

ELECTION COMMISSION OF PAKISTAN

MR. SIKANDAR SULTAN RAJA,	CHAIRMAN
MR. NISAR AHMED DURRANI,	MEMBER
MR. SHAH MUHAMMAD JATOI,	MEMBER
MR. JUSTICE (R) IKRAM ULLAH KHAN,	MEMBER

CASE No.F.8(2)/2024-Law-III

Subject: APPLICATION FOR TRANSFER OF ELECTION PETITION U/S 151 OF ELECTION ACT

Dr. Tariq Fazal Choudhry

.....Petitioner(s)

VERSUS

Mr. Shoaib Shaheen & Other

.....Respondent(s)

For the Petitioner	:	Mr. Waqas Mir, ASC along with Mr. Hammad Hussain, Advocate.
For the Respondent	:	In person
Date of hearing	:	<u>17-10-2024</u>

ORDER

Sikandar Sultan Raja, Chairman- The Commission is going to decide the above mentioned application preferred by the petitioner, Dr. Tariq Fazal Ch. Whereby, he has invoked the jurisdiction of the Commission under Section 151 of Election Act, 2017 (herein after referred as "the Act") for transfer of election petition No. 73 of 2024 titled as "Shoaib Shaheen Vs. Dr. Tariq Fazal Ch." pending before the learned Election Tribunal (herein after referred as "the Tribunal") at Islamabad.

02. Briefly stated, the respondent herein namely Mr. Muhammad Shaoib Shaheen has challenged the election to National Assembly seat NA-47 Islamabad, by filing Election Petition against the applicant on multiple grounds. During course of trial of the Election Petition, the applicant keeping in view the conduct of trial observed and realized that conduct of trial proceedings of the Election Petition is not in accordance with the provisions of Elections Act, 2017. The applicant apprehended that he will not be treated fairly and justly, therefore, he filed the instant application for the transfer of the titled petition from Election Tribunal, Islamabad to any other Election Tribunal.

03. It is pertinent to mention here that the Commission has already decided the earlier Transