

**IN THE HIGH COURT OF SINDH,
AT KARACHI**

C.P No. D-7073 of 2022

Present:

Ahmed Ali M. Shaikh, CJ
and Yousuf Ali Sayeed, J

Petitioner : Imran Khan through Ghulam Shabbir Shah, Advocate.

Respondent No.1 : Malik Amanullah Khan through Abdul Wahab Balouch, Advocate.

Respondent No.2 : President Cantonment Board, Malir through Ashraf Ali Butt, Advocate.

Respondent No.3 : Election Tribunal, Malir Cantonment through Kazi Abdul Hameed Siddiqui, D.A.G along with Mubashir Mirza, A.A.G.

Respondent No.4 : Election Commission of Pakistan, Islamabad, through Sarmad Sarwar, Law Officer.

Date of hearing : 15.02.2023

ORDER

YOUSUF ALI SAYEED, J. - The Petition impugns the Order made on 14.11.2022 by the District & Sessions Judge Malir as the Appellate Election Authority for Malir Cantonment, allowing Election Appeal No. 07 of 2021 (the “**Appeal**”) filed by the Respondent No. 1 under the Cantonments Local Government (Election) Rules, 2015 (the “**2015 Rules**”) against the election of the Petitioner to the post of Vice-President of the Cantonment Board, Malir, Karachi (the “**Board**”).

2. As it stands, the Petitioner and Respondent No.1 were rival candidates for the aforementioned post in the election held in that regard on 27.11.2021, with the Petitioner securing 6 out of the 11 votes cast as opposed to the 5 votes obtained by the Respondent No.1. As such, the Petitioner was declared to have been elected as the Vice-President of the Board vide a letter dated 29.11.2021 issued by the Cantonment Executive Officer.

3. The Respondent No.1 then challenged the election of the Petitioner through the Appeal on the ground that 1 member/voter had placed a mark other than a cross mark in the column provided on the ballot paper against the name of the Petitioner in an endeavour to deliberately disclose his identity in violation of Rule 89 (4) of the 2015 Rules, with it being averred that this constituted a corrupt practice as it had been done as part of a pact with the Petitioner to sway the result in his favour. On that basis, it was prayed that the election be declared void and the process either be conducted afresh, or in the alternative, the election be declared void by excluding the challenged vote from the count and lots be drawn to determine the outcome. Through Paragraphs 7 and 8 of the Memo of Appeal, it was stated by the Respondent No.1 in that regard as follows:

“7. That it is pertinent to point out here that the Cantonment Local Government Election were held on party basis and petitioner alongwith three other members were elected on the ticket of Pakistan Tehreek-e-Insaaf (PTI) whereas, two members were elected on the ticket of Jamaat-e-Islami. Likewise, two members were elected on the ticket of Pakistan People's Party Parliamentarians (PPPP), one member on the ticket of Mutihadda Qoumi Movement (MQM) and one member was elected as independent. Further member on special seat was elected on ticket of Jamaat-e-Islami with the support of PTI members.

8. That one day before the scheduled meeting of Cantonment Board wherein election of Vice-President was to be held, all the members irrespective of their party affiliation unanimously nominated the petitioner as candidate for the seat of Vice-President. Much to the consternation and dismay of the petitioner, on the day of election, the member belonging to PPPP nominated the respondent No. 2 as candidate for Vice-President and thereafter, despite clear majority of the petitioner (04 Members of PTI and 03 Members of JI), the respondent No. 2 bagged 06 votes, including one invalid vote, which unambiguously shows that one of the members from the camp of the petitioner was influenced to vote for the respondent No. 2 and in order to disclose his identity, the said voter deliberately placed mark other than cross mark at the requisite place on the voting paper.”

4. The Petitioner and the Board filed their respective replies, raising objections as to the maintainability of the Appeal, as well as refuting the case of the Respondent No.1 on the merits. However, the Appeal culminated in the impugned Order, the operative part of which reads as follows:

7. I have carefully gone through the contents of the petition filed before this tribunal and all the documents annexed thereto. The appellant has challenged the election of Vice President by which respondent No.2 was declared successful as he secured highest number of votes. The appellant's contention is that the ballot which was supposed to be rejected for carrying mark other than provided under the Rules, was counted. I have examined the ballot paper issued on Form-XX, and vote cast in favor of Candidate at Serial No.2. Perusal of the copy of ballot paper appended with the petition it is evident that the mark put for casting of vote in favor of any desired candidate is other than Mark "X" and bore other type of symbol, which suggests that same was done in order to disclose identity of the voter.

