

Judgment Sheet

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

**Election Appeal No.S – 10 of 2016**

Appellant: Muhammad Zaman,  
through Mr. Ali Asghar K. Panhyar Advocate.

Respondent No.1: Federation of Pakistan, through  
Chief Election Commissioner of Pakistan,  
through Mr. Aushaq Ali Sangi, Assistant Attorney  
General.

Respondents 2 to 5 : Provincial Election Commissioner Sindh, Secretary  
Local Government Sindh, District Returning Officer  
District Ghotki and Returning Officer U.C-I Ghotki,  
called absent.

Respondent No.6: Shafi Muhammad,  
through Mr. Sudhamchand Advocate.

Dates of hearing: 20.11.2017.

**J U D G M E N T**

**NADEEM AKHTAR, J.** : Through this appeal under Section 14(5) of the Representation of the People Act, 1976, the appellant has impugned the order passed on 22.04.2016 by the learned Election Tribunal Ghotki at Mirpur Matheloin Election Petition No.01/2016, whereby the said election petition filed by the present appellant was dismissed under Rule 64 of the Sindh Local Councils Election Rules, 2015, (**'the Rules'**) on the ground that he did not comply with the mandatory provisions of Rules 61(a), 61(b) and 62(3) of the Rules.

2. It was held by the learned Tribunal that notice was not served by the appellant either personally or by courier service or by registered post upon the respondents who were joined by him as respondents in his election petition and against whom allegations of corrupt and illegal practice were made by him, and thus compliance of Rule 61(b) of the Rules was not made by him. It was further held that the election petition and schedule / annexures filed therewith were not signed and verified by the appellant, therefore, mandatory provisions of Rule 62(3) of the Rules were also not complied with by him.

3. Mr. Ali Asghar K. Panhyar, learned counsel for the appellant, contended that dismissal of the petition on the ground that notice in terms of Rule 61(b) was not issued by the appellant to respondents against whom allegations of corrupt and illegal practice were made in his petition by the appellant, is not sustainable

;firstly, as such requirement is not mandatory ; and, secondly, as no such objection was raised by the learned Tribunal at the time of filing of the election petition or before hearing the same. According to him, had the learned Tribunal raised an objection to this effect, the defect, if any, would have been cured by the appellant ; and by not raising such objection at the proper stage, learned Tribunal committed a mistake for which the appellant should not have been penalized.Regarding the other ground of non-verification of the petition and schedule / annexures thereto, he submitted that the petition was supported by an affidavit of the appellant which was duly sworn by him on oath and as such the petition could not be dismissed. He further submitted that the petition was dismissed merely on technical grounds without hearing the main grievance of the appellant. It was urged that the matter ought to have been decided by the learned Tribunal on merits rather than on technicalities. In support of his above submissions, learned counsel placed reliance on Shaukat Ali V/S Ghulam Qadir and others, 1986 CLC 838 and Dr. Dilnawaz Rafi Shaikh and 3 others V/S Riyazur Rahim and 3 others, 2015 MLD 965.

4. On the other hand, Mr. Sudhamchand, learned counsel for private respondent No.6, contended that the provisions of Rules 61(b) and 62(3) are mandatory in nature and the same cannot be termed as merely technical as non-compliance of any of the said provisions results in dismissal of the election petition as contemplated in Rule 64 of the Rules. He submitted that in view of violation of the above mandatory provisions of the Rules, the election petition was rightly dismissed by the learned Tribunal. In support of his submissions, he relied upon Lt.-Col. (Rtd.) Ghazanfar Abbas Shah VS Mehr Khalid Mehmood Sargana and others, 2016 SCMR 1585 and Zia urRehman VS Syed Ahmed Hussain and others, 2014 SCMR 1015.

5. Mr. Aushaq Ali Sangi, learned Assistant Attorney General for Pakistan, adopted the arguments advanced by learned counsel for private respondent No.6 and prayed for dismissal of this appeal.

6. I have heard learned counsel for the parties and with their assistance have also perused the material available on record and the law cited at the bar. Before advertng to the merits of the case and the arguments advanced by learned counsel for the parties, it may be observed that this appeal has been filed by the appellant under Sub-Section (5) of Section 14 of the Representation of the People Act, 1976, which provides that against the decision of the Returning Officer rejecting or accepting the nomination paper of the candidate, the candidate may

prefer an appeal to the Tribunal, constituted for the constituency to which the nomination relates, consisting of not less than two and not more than three judges of the High Court nominated by the Chief Election Commissioner with the approval of the President. It may be noted that this appeal has not been filed by the appellant against acceptance or rejection of nomination paper, nor is this Court hearing this appeal against any such order. This appeal has been filed against a final order of the Tribunal constituted under Section 47 of the Sindh Local Government Act, 2013, for trial of election petitions, whereby the election petition filed by the appellant was dismissed being barred by Rules 61(b) and 62(3) of the Rules. Therefore, the appellant ought to have filed this appeal under Section 54 of the Sindh Local Government Act, 2013, which provides that any person aggrieved by a final order of a Tribunal may prefer an appeal to the High Court within thirty days of the communication of such order. It is well-settled that if wrong provision of law is mentioned in the title of any proceedings, such mistake can be ignored and condoned provided the proceedings have been instituted within time and the Court otherwise has jurisdiction to decide the same. Therefore, I am not inclined to dismiss this appeal on the above ground and will treat it as an appeal under Section 54 *ibid*.

