ELECTION TRIBUNAL
HIGH COURT OF SINDH, KARACHI

Election Petition No. 52 of 2024
[Zain Pervez v. Election Commission of Pakistan & others]

Petitioner	:	Zain Pervez son of Masood Pervez through Mian Shahbaz Ali, Advocate.
Respondents 1&2	:	Election Commission of Pakistan & another through M/s. Alizeh Bashir, Assistant Attorney General for Pakistan alongwith M/s. Abdullah Hanjrah, Deputy Director (Law) and Sarmad Sarwar, Assistant Director (Law), ECP, Karachi.
Respondent 8	:	Syed Farhan Ansari son of Ahmed Ashraf Ansari [**Returned Candidate**] through Mr. Salahuddin Ahmed, Advocate assisted by M/s. Aman Aftab and Mehak Azfar, Advocates.
Respondents 3-7 & 9-29	:	Nemo.
Date of hearings	:	30-07-2024 & 12-08-2024
Date of order	:	03-10-2024

O R D E R

Adnan Iqbal Chaudhry J. – This order decides CMA No. 1505/2024 by the Respondent No.8 (returned candidate) and the preliminary issue settled on 30.07.2024, both raising the question whether this election petition ought to be rejected under section 145(1) of the Election Act, 2017 **[the Act]** which stipulates:

> "**145. Procedure before the Election Tribunal.—** (1) If any provision of section 142, 143 or 144 has not been complied with, the Election Tribunal shall summarily reject the election petition.

2. Barrister Salahuddin Ahmed, learned counsel for the Respondent No.8 submitted that given the consequence of rejection in section 145(1) of the Act, the provisions of sections 142 to 144 of the Act are mandatory and thus, must be construed strictly. The precise

objections taken by learned counsel and the reply of Mr. Shahbaz Ali, learned counsel for the Petitioner, are discussed *infra*. The Election Commission of Pakistan **[ECP]** adopted the submissions of Barrister Salahuddin Ahmed.

Objection on the receipt/challan of costs:

3. Section 142(1) of the Act requires *inter alia* the petitioner to deposit security for costs of the petition. It reads:

> "**142. Presentation of petition.—**(1) An election petition shall be presented to the Election Tribunal within forty-five days of the publication in the official Gazette of the name of the returned candidate and shall be accompanied by a receipt showing that the petitioner has deposited at any branch of the National Bank of Pakistan or at a Government Treasury or Sub-Treasury in favour of the Commission, under the prescribed head of account, as security for the costs of the petition, such amount as may be prescribed.

Initially, the head of account prescribed in Rule 139(4) of the Election Rules, 2017 **[Rules]** for depositing said costs was "*C-03 Miscellaneous Receipts, C-038 Other, C-03870–Other (Election Receipts)*" **[previous head of account]**. By notification dated 23.11.2021, the ECP had amended Rule 139(4) to substitute that head of account with "*C02- Receipts from Civil Administration and Other Functions, C021-General Administration Receipts-Organs of State, C02166-Receipts of Election Commission of Pakistan under Elections Act 2017*" **[prevailing head of account]**. The treasury receipt dated 27.03.2024 filed along with the petition was for a deposit made in the previous head of account. The office raised an objection. Therefore, the Petitioner made a second deposit in the prevailing head of account *vide* receipt dated 02.04.2024.

4. Counsel for the Respondent No.8 submitted that since the first deposit was not under the prevailing head of account, it was a non-compliance of section 142(1) of the Act, and therefore rejection of the petition is mandated by section 145(1). As regards the second deposit, he submitted that compliance made after expiry of limitation

for filing an election petition could not be accepted. Reliance was placed on *Ch. Muhammad Ayaz v. Asif Mehmood* (2016 SCMR 849).