8. Proviso attached with Rule 40 of the Cantonments Local Government (Election) Rules 2015, provides that "a ballot paper shall be deemed to have been marked in favour of candidate if the whole or at least half of the area of the mark of "marking aid rubber stamp" appears clearly within the box or space reserved for the symbol allocated to that candidate and where the mark of "marking aid rubber stamp" is divided exactly equally between two such spaces, the ballot paper **shall deemed to be invalid.**"

9. Keeping in view of above proviso, I am of the opinion that ballot paper bears the mark other than the mark prescribed under the rules, therefore same cannot be considered as valid vote cast in favor of candidate. For the reasons discussed hereinabove the petition in hand is hereby allowed and the result declaring the respondent No.2 as successful for the post of Vice President is hereby strike down. The respondent No.1/President Board is directed to convene board meeting on 18.11.2022 to recount all the ballot papers casted for election of Vice President and only those ballot papers shall be counted as valid, which shall be casted strictly in accordance with the rules and announce result accordingly.

5. On 17.11.2022, being the first date that the Petition came up in Court, the operation of the impugned Order was suspended whilst issuing notice in the matter, and the record of proceedings in the underlying Appeal was called for scrutiny. Thereafter, learned counsel entered appearance on behalf of Respondents Nos.1 & 2 respectively and sought time to file comments. However, while comments were forthcoming on behalf of the Respondent No. 2, supporting the case of Petitioner, it was stated orally on behalf of the Respondent No.1 that comments were unnecessary as the matter would be argued directly on the basis of the record.

6. Proceeding with his submissions, learned counsel for the Petitioner argued that the Appellate Authority had failed to appreciate that the Appeal was not maintainable for non-compliance of Rules 53 to 56 of the 2015 Rules, with it being said that those provisions were mandatory and that non-adherence thereto constituted a fatal defect necessarily warranting dismissal of the Appeal under Rule 61. Furthermore, dissecting the impugned Order, it was averred that the Appellate Authority had erred in law by invalidating an otherwise a valid vote, as the key factor in determining the validity of a vote was to determine the intention of the voter and in the event that such intention appeared to be clear, the vote could not be rejected or

discarded. Reliance was placed in that regard on the judgment of the Honourable Supreme Court in the cases reported as Allah Bakhsh and others versus Mst. Irshad Begum and others 1996 SCMR 1496 and Dr. Sher Afghan v. Aamar Hayat Khan 1987 SCMR 1987, as well as a judgment of the Lahore High Court in the case reported as Syed Tassaduq Abbas Bukhari v. Chairman, Appeal Committee, Punjab-I, Pakistan Bar Council, Islamabad and 20 others 2001 MLD 634. It was contended that the impugned Order ran contrary to the principles of law laid down in those cases, as the intention of the voter in the matter at hand was clear beyond any shadow of a doubt. It was argued that the vote in question could only have been invalidated in the event that any of the conditions specified in Rule 89(6) was attracted and not otherwise, but the Appellate Authority had erred in doing so while referring to Rule 40, which was inapplicable and even otherwise did not go against the Petitioner *per se*.

7. On the other hand, relied on the judgment in the case reported as Faqir Abdul Majeed Khan v. District Returning Officer and others 2006 SCMR 1713, while arguing that the impugned Order was correct and that the vote in question had been rightly rejected. Furthermore, he contended that secrecy was an integral part of the election, which had been violated through the affixation of a mark other than a cross-mark, so as to indicate the identity of the voter as part of an underhanded change of allegiance. However, when called upon to show the relevant provisions laying down the requirement of secrecy and the consequences of a violation, he was unable to point out any provisions of the 2015 Rules, but instead cited Rule 52 of the Cantonments (Elections and Election Petitions) Rule

1995, (the “**1995 Rules**”), insisting that the same were still in force.

8. Having considered the arguments advanced in light of the record and 2015 Rules, particularly Rules 40(4), 89(4) and 89(6) thereof, it is apparent in the context of the overall framework that Rule 40 falls under Chapter III of the 2015 Rules, relating to the direct election for members of the board, where the public comprises the electorate and cast their votes by affixing a mark within the box appearing against the name of their chosen candidate using the particular marking aid rubber stamp provided for such purpose. That process is different from the indirect election envisaged under Rules 88 and 89, falling under Chapter IX, where the elected councillors then go on to elect the Vice-President. As such, Rule 40(4) and its proviso cannot be conflated with the provisions relating to the Vice-Presidential election. The same would be true of Rule 52 of the 1995 Rules, which too related to the election of members, and as it transpires, stand repealed by the Cantonment Local Government Election Rules, 2002, with the 2015 Rules presently holding the field.

9. Furthermore, beyond the requirement of Rule 89(5) that a vote for the Vice-President be recorded in private, no further element of secrecy is discernible. Nor is any consequence for a violation prescribed under Rule 89(6), which only provides three circumstances for invalidity of a ballot paper, in as much as it stipulates that:

“(6) The voting paper shall be invalid, if-

- (a) it does not bear on its reverse the signature of the President as required under sub-rule (5);
- (b) the cross marks are placed opposite name of more than one candidate; or

(c) the cross mark is so placed as to render it doubtful for which candidate the vote has been recorded.”

10. Even otherwise, it is not the case of the Respondent No.1 that the impugned vote in favour of the Petitioner was recorded under the gaze of other persons. Instead, the contention advanced is that the mark recorded was in deliberate deviation of a cross-mark so as to link that specific vote to a particular elector. However, that purpose could also be just as easily served if, for example, a cross-mark were made in red ink or some other unusual or conspicuous colour so as to stand out from other votes. Could there be any consequences if that were so? Learned counsel for the Respondent No.1 was at a loss to point to any rule prescribing a particular colour of ink, or provide any answer to what would be the outcome if such a device were employed. Rule 89(6) is silent in that regard, and none of the causes for invalidation stated therein apply in the matter. Moreover, the assertion as to a secret pact between the Petitioner and the caster of the vote remains a hypothesis unsupported by even a suggestion as to the identity of the errant voter let alone any tangible evidence.

11. That being said, when the case-law cited in support of the competing contentions advanced on behalf of the contestants is examined, it comes to the fore that the dispute underpinning Irshad Begum’s case (Supra) had arisen from the election of the Chairman of a district council, under the Balochistan Local Councils (Election of Chairman) Rules, 1979, under circumstances similar to the matter at hand, in as much as the contestants were separated by a single vote. However, a doubtful vote had been counted in favour of one contestant, although it could have been counted in favour of either of the

candidates, but at the same time a vote in favour of the rival contestant was not counted simply because it bore a mark that was different from a cross-mark. In that context, after considering the judgments in various decided cases, it was held that:

“5. The ratio decidendi of the above cases seems to be that in matters of election technicalities should not defeat the intention of the voter his right to franchise and even if a voter has placed cross-mark on a ballot-paper not precisely on dotted line against which name of candidate appeared but in between respective dotted lines bearing names of rival candidate, the vote cannot be declared invalid if the intention of the voter is discernible from the fact that the cross-mark is more above the dotted line in favour of a particular candidate.

6. In the present case, there is no doubt that sub-rule (3) of Rule 7 of the Rules provides that a voter will place cross-mark on the ballot-paper against the name of the candidate for whom he wishes to vote, but placement of other mark than cross against the name of the candidate in whose favour the voter intended to cast his vote would not invalidate the vote as the intention of the voter is clear. In this regard, reference may be made to a judgment of a Division Bench of the High Court of Sindh in the case of *Irshad Ahmed v. Shafi Muhammad and 5 others* (1981 CLC 1332), in which Zaffar Hussain Mirza, J. (as his Lordship then was) has dilated upon this aspect as under:--

“The clear principle for the guidance of the Presiding Officers that emanates from the aforesaid instructions, to my mind, is that if the ballot-paper unambiguously reveals the intention of the elector cast his vote in favour of a particular candidate the presence of other marks will not render the vote invalid and the vote will be counted in favour of the candidate for whom the vote appears to have been cast. There have been several cases in the past where this principle has been adhered to in election cases. On page 134 of the book “The Law of Elections and Election Petitions in India” by Nanak Chand Pandit and Gyan Chand Mathur, Second Edition (1957) the Authors quoted from reported cases the following observations:--

The Court ought to give effect to any mark on the face of the paper which, in its opinion, clearly indicates the intention of the voter whether such marks are in the shape of a cross or a straight line or at, other form, or whether made with pen and ink, pencil, or even it, indentation made on the

paper and, whether on the right or left hand of the candidate's name or elsewhere within his compartment of the voting paper.

The mere fact of two crosses being placed ought not to vitiate the ballot paper, if there is no doubt as to the intention to vote and to vote emphatically for the one candidate'."

Rogers on Elections, Volume II, 20th Edition at page 101 observed that the provisions as to marking the ballot-papers are directory only, and not absolute, and if substantially obeyed are sufficient. Referring to the case of Woodward v. Sorsons (1875 LR 10 CP), the Author observes:--

"In the latter case it was held that a ballot paper so marked as to show for whom the voter intended to vote ought to be counted, however, much the directions contained in the Ballot Act were contravened."

Further it was observed with reference to Phillips v. Goff (1886) 17 QBD 805):

"It was there held that ballot papers, though not marked in the prescribed manner, ought to be counted if it could be ascertained with reasonable certainty for whom the voter in each case intended to vote, how many votes he intended to give, and that he had not intended to give more votes than there were members to be elected.

The Author also refers on page 101 to the case of N.F. Derey Shire where a vote was marked with a strong black cross against one candidate and a faint cross against another, the Court held the vote good for the first-named candidate."

7. In our view, the legal proposition propounded as above seems to be correct. In the case in hand, even the learned Judges of the Division Bench of the High Court were of the view that the vote in question was wrongly excluded from counting in favour of the appellant. We are, therefore, of the view that the learned Judges of the Division Bench erred in ordering re-election instead of declaring the appellant as elected."

12. Similarly, in the case of Syed Tassaduq Abbas Bukhari (Supra), a vote that had been cast in a bar election by making a tick mark rather than a cross-mark was held to be valid and was counted, with it being contended on behalf of the party challenging the vote that it ought to

have been discarded as it contravened Rule 60 of Punjab Rules of Business of Bar Association/Memorandum of Association, as per which each voter was required to put a cross mark (X) for his choice of candidate for each office. The Court held that:

“6. The only point which requires determination in this writ petition is that if respondent No.2 was justified in counting a ballot paper in favour of respondent NO.3 which contained a tick mark instead of cross-mark as contemplated and stipulated by Rule 60 (ibid). The main stress of the learned counsel for the petitioner is that as Rule 60 (ibid) requires a voter to put cross-mark against a candidate of his own choice, so if any voter has not put cross-mark against a candidate of his own choice, his ballot paper will become invalid and would not be counted in favour of that candidate.

7. There is no doubt that as per Rule 60 (ibid) it is required that every person exercising his right of vote shall have put a cross-mark against a candidate of his own choice, but this rule does not contain any penal provision. It is thus, clear that if a voter does not put cross-mark against a candidate of his own choice but simply puts a tick mark against the name of his favourite candidate, this will not make the ballot paper invalid. By putting a cross-mark or tick mark a voter signifies his intention in favour of his candidate. It is the intention of the voter which is to be looked into and taken into consideration while judging the validity or invalidity of a ballot paper. The mere fact that Rule 60 (ibid) requires a cross-mark to be made against the name of one's favourite candidate does not mean that if any voter has put a tick mark instead of cross-mark that will invalidate the vote. To put such restricted interpretation upon Rule 60 (ibid) will create difficulties and will not be in the interest of justice.”

13. Conversely, the case of Faqir Abdul Majeed Khan (Supra), as relied upon by the Respondent No.1, pertained to a direct election to the office of a Tehsil Nazim under the Punjab Local Government Elections Rules, 2005, Rule 30(6)(ii) of which provided that "the voter, on receiving ballot-paper or ballot papers shall put the marking aid rubber stamp on the ballot paper at place within the

space containing the symbol of contesting candidate of his choice". That judgment is of no relevance for the same reason that Rule 40 was found inapplicable. Indeed, the instant case is not one where a rubber marking stamp was to have been used, nor is that the case of the Respondent No. 1, for if that were so, all the votes cast in the vice-presidential election would have to be discarded.

14. In light of the foregoing, we are of the view that the findings of the Appellate Authority cannot sustain. As such, we hereby allow the Petition and set aside the impugned Order. The office is directed to return the R&P of the Appeal to the concerned forum.

JUDGE

CHIEF JUSTICE

Karachi.
Dated: