, provides that any elector of a constituency may propose or second the name of any duly qualified person to be a member of that constituency. Similarly, para.39 of the Manual

of Instructions for the Guidance of the Returning Officers, issued by the Election Commission of Pakistan, provides that it is necessary that the person proposing or seconding the constituency must belong to that constituency and should be registered as elector in the electoral roll of any one of the electoral areas comprised in the constituency. Furthermore, law has taken into consideration the commission of such a mistake. Section 14(4) of the above said Act provides that a person may be nominated in the same constituency by five nomination papers. Similarly, para 40 of the above said Manual of Instructions provides that a candidate may file five nomination papers from a constituency. Section 14(3)(b) of the Representation of the People Act, 1976, provides that the Returning Officer may reject the nomination papers if he is satisfied that the proposer or the seconder is not qualified to subscribe to the nomination paper. Similarly, section 14(3)(c) provides for the rejection of the nomination papers, if any provision of section 12 or section 13 has not been complied with.

9. The above mentioned shows that a person not belonging to the concerned constituency cannot be a proposer or a seconder and the nomination papers of a candidate are liable to be rejected if the proposers or the seconder are not qualified to subscribe to the nomination papers. Second proviso to section 14(3)(d) of the Representation of the People Act, 1976, provides that the Returning Officer can allow the removal of only those defects which are not of substantial nature. The unqualified proposer or the seconder leads to the rejection of nomination papers as provided in section 14(3)(b) and, therefore, such a defect cannot be held to be not of substantial nature because such a defect can be removed only by the substitution of a nomination paper and the law does not provide for the substitution of the proposers or the seconders and the safety valve has been provided to the candidates by permitting them by filing up to five nomination papers.....

Furthermore, the questions which beg determination in the instant petitions came up for determination before the Honorable Supreme Court of Pakistan in the case of RANA MUHAMMAD TAJAMMAL HUSSAIN v. RANA SHAUKAT MAHMOOD (PLD 2007 Supreme Court 277) wherein it was held that:

"...Learned counsel however, contended that the compliance of such provision of law i.e. section 12(1)(2) of the Act, 1976 is not mandatory but directory and due to its non-compliance the election of a candidate cannot be declared void and such defect can be cured by allowing substitution of qualified proposers and seconders in exercise of powers under section 14(3) proviso (ii) of the Act, 1976. In this behalf he has referred the judgment in the case of Ishaq, Dar v. The Election Tribunal Punjab KLR 1998 Civil Cases 374 (Lahore).

"...Moreover, in our considered opinion, with reference to a duty cast upon a qualified elector to propose or second a candidate to represent the members of the constituency in an elected house is mandatory and not directory."

9. It has been pointed out hereinabove that the object of section 12(1) of the Act, 1976 is that elector of the constituency may propose or second the name of any duly qualified person as a candidate for election as a member for the constituency, clearly spells out the intention of the legislature. Therefore, keeping in view that intention of the legislature the word 'may' used in section 12(1) has to be read as 'shall' and on having held that the word 'may' can be interchanged with the word 'shall' to enhance the intention of the legislature, the candidate is bound and under mandatory obligation to ensure filing of nomination papers from the constituency duly proposed and seconded by the electors therefrom. There is no cavil with the proposition that once it is found out that the provision of the law is mandatory by its implication, the same is bound to be strictly following as has been held in *Dalchand v. Municipal Corporation Bhopal* AIR 1983 SC 303.

10. Thus it is held that the plea of the learned counsel for appellant that permission be accorded to him to substitute the names of the proposer and seconder, at this stage, seems to be not acceptable. Therefore, opinion expressed in the case of *Ishaq Dar v. Election Tribunal* (KLR 1998 Civil Cases 374) is not approved for the reasons mentioned hereinabove because of the fact that this provision of law is mandatory in its nature and would have substantial effect on the election for which a schedule is to be announced and any nomination paper found invalid cannot be allowed to be validated afterwards, even in exercise of powers either by the Returning Officer or the election Tribunal or for that matter High Court or this Court, in terms of section 14(1)(2) of the Act, 1976. A perusal of this provision also 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, whereas defect in any submitted nomination papers, duly proposed and seconded by a candidate, is of a substantial nature and provisions of sections 12 and 14 of the Act, 1976 are mandatory in nature as held in *Muhammad Abbas v. Returning Officer* 1993 MLD 2509, *Qaisir Iqbal v. Ch. Asad Raza* 2002 YLR 2401, *Asif Khan v. Returning Officer* 2003 MLD 230 and *Mudassar Qayyum Nahra v. Election Tribunal* 2003 MLD 1089. Thus on having approved the principle discussed in these judgments, the earlier judgment in the case of *Ishaq Dar* (*ibid*) on the point is not approved. (pages 281, 285, 286)".

11. From the perusal of the above judgments, it appears that though the provisions discussed in the judgment relates to the Act, 1976, yet these provisions, as explicated, are in pari materia to the provisions under consideration. Furthermore, the judgment summarizes the controversy, which has been raised in these petitions and conclusively determines the said controversy by holding that the 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. Reliance in this regard can also be placed in the cases of *BARKHURDAR v. APPELLATE TRIBUNAL/ADDITIONAL DISTRICT AND SESSIONS JUDGE and 3 others* (PLD 2016 Lahore

101), *ABDUL LATIF and others v. The APPELLATE AUTHORITY FOR LOCAL COUNCILS KHAIRPUR/THE DISTRICT AND SESSIONS JUDGE AND OTHERS (2016 CLC 855) AND NADEEM SHAFI v. TARIQ SHUJA BUTT and others (PLD 2016 SC 944).*

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 alongwith all the pending applications.

Dated: 19-07-2018

JUDGE

JUDGE

M.Tahir/PA.