5. In identical circumstances, the objection that a deposit in the previous head of account was a non-compliance of section 142(1) of the Act, has been rejected by this Tribunal by order dated 16.09.2024 in the case of *Khurram Sher Zaman v. Mirza Ikhtiar Baig* (E.P. No. 02/2024) excerpted as follows:

> "7. It appears that despite the amendment in Rule 139(4) of the Rules, the NBP continued to maintain the previous head of account, continued to issue challans thereof and accepted deposits therein. That is manifest in the first receipt dated 21.03.2024 issued by the NBP to the Petitioner. Therefore, it is important to highlight at the outset that while the first deposit by the Petitioner was not in the prevailing head of account, it was nonetheless a deposit in a treasury head of account intended for election receipts. It is not the case here that the first deposit was in any unrelated account of the Government.
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> 8. For the present purposes, the deposit requirements in section 142(1) of the Act can be identified as follows:
> (a) prior to presenting the petition, a deposit at any branch of the National Bank of Pakistan or at a Government Treasury or Sub-Treasury;
> (b) in favour of the ECP;
> (c) under the prescribed head of account; and
> (d) such amount as may be prescribed.
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> Requirements (a), (b) and (d) were clearly intended for the Petitioner, and it is not disputed that the deposit made by the Petitioner fulfilled those requirements. Requirement (c), however, appears to be a different matter.
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> 9. The form of challan for an election deposit is prescribed as *'T.R. 6'* in the Treasury Rules of the Federal Government. The column of that challan that requires mention of the head of account reads: *"To be filled in by the departmental officer or the treasury"*. Rule 431 of the Treasury Rules also stipulates that it is the responsibility of the bank to ensure that the head of account in a treasury challan is correctly mentioned before accepting deposit from the public. The first receipt dated 21.03.2024 issued to the Petitioner also manifests that the head of account was pre-printed on the challan and filled-in by the NBP, not by the Petitioner. Indeed, the public is not expected to verify the head of account already printed on a treasury challan. Given that scheme of things, it is apparent that requirement (c) of section 142(1) of the Act is essentially that where a deposit is made by the public "in favor of the ECP", it is to be credited to the account specified in Rule 139(4) of the Rules, and which can only be intended for the receiving bank/treasury, not for the public/petitioner.

Requirement (c) is obviously for purposes of book-keeping by the bank/treasury and the ECP, and that is why the description of the head of account is left to the rule-making power of the ECP. This aspect was not considered by the Tribunal at Lahore in the case of *Mushtaq Ahmed v. Aftab Akbar Khan* (2019 MLD 1313), and therefore that case is of no help to the Respondent No.1.

10. While it is correct that the presence of a penal consequence for non-compliance is usually indicative of a mandatory provision, the settled law is that the ultimate test lies in ascertaining the legislative intent,[1] and in doing so, the Court must scrutinize the pith and substance of the provision and not be swayed by its form.[2] Now, a provision may have different parts to it, some mandatory and some directory. That aspect was discussed in the case of *The State v. Imam Bakhsh* (2018 SCMR 2039) as follows:

> "It can even be the case that a certain portion of a provision, obligating something to be done, is mandatory in nature whilst another part of the same provision, is directory, owing to the guiding legislative intent behind it. Even parts of a single provision or rule may be mandatory or directory. "In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be secured." Crawford opined that "as a general rule, [those provisions that] relate to the essence of the thing to be performed or to matters of substance, are mandatory, and those which do not relate to the essence and whose compliance is merely of convenience rather than of substance, are directory." In another context, whether a statute or rule be termed mandatory or directory would depend upon larger public interest, nicely balanced with the precious right of the common man."
> (Underlining supplied for emphasis)

Remington Rand of India Ltd. v. The Workmen (AIR 1968 SC 224) illustrates how a single provision can have a mandatory part as well as a directory part. There, the question was whether the provision in the Industrial Disputes statute requiring the Government to publish an award within 30 days was mandatory or directory. It was held that while the part requiring publication was mandatory, the time-frame fixed for the same was only directory.

11. The observation in *Imam Bakhsh* that a single provision may have a mandatory as well as a directory part, is apt to the deposit-provision in section 142(1) of the Act, which comprises of requirements (a), (b), (c) and (d) as discussed above. The intent of the legislature there is of course to secure at the outset some amount towards costs that may be imposed by the Tribunal on the Petitioner

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[1] *Collector of Sales Tax Gujranwala v. Super Asia Mohammad Din & Sons* (2017 SCMR 1427); *Province of Punjab v. Murree Brewery Company Ltd.* (2021 SCMR 305); and *Commissioner Inland Revenue, Zone-II, RTO, Rawalpindi v. Sarwaq Traders* (2022 SCMR 1333).

[2] *Tri-Star Industries (Pvt.) Ltd. v. Trisa Burstenfabrik AG Triengen* (2023 SCMR 1502).

under various provisions of the Act. That compliance was made by the Petitioner by fulfilling requirements (a), (b) and (d) *i.e.* by producing a receipt at the time of presenting the petition which reflected the prescribed deposit of Rs. 20,000/- in a treasury head of account in favor of the ECP. Requirement (c), which required the NBP/treasury to credit the prevailing head of account, was only directory, as it is only a matter of making a book-entry to debit one treasury account and credit the other. The underlying principle here is in the following oft cited passage from *Maxwell on Interpretation of Statutes*:

> "Where the prescription of a statute relates to the performance of a public duty and where the invalidation of the acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty without promoting the essential aims of the Legislature, such prescriptions seem to be generally understood as mere instructions for the guidance and Government of those on whom the duty is imposed, or in other, words as directory only. The neglect of them may be penal indeed but it does not affect the validity of the act done to disregard of them."[3]

12. Counsel for the Respondent No.1 had submitted that the jurisprudence of election laws is different, in that a provision that entails a penal consequence for non-compliance is always construed strictly. That is not entirely accurate. The correct statement of the law, as articulated in the case of *Col. (Retd.) Syed Mukhtar Hussain Shah v. Wasim Sajjad* (PLD 1986 SC 178), is that: "so far as election laws are concerned the requirements of law in so far as officers conducting the election are concerned are usually taken to be directory and so far as these requirements concern the voter they are usually taken to be mandatory."

13. The case of *Kaushalendra Prasad Narain Singh v. Nand Kishore Prasad Singh* relied upon by the Petitioner's counsel, was also a case where dismissal of an election petition was sought on the ground that the challan for costs of the petition was deposited in favor of "*security, Election Commission*" instead of "*Secretary, Election Commission*". There too a dismissal was provided by the statute for non-compliance. However, the Supreme Court of India held that such requirement for deposit was only directory, not mandatory as the essence of the provision was to ensure that a deposit is available at the disposal of the Election Commission.

14. Therefore, in view of the foregoing, the first receipt dated 21.03.2024 produced by the Petitioner at the time of presenting the petition was in compliance with the mandatory part of section 142(1) of the Act. Since the requirement for crediting the prescribed head of

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[3] Maxwell on the Interpretation of Statutes – Eleventh Edition, cited in *Col. (Retd.) Syed Mukhtar Hussain Shah v. Wasim Sajjad* (PLD 1986 SC 178). A similar view was taken in *Chief Commissioner, Karachi v. Jamil Ahmed* (PLD 1961 SC 145); and *Province of Punjab through Conservator of Forest v. Javed Iqbal* (2021 SCMR 328).

> account was for the NBP/treasury and at best directory, the penal consequence of rejection of the petition in section 145(1) of the Act is not attracted. Having concluded so, I do not examine the point whether a subsequent compliance could cure the defect. The subsequent deposit made by the Petitioner is hereby taken as an additional deposit. Let the record reflect that the Petitioner has deposited a total of Rs. 40,000/- as security for costs."

The same order is passed in this petition as well.

Absence of petitioner's affidavit-in-evidence; and defective affidavits of witnesses:

6. The Petition was presented on 28.03.2024, and on 25.07.2024 the Petitioner filed his affidavit-in-evidence along with CMA No. 1608/2024 praying that the affidavit-in-evidence be accepted. Counsel for the Respondent No.8 submitted that the Petitioner's failure to file affidavit-in-evidence while presenting the petition was a non-compliance of section 144(2)(a) of the Act, and therefore the petition is liable to be rejected under section 145(1) of the Act. He submitted that the affidavit-in-evidence could be accepted after the period of 45 days prescribed for filing the petition. On the other hand, learned counsel for the Petitioner submitted that section 144(2)(a) of the Act dealt with affidavits of witnesses, not with the petitioner's affidavit-in-evidence.

7. The other objection arising from section 144(2)(a) of the Act is premised on the fact that while the petition was accompanied by affidavits of witnesses, the oath commissioner's attestation did not specify that he had administered oath to the deponents. To rectify that defect, the witnesses filed fresh affidavits on 02.04.2024, this time duly sworn on oath before the High Court's Assistant Registrar at the Identification Section (*ex-officio* oath commissioner). Learned counsel for the Respondent No.8 submitted that since the first set of affidavits were not on oath, those could not be taken in compliance of section 144(2)(a) of the Act, and thus the petition is to be rejected under section 145(1) of the Act. As regards the second set of affidavits, learned counsel submitted that those could not be accepted after the period of 45 days prescribed for filing the petition. On the other hand, learned counsel for the Petitioner submitted that a 'statement on

affidavit' under section 144(2)(a) of the Act could not be equated with an 'affidavit-in-evidence', and therefore there was no bar in accepting the latter.

8. Section 144(2)(a) of the Act requires:

> "**144. Contents of petition.—**(1) …….
> (2) The following documents shall be attached with the petition—
> (a) complete list of witnesses and their statements on affidavits;"

Clearly, the affidavits required by sub-section (2)(a) above are of the Petitioner's witnesses, not of the Petitioner himself, and of course only of those witnesses who accompany the Petitioner voluntarily. The provision does not require an affidavit-in-evidence by the Petitioner at the time of presenting the petition as the petition is already required to be on oath by section 144(4) of the Act. The 'proof' of facts by affidavit-in-evidence is then dealt separately under section 148(2) of the Act, which provides:

> "**148. Procedure before Election Tribunal for trial of petitions.-** (1) …….
> (2) The Election Tribunal shall, unless it directs otherwise for reasons to be recorded, order any or all the facts to be proved or disproved by affidavit and may, for the purposes of expeditious disposal, apply such other procedure as the circumstances of the case may warrant."

Therefore, the Petitioner is not required to file an affidavit-in-evidence until the Tribunal orders him to do so under section 148(2) of the Act, and which follows when the case is ripe for trial. Even under Order XIX Rule 1 CPC, proof of facts by affidavit requires an order of the Court. Surely, the Petitioner is not expected to prove his case by affidavit-in-evidence at the time of presenting the petition when a defense has yet to be set-up. That being so, there is no question of non-compliance of sub-section (2)(a) of section 144 of the Act.

9. As regards the objection to the validity of affidavits of witnesses filed along with the petition, I do not see how such an objection can lead to rejection of the petition. As pointed out above,

the affidavits of witnesses required by sub-section (2)(a) of section 144 of the Act are of those witnesses who accompany the Petitioner voluntarily. Even assuming for the sake of argument that those affidavits are invalid, the Petitioner can still lead evidence himself and summon the non-voluntary witnesses mentioned in the list of witnesses. Clearly, the consequence of rejection of the petition provided in section 145(1) of the Act is not intended for a flaw in the affidavit of witnesses.

Fate of the first set of affidavits of witnesses:

10. While the petition cannot be rejected for defective affidavits by witnesses, the scope and fate of those affidavits still needs to be stated.

11. Reading section 144(2)(a) of the Act with section 148(2), it appears that though a witness accompanying the Petitioner has to file a statement on affidavit at the outset, the purpose of that statement is essentially to make a disclosure of the evidence that may be led, and not necessarily to serve as the affidavit-in-evidence of that witness at the trial. An affidavit filed by the Petitioner's witness at a time when the defense has yet to be set-up cannot be sealed as his entire testimony for the purposes of trial. It may well be that after the defense comes forth, or on the discovery of other material, the witness may need to add to, or clarify, or even drop a part of his previous statement. The intent is to expedite the trial, not to confound or shut out the evidence. Thus, as and when the petition is ripe for trial, section 148(2) of the Act envisages an order by the Tribunal calling upon witnesses to prove facts by affidavit. At that stage a witness may either rely on the statement on affidavit filed by him at the outset, or file a fresh affidavit-in-evidence. Of course, any inconsistency between the two would go to the veracity of the evidence.

12. It is correct that the set of affidavits of witnesses filed along with the petition did not reflect that the oath commissioner had administered oath. But then, the strict compliance of Order VI Rule 15 CPC applicable to verification of the petition by virtue of sections 144(4) and 145(1) of the Act, is not applicable to affidavits of witnesses under section 144(2)(a) of the Act. Consequently, the provisions of the Oaths Act, 1873 are not overridden for affidavits filed by witnesses.

13. Section 13 of the Oaths Act, 1873 provides:

> "**13. Proceeding and evidence not invalidated by omission of oath or irregularity.--** No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever, in the form in which any of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever, in or in respect of which such omission, substitution or irregularity took place, or shall affect the obligation of a witness to state the truth."

Section 13 of the Oaths Act is a curial provision. It was held by the Supreme Appellate Court in *Sajjad Ahmed v. The State* (1992 SCMR 408), reiterated in *Muhammad Aslam v. The State* (1999 SCMR 845), that if evidence of a witness was not recorded on oath, the flaw was not fatal and did not vitiate the trial as the irregularity is curable under section 13 of the Oaths Act. In *Shamsher Ali v. Qaim Khatoon* (PLD 1997 SC 559) the Supreme Court went on to hold that even evidence recorded on solemn affirmation cannot be brushed aside simply on the ground that it was not taken on oath.

14. Coming back to the instant case, the affidavits of witnesses filed with the petition are not evidence until the deponents thereof step into the witness box, take oath, produce those affidavits as evidence, and present themselves for cross-examination.[4] As and when that happens, the defect in oath on those affidavits will stand cured by virtue of section 13 of the Oaths Act. A similar view was taken by the High Court of Sindh in the cases of *Bismillah Begum v. Mahji* (1991 MLD 1303, and *Pearl Leather Product (Pvt.) Ltd. v. Feroza Khatoon* (2001

[4] See *The President v. Justice Shaukat Ali* (PLD 1971 SC 585).

YLR 2604). Having concluded so, I do not advert to the question whether the second set of affidavits of witnesses are time-barred.

Objection to the verification clause of the petition:

15. The verification clause of the petition reads:

> *"I, Zain Pervez son of Masood Pervez Muslim, Adult, resident of ..... Karachi, the Advocate of the Petitioner, do hereby verify the Petitioner through his national identity card. And the contents of petition have been verified to be true and correct as per the brief/instructions received."*

As apparent from the text underlined, the verification clause is defective. The identification clause of the Advocate has been merged with the verification clause of the Petitioner. However, the error appears to be typographical inasmuch as the clause is signed by the Petitioner, not by the Advocate, and a separate identification clause signed by the Advocate follows underneath. Be that as it may, the petition is also verified by way of a separate affidavit which reads: *"That whatever has been stated above is true and correct to the best of my knowledge and belief."* As held in the case of *Sardarzada Zafar Abbas v. Syed Hassan Murtaza* (PLD 2005 SC 600), reiterated in *Lt. Col (Rtd.) Ghazanfar Abbas Shah v. Khalid Mehmood Sargana* (2015 SCMR 1585), "there is no material difference between a verification on oath and a verification through an affidavit". Therefore, in view of the separate affidavit of verification, the petition cannot be rejected.

16. The other objection to the verification clause of the petition was that it did not comply with sub-rule (2) of Order VI Rule 15 CPC which requires that:

> "The person verifying shall specify, by reference to the numbered paragraphs of the pleadings, what he verifies of his own knowledge and what he verifies upon information received and believed to be true."

Learned counsel for the Respondent No.8 thus submitted that the failure to do so was a non-compliance of section 144(4) of the Act which entails rejection under section 145(1) of the Act.

17. As to an objection to the verification clause of an election petition on the premise of sub-rule (2) of Order VI Rule 15 CPC,[5] it was observed by the Supreme Court in the case of *Sardarzada Zafar Abbas*[6] that:

> "Such objection is not very material because at times the entire statement happens to be given on the basis of one's knowledge and at time on the basis of information received. It depends upon the facts of each case, as to what category the assertions belong. The situation is likely to differ from case to case."

In the case of *Abdul Qadir v. Abdul Wassay* (2010 SCMR 1877), also an election matter, the Supreme Court went on to hold that:

> "This provision of law in fact cannot be considered to be mandatory as a person can verify the paras in the pleadings on his own knowledge without verifying any para upon receipt of the information, same are believed to be true."

A similar view was expressed in *Feroze Ahmed Jamali v. Masroor Ahmed Khan Jatoi* (2016 SCMR 750). Counsel for the Respondent No.8 had placed reliance on *Sultan Mahmood Hinjra v. Malik Ghulam Mustafa Khar* (2016 SCMR 1312). But even in that case the petition was not rejected merely for non-compliance of sub-rule (2) of Order VI Rule 15 CPC, rather due to the fatal flaw that the verification clause did not reflect that oath was administered and there was also nothing to show how the petitioner was identified to the oath commissioner.

18. The Supreme Court having declared that sub-rule (2) of Order VI Rule 15 CPC is not mandatory even for an election petition, the petition cannot be rejected on that score.

Objection to the oath administered on the petition:

19. The objection under this head was that the Assistant Registrar of the Identification Section of the High Court was not authorized to administer oath on an election petition; and therefore, the petition

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[5] Adopted erstwhile by section 55(3) of Representation of the People Act 1976, a provision similar to section 144(4) of the Election Act 2017.
[6] PLD 2005 SC 600.

was not on oath and a non-compliance of section 144(4) of the Act. Reliance was placed on *Lt. Col. (Rtd.) Ghazanfar Abbas Shah v. Khalid Mehmood Sargana* (2015 SCMR 1585).

20. The same objection has been rejected by this Tribunal by order dated 16.09.2024 passed in the case of *Khurram Sher Zaman v. Mirza Ikhtiar Baig* (E.P. No. 02/2024), excerpted as follows:

> "16. With the implementation of the Identification Section Management System (ISMS) in the High Court of Sindh in the year 2012, which linked the Identification Section to NADRA's data-base, the Assistant Registrars of that Identification Section were appointed *ex-officio* oath commissioners by the High Court. Since then, all pleadings for use in the High Court are brought to the Identification Section for administering oath on the verification clause. The submission of counsel for the Respondent No.1 was that since the Judge of the High Court acts *persona designata* as Election Tribunal and not as the High Court, the oath commissioner appointed by the High Court has no authority to administer oath on an election petition – in other words, the High Court does not have authority to appoint an oath commissioner for an election petition intended before the Election Tribunal.
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> 17. Section 144(4) of the Act provides that "….. the petition shall be verified in the manner laid down in the Code of Civil Procedure, 1908 (Act V of 1908), for the verification of pleadings." Order VI Rule 15 CPC then sets out the manner of verification and oath, whereas section 139 CPC provides that oath may be administered by any officer or other person "whom a High Court may appoint in this behalf". Therefore, even though the Judge of the High Court acting as Election Tribunal is not the High Court, the authority of an officer appointed by the High Court to administer oath on an election petition emanates from section 144(4) of the Act itself by way of adopting section 139 CPC.
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> The fallback argument was that the High Court should have then issued a special notification appointing the Assistant Registrars of the Identification Section as oath commissioners also for election petitions. If that argument is taken to its logical end, all staff of the High Court dealing with election petitions would require fresh appointment as staff of the Election Tribunal, which would then defeat the purpose having a sitting High Court Judge act *persona designata* as Election Tribunal.
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> 18. In view of the foregoing, the objection to the authority of the Assistant Register of the Identification Section of the High Court to administer oath on the election petition has no force. The case of *Lt. Col. (Retd.) Ghazanfar Abbas Shah* is not attracted as the petition was duly verified as per section 144(4) of the Act."

The same order is passed in this petition as well.

21. In view of the foregoing, none of the objections succeed for rejecting the petition under section 145(1) of the Election Act, 2017. CMA No. 1505/2024 is therefore dismissed and the preliminary issue is answered in the negative.

JUDGE

Karachi
Dated: 03-02-2024