

**BEFORE THE ELECTION TRIBUNAL, HIGH
COURT OF SINDH
CIRCUIT COURT HYDERABAD**

Election Petition No.S-04 of 2018

Petitioner: Mashooq Ali through Mr. Suresh Kumar, Advocate.

Respondent No.1: Ali Ghulam through Mr. Ishrat Ali Lohar, Advocate.

Respondents No.2 to 11: Ex-parte vide order dated 08.11.2018.
Mr. Zulfiqar Ali Rajput, Assistant Attorney General for Pakistan represented the Federation of Pakistan.

Date of hearing: 29.05.2021.

Date of judgment: 10.07.2021.

JUDGMENT

AMJAD ALI SAHITO, J: - The petitioner Mashooq Ali, a contesting candidate of General Election of Provincial Assembly of the Sindh PS-41 Sanghar-I (which hereinafter is referred to as "said Constituency"), through this Election Petition filed under Section 139 & 142 of the Elections Act, 2017 (which hereinafter is referred to as "the Act of 2017"), held on 25.07.2018, challenged the Notification No. F.2 (40)/2018-Cord.- dated 07.08.2018, whereby respondent No.1, Ali Ghulam, was declared as a returned candidate. In the petition, the petitioner has prayed for the following reliefs:-

- (i) A declaration that the election of respondent No.1 is void and that the petitioner has been duly elected.
- (ii) Any other relief this Honourable Court deems fit may be granted.
- (iii) Costs of the petition are borne by respondent No.1.



2. Brief facts of the case are that the petitioner and Ali Ghulam, respondent No.1, along with respondents Nos.2 to 11 contested the General Election 2018 for the seat of P.S- 41 Sanghar-1. The election was held on 25th July 2018 on 134 polling stations. According to Final Consolidated Result (Form-49), prepared by the Returning Officer (which hereinafter is referred to as "R.O.") of the said Constituency, Ali Ghulam, respondent No.1 obtained 36081 votes, while the petitioner namely Mashooq Ali secured 35935 votes with a difference of 146 votes, resultantly, the respondent No.1 was declared as returned candidate vide Notification No.F.2(40)/2018-Cord. dated 07.08.2018 by the Election Commission of Pakistan. Per petitioner, the said notification has aggrieved him, thus, he has filed the present election petition asserting that polling staff appointed at 35 polling stations No.4 to 12, 14, 17, 18, 25, 32 to 36, 44, 59, 60, 66 to 69, 72, 88, 103, 104, 105, 107, 115, 117, 118 and 119 were relatives and supporters of the returned candidate as well followers of Pir Sahib Pagara the Head of G.D.A. party and in this regard, petitioner filed such application before R.O. The petitioner further asserted that from the second week of July 2018, he received threats from respondent No.1 and his above supporters, as such, he moved an application to District Administration. According to him, R.O. and District Returning Officer did not take any action on his applications. On the day of the poll, the agents and supporters of respondent No.1 while being in connivance of polling staff did not allow the agents of the petitioner to perform their duty properly on said 35 polling stations. At the polling station, Nos.68 and 69, the agents and supporters of respondent No.1 created disturbance, caused injuries to the workers of the petitioner, as such, FIR bearing No.34 of 2018 was registered at PS Chotiaryon. At the polling station, No.58 disturbance by the agents and supporters of respondent No.1 was also created and such NC was also lodged. He asserted that in connivance of polling staff, the agents of respondent No.1 cast bogus votes on polling station Nos.59, 60, 66, 67, 68,

69 and 72. After the closure of the poll, the agents of the petitioner were not allowed while counting was started in presence of agents of respondent No.1, who with the assistance of presiding and polling officers spoiled the valid votes of the petitioner and cast bogus votes; as such, illegalities and contraventions of section 90 (1) to (18) of the Election Act, 2017 have been made. Despite requests by the petitioner, Forms No.45 and 46 were not provided. It is further stated that on 26.07.2018 at evening time, the R.O affixed Form No.47 on the notice board, in which 35922 were shown to have secured by petitioner while 36024 votes were stated as obtained by returned candidate, with a margin of only 102 votes i.e. 0.196%. The petitioner moved an application for a recount of votes for said 35 polling stations on 28.07.2018 at 8.00 a.m. but, R.O. kept him at the wait, received an application at 2335 hours and rejected the same. Per petitioner, he filed a petition before Election Commission under section 8 and 9 of the Election Act 2017; however, no order was passed. He also filed a C.P No.3002 of 2018 before Hon'ble High Court of Islamabad but the same was dismissed being beyond its territorial jurisdiction, as such, he subsequently filed a petition being C.P No.D-2535 of 2018 before Hon'ble High Court of Sindh, Circuit Court @ Hyderabad. Petitioner further stated that as per Form-46, the ballot papers supplied at polling station Nos.9, 11, 22 and 80, out of which, 2999 ballot papers, were missing, which were provided by the presiding and polling officers to respondent No.1 and were used as his votes. He also alleged the discrepancies / different figures in comparison of Form-45 issued by presiding officers and Election Commission, which invalidates Form-48 and consequently result of respondent No.1 /respondent No.1 has been procured by corrupt and illegal practices. The petitioner, therefore, prayed for the reliefs as quoted above.

3. Upon notices issued to the respondents through all possible modes for effecting service upon them, only respondent No.1 being returned candidate chose to contest the

petition, and submitted his written statement, questioning the maintainability of this petition sought its rejection under Order 7 rule 11 CPC on the ground that it does not fulfill the requirement of Election Act, 2017. He while denying the averments of memo of the petition that the appointments of his relatives as polling staff asserted that all the polling staff was appointed by Election Commission of Pakistan, on the contrary, respondent No.1 objected to the duty of one Noor Muhammad Chandio, who was A.R.O. of PS-41 and close relative and support of petitioner. In this regard, the alleged application by the petitioner is without 'DATE' and managed one. The consolidation of the result was made after the issuance of notice to all candidates and during the final consolidation of the result, the votes of the petitioner were increased from 35922 to 35935. He alleged that after the consolidation of the final result dated 28.07.2018, when the petitioner was declared an unsuccessful candidate, he moved an application at 08:00 a.m. and from the perusal of the order dated 28.07.2018, the learned R.O. mentioned the time on the face of the application as well in its order. The returned candidate, therefore, prayed for the dismissal of the petition with costs. Respondents No.2 to 11 chose not to contest despite service of notices, as such, they were declared ex-parte vide order dated 08.11.2018. From the pleadings of parties, the following issues were framed:-

1. Whether the petition is not maintainable under the law?

2. Whether the election and result of the returned candidate/respondent No.1 Ali Ghulam Nizamani for the constituency of PS-41, Sanghar-I, in the General Elections, 2018, has been procured by corrupt and illegal practices?

3. What should the decision be?

4. In support of his support, the petitioner Mashooq Ali examined himself as well as three witnesses namely Muhammad Awais, Ali Azam and Asif Ali. Their affidavits-in-evidence were already filed, and they all owned the averments

of their affidavits in their evidence. They also produced numerous documents in support of their evidence. Thereafter petitioner closed his side. On the other hand, respondent No.1 Ali Ghulam examined himself, accepted his affidavit-in-evidence to be correct and also produced numerous documents in support of his claim. Respondent No.1 also examined witnesses Hidayatullah, Muhammad Usman and Asadullah, who also produced their affidavits-in-evidence. Thereafter, respondent No.1 closed his side of evidence through the statement.

5. Learned counsel for the petitioner while reiterating the contents of the petition mainly contended that at polling station No.12 Government Girls Primary School, there was a total of 548 votes, 16 votes were shown as rejected on the first page of Form-45, while at the same polling station on its next page, 30 rejected votes have been shown; similarly at so many other polling stations, the votes obtained by the petitioner were rejected by the polling staff who was supporting to the returned candidate. He contended that while consolidating the result, the R.O. counted only 3144 invalid votes and there was about 800 valid vote of the petitioner, which according to learned counsel, were spoiled by the Presiding Officer and agent of respondent No.1; however, R.O. observed the said illegality, therefore, he was requested to make a note but he refused. On the contrary, the R.O. validated only 131 invalid votes and after the addition of postal ballots petitioner has to show 35935. Allegedly, the only difference of 146 votes appeared; that the count of votes by Presiding Officer as well R.O. is not conducted honestly, justly, fairly and following the provision of Election Rules. He pointed out that on the petition of the petitioner before the Election commission under section 8 & 9 of the Election Act 2017, no order had been passed by the Election Commission. Subsequently, the petitioner filed a petition before Hon'ble High Court of Sindh @ Hyderabad and during its pendency, the petitioner provided Forms; according to Forms-46 of polling station No. 9, 11, 22 & 80, showed

missing of 2999 ballot papers, which were provided by polling Officer to respondent No.1, and were used as votes of respondent No.1, in the election. Their comparison of form-45, issued by Presiding Officer, and by Election commission and form-46 shows discrepancies/different figure which invalidated form-48, as such, election of respondent No.1, is procured by corrupt and illegal practices with the conveyance of Presiding Officer and polling Officer and in contravention of mandatory provisions of the Election Act and Rules, 2017. Lastly, he prayed that the election of respondent No.1 be declared as void and consequently, an entire fresh poll be conducted or at least fresh polling on the pointed polling station may be ordered coupled with recounting of the entire constituency. In support of his contentions, he has relied upon the decision in the case "Mian MUHAMMAD SHAHBAZ SHARIF through Attorney and others v. FEDERATION OF PAKISTAN and others" [PLD 2018 Sindh 735].

5. Conversely, learned counsel appearing on behalf of respondent No.1 while rebutting the arguments as advanced by learned counsel for the petitioner has contended no illegality or irregularity was made during the process of the poll and the entire poll was conducted peacefully in presence of law enforcing agencies were deployed on all the polling stations; whole polling process was supervised through CCTV cameras, thus, no question of rigging or procuring result through corrupt and illegal practices arises. As far as the discrepancies alleged by the petitioner in Form No.45, 46 etc., he has failed to bring any document in his evidence which tangibly supports the version of the petitioner. Regarding application by the petitioner moved by the petitioner for recounting of votes, it was moved after three days of the poll at odd hours of the night on 28:07.2018 and the learned R.O. passed a speaking order on it. Even the petitioner himself admitted in his cross-examination that he moved an application to the R.O. at a belated stage. He alleged that so far applications as claimed by the petitioner moved for various purposes, those were managed

later on as no proof i.e. receipt or received / delivery of such applications has been brought on record. He strongly denied that ousting of polling agents of the petitioner from polling stations and even if it is presumed that the allegation was so, yet all the polling stations were covered by the CCTV footages and the petitioner has failed to bring on record such proof. Learned counsel contended that as the petitioner did not succeed to win the election, therefore, he has levelled baseless and forged allegations and the witnesses examined by him were his political workers and polling agents, thus, they are interested and cannot be trusted, even petitioner has failed to produce any of the polling officer or official in the Tribunal who may testify to corroborate the version of the petitioner and though there is nothing even if any act of omission or negligence on the part of the Election Commission or polling staff is found yet the respondent No.1/returned candidate cannot be held responsible for it. The polling staff at all polling stations was deployed by the Election Commission, therefore, there is no possibility of any corrupt or illegal practice, as such, allegations of the petitioner are based on mere presumptions and assumptions, which in the eyes of law are unwarranted. Per learned counsel, the petition is not maintainable for the reasons that no illegality or irregularity has been pinpointed by the petitioner, therefore, the petition is liable to be dismissed. In support of his contentions, he has relied upon the judgment passed in the case of "JAM MADAD ALI v. ASGHAR ALI JUNEJO and others" [2016 SCMR 251].

7. Learned Assistant Attorney General for Pakistan contended that the entire process of election was made in a peaceful manner and no illegal practices or procurement of result with the connivance of officials or in contravention of mandatory provisions of the Act of 2017 was made.

8. Heard and perused the material available on record with the able assistance of counsel appearing on behalf of respective parties.

9. Issue No.1 relates to the maintainability of the instant petition; however, from a careful perusal of the petition coupled with annexure, it transpires that the mandatory provisions of sections 142, 143 and 144 of the Act, 2017 have been complied with besides all the contesting candidates were joined in the petition. The requisite security amount has also been deposited and such receipt is also available in the file vide Ex.01/P. Consequently, the petition is maintainable and this issue is answered in the affirmative.

10. As far as issue No.2 is concerned, the petitioner Mashooq Ali has alleged that respondent No.1/returned candidate Ali Ghulam Nizamani has procured the result by corrupt and illegal practices. In this regard, the petitioner has examined himself as well as three witnesses in his favour. In his evidence, the petitioner though owned his affidavit-in-evidence to be correct where he has mentioned that the result of the election has been procured by corrupt and illegal practices. The main stance of the petitioner the polling staff at 35 polling stations No.4 to 12, 14, 17, 18, 25, 32 to 36, 44, 59, 60, 66 to 69, 72, 88, 103, 104, 105, 107, 115, 117, 118 and 119 were relatives and supporters of the returned candidate as well followers of Pir Sahib Pagara the Head of G.D.A. party and in this regard, petitioner filed such application before Returning Officer but no action was made on his request by the R.O. Whereas, the returned candidate/respondent No.1 denied such plea and stated the said application was subsequently managed. A perusal of application [Ex.01/C] moved by the petitioner to the R.O. shows that it does not bear any date and receipt note of the office of R.O. Even the petitioner himself admitted in his cross-examination that *"It is correct to suggest that in Ex.01/C, no date is mentioned. It is correct to suggest that the application which was moved to R.O. was not received by the Returning Officer of PS,41 Sanghar-I."* He further admitted that *"It is correct to suggest that caretaker government was independent government.....It is correct to suggest that R.O. and*

presiding officer were appointed by the Election Commission of Pakistan" Whereas, respondent No.1 has denied the appointment of his relatives or supporters on the above polling stations. In such a situation, when as per petitioner, the R.O. did not receive such application, he had the opportunity to move an application to the District Returning Officer or Election Commission of Pakistan; however, no such material is brought on record as to whether the petition did so. As such, this plea for the appointment of polling staff, who were supporters of the returned candidate, does not carry weight in absence of a tangible and cogent record.

11. Now coming to another plea of the petitioner that on the day of poll, his polling agents were ousted from polling stations or result of returned candidate has been procured through corrupt and illegal practices. The petitioner though has claimed that his polling agents were ousted from polling stations; however, during his cross-examination, admitted that "It is correct to suggest that in the entire documents, which I have produced, no application moved to R.O. for ousting out them/polling agents from polling stations." PW Muhammad Awais has also not supported the petitioner by deposing in cross-examination that "it is correct to suggest that I have not moved an application to the presiding officer with regard to the ousting out from the polling station nor any application to the high ups for illegal practice....It is correct to suggest that other polling agents were present at the time of counting votes. Similarly, PW Ali Azam admitted that "It is correct to suggest that whole day I was present at polling station-68, GPS Pir Bux Rajar. The polling station was declared sensitive by the Election Commission of Pakistan. It is correct to suggest that Army personal and Rangers were posted there." This witness also stated that when he was ousted out from the polling station and detained in a room, he did not move any such application. He has stated in his cross-examination that he gives evidence only on the ground that he has doubt that votes were not counted in his presence. Another witness of the petitioner

namely Asif Ali in his evidence has deposed that "I do not know the name of agent who however started to cast bogus votes. On which, we have raised objection and such complaint was made to the polling officer; even then, they continued to cast bogus votes. Such complaints were made to the polling officers, but no one had redressed the grievance." However, in his cross-examination, he has admitted that "It is correct to suggest that I have not produced any document before Tribunal regarding my evidence against respondent No.1. It is also correct that I have not produced my agent-nama to believe that I was appointed by the petitioner as polling agent at polling station No.66. It is correct that CCTV cameras were installed, however, those were not in working condition." After careful consideration of the above-quoted evidence, it does not appeal to the prudent mind that in presence of CCTV cameras as admitted by the parties in their testimonies, how the polling agents were ousted from polling stations. Even if it is so: the petitioner has failed to get footages of such activity and bring it on record to substantiate his claim. As alleged by the petitioner that cameras were not functional, even, he has failed to bring on record a valid receipt copy of any application to have been moved to the authorities in this regard and sent through any mail service. On the contrary, the returned candidate and his witnesses have specifically deposed that CCTV cameras were installed and counting of the votes was made in presence of the agents of the petitioner. As a result of the existing position, the petitioner has failed to prove that his agents were ousted from polling stations.

12. As far allegation of the petitioner that according to Forms-46 of polling station No. 9, 11, 22 & 80, showed missing of 2999 ballot papers, which were provided by polling Officer to respondent No.1 is concerned, the petitioner has failed to bring on record certified copies of Forms-46 of the said polling station so that the same could be discussed and its consequences may come into display. In this regard, an important legal question that needs resolution, it suffices to

say the petitioner has relied upon photocopies of the documents, which being public documents could have been obtained as a certified true copy but he failed to do so. However, in presence of original documents which ought to have been obtained as certified true copies and without seeing the originals, Photostat copies of the documents cannot be made basis on the just and proper conclusion merely on oral assertions.

13. The version of the petitioner concerning procurement of the result through corrupt and illegal practices has not been supported by their testimonies or through any documentary evidence. It is the duty of the petitioner when he alleges such illegal practices, he must bring on record documentary proof or corroborative piece of evidence; neither he has brought on record any document showing such illegal practice or evidence which supports him, on the contrary, Respondent No.1's witnesses namely Hidayatullah and Asadullah admitted the presence of Army personals and installation of CCTV cameras at polling stations and this assertion has gone un-rebuttal and un-challenged. The petitioner has also failed to establish that the respondent No.1/returned candidate with the support of the presiding officers or other polling staff procured his election result in any illegal manner through direct or circumstantial evidence. It is necessary for the petitioner that he should completely bring on record convincing evidence; however, the evidence brought on record by the petitioner is neither of such values, based on which, the election of the entire or at some polling stations of the constituency could be declared as void. Appraisal of entire evidence and record proves that the personnel of enforcing agencies were deployed on all polling stations and no calamity occurred during the process of voting as nothing in this regard. However, it has been brought on record that an FIR (Ex.01/G-I) was reported by one ASI Khawand Bux Chandio, for an incident, which allegedly to has taken place at one furlong from the polling station. The petitioner has also failed to nominate

any of the polling staff in league with the returned candidate to bring into a witness box or produce any documentary evidence strengthening his version with any solid or tangible evidence for declaring the election of respondent No.1/returned candidate as void.

14. As to the plea taken by the petitioner for a recount of the votes in the entire or some polling stations of the constituency is concerned based on the difference of 146 votes i.e. less than 5% between petitioner and returned candidate/respondent No.1, the Court must take into consideration certain essential pre-requisites for satisfying the conscience to permit a recount. The petitioner should specify allegation of tampering, manipulation and maneuvering in very clear terms along with the necessary details and prima facie material supporting such allegations as the secrecy of the ballot should not be violated based on frivolous, vague and unfounded allegations and the primary objective should be to do full justice in the matter. This Tribunal is fully mindful while exercising its powers in this regard keeping in mind that recount may not exploit for a roving inquiry to fish out material for reversing the election or for declaring it void. As to pre-requisite requirements, I have already discussed above that the petitioner has failed to meet such requirements, which may convince this Tribunal to exercise powers for the recount. In this regard, I am fortified with the decision of the Hon'ble Supreme Court of Pakistan held in the case of **'JAM MADAD ALI v. ASGHAR ALI JUNEJO and others'** [2016 SCMR 251]. In the said judgment, the Hon'ble Supreme Court has quoted the decision made by the Supreme Court of India in the case of **'Bhabhi v. Sheo Goyind and others'** [AIR 1975 SC 2117] wherein the criteria for permitting a recount in an election matter had been laid down as under:-

"15. Thus on a close and careful consideration of the various authorities of this Court from time to time it is manifest that the following conditions are imperative

before a Court can grant inspection, or for that matter sample inspection, of the ballot papers:

(1) That it is important to maintain the secrecy of the ballot which is sacrosanct and should not be allowed to be violated on frivolous, vague and indefinite allegations;

(2) That before inspection is allowed, the allegations made against the elected candidate must be clear and specific and must be supported by adequate statements of material facts;

(3) The Court must be *prima facie* satisfied on the materials produced before the Court regarding the truth of the allegations made for a recount;

(4) That the Court must come to the conclusion that in order to grant prayer for inspection it is necessary and imperative to do full justice between the parties;

(5) That the discretion conferred on the Court should not be exercised in such a way so as to enable the applicant to indulge in a roving inquiry with a view to fish materials for declaring the election to be void;"

In the instant petition, the allegations levelled by the petitioner appear to be frivolous, vague and indefinite without support by adequate statements of material facts regarding truth for a recount; as such, this prayer cannot be allowed in absence of pre-requisite requirements.

15. In view of the above discussion the Election Petition is maintainable, petitioner has failed to establish issue No.2, the burden of which was upon him, hence the Issue No.2 above is answered in negative and resultantly Issue No. 3 is answered to the effect that instant Election Petition is **dismissed**.

Sd.-Anjad Ali Sahito
Judge