7. The first ground on which the appellant's election petition was dismissed was that notice in terms of Rule 61(b) was not issued by him to respondents against whom allegations of corrupt and illegal practice were made by him in his petition. Rule 61(b) specifically provides that all contesting candidates and any other person against whom any allegation of corrupt or illegal practice is made in an election petition shall be joined by the petitioner as respondents, and he shall serve a copy of his petition on each such respondent personally or by courier service or registered post. It is not the case of the appellant that copy of the petition was served by him on all the respondents through any of the prescribed modes in compliance of Rule 61(b). It has been argued on his behalf that such requirement is not mandatory and no such objection was raised by the learned Tribunal at the time of filing of the election petition or before hearing the same. Thus, it is an admitted position that compliance of Rule 61(b) was not made by him. In this context, I may refer to the case of *Inayatullah V/S Syed Khursheed Ahmed Shah and others*, **2014 SCMR 1477**, wherein it was observed by the Hon'ble Supreme Court that the election petition was not served on the 19 respondents personally or through registered post, and the question whether the courier service employed by the appellant could be construed as service personally effected on the respondents by the appellant, was considered. In

paragraph 3 of the above-cited authority, it was held by the Hon'ble Supreme Court as under :

*“3. Considering the provisions of the various statutes including the Civil Procedure Code (C.P.C.) the distinction between personal, service/appearance etc. and appearance/service etc. through an agent is well recognized. The courier service can at best be treated as an agent of the appellant. Service through an agent, keeping in mind the similar provisions of the Civil Procedure Code (C.P.C.) and other statutes will not constitute service effected personally. As far as service through registered post is concerned, that has not even been claimed by the appellant. In any event, the Postal Service of Pakistan has been created under the Post Office Act, 1898. There are a number of courier service operating in Pakistan. Our research staff has accessed reports which show that legislative efforts are a foot to regulate the services of couriers. As a result, the Pakistan Private Courier Regulatory Bill, 2012, was prepared. However, the said Bill has not become a law. In any event, service through registered post raises statutory presumptions in the ordinary course. No such presumption attaches to service through courier. Learned counsel for the appellant made a feeble attempt to argue that service through courier could be considered valid on the ground of practice and usage. This plea is not legally tenable in view of the express wording of the Act.”*

8. It would be seen that in the above-cited case service on the respondents was not effected either personally or through registered post, and it was held therein that service through courier service was not a valid service. In the present case, service on the respondents was admittedly not effected by the appellant either personally or through registered post or even by courier service. It may be noted that because of the word “shall” used in Rule 61(b), the provisions thereof are mandatory in nature. Thus, the appellant was duty-bound to comply with such mandatory requirement and it was not the function or duty of the learned Tribunal to raise objection in this behalf at the time of filing of the election petition or before hearing the same. Accordingly, the argument advanced on behalf of the appellant regarding mistake of the learned Tribunal is not tenable. In the above circumstances, especially in view of the law laid down by the Hon'ble Supreme Court in *Inayatullah*(supra),the election petition of the appellant was rightly dismissed by the learned Tribunal being barred under Rule 61(b).

9. Regarding non-verification of the petition and schedule / annexures thereto, it has been argued on behalf of the appellant that the petition was supported by his affidavit which was duly sworn by him on oath. This point has been authoritatively decided by the Hon'ble Supreme Court in the cases of *Lt.-Col. (Rtd.) Ghazanfar Abbas Shah* (supra) and *Sultan MehmoodHinjra V/S Malik Ghulam Mustafa Khar and others*, **2016 SCMR 1312**. In both the above

authorities, the election petitions were not verified on oath and instead affidavits containing verification of the petitioners were filed therewith. In Lt.-Col. (Rtd.) Ghazanfar Abbas Shah (supra), it was observed by the Hon'ble Supreme Court that it was not reflected from the verification / affidavit whether the appellant was present at the time of verification before the Oath Commissioner because he had not been identified with reference to his national identity card which was the ordinary, usual and general course for identification of a person or even by an advocate ; and it was held that on account of this deficiency and other deficiencies verification of the election petition was not valid and in such circumstances it was rightly dismissed by the Election Tribunal. This view was followed by the Hon'ble Supreme Court in Sultan MehmoodHinjra(supra).I have examined the appellant's election petition and the affidavit filed by him in support thereof which does not bear his national identity card number. This deficiency was noticed by the learned Tribunal in the impugned order which does not require any interference in view of the above-cited authorities.

10. Rule 64 provides that if the Election Tribunal is satisfied that all or any of the preceding provisions, which obviously include Rule 61(b) and 62(3), have not been complied with, the petition shall be dismissed forthwith. In paragraph 7 of ZiaurRehman (supra), it was held by the Hon'ble Supreme Court that when the law prescribes a certain format of an election petition and its verification on oath and entails penal consequences for its non-compliance, it is a mandatory provision. With due respect to learned counsel for the appellant, the cases of Dr. Dilnawaz Rafi Shaikh (supra) Shaukat Ali (supra) cited and relied upon by him have no relevance to the issue at hand or to the facts and circumstances of the instant case.

11. In view of the law laid down by the Hon'ble Supreme Court as discussed above, I am of the considered view that dismissal of the appellant's election petition for non-compliance of the mandatory provisions of Rules 61(b) and 62(3) was fully justified, and such finding of the learned Tribunal does not require any interference by this Court. Accordingly, the appeal is dismissed with no order as to costs.

---

J U D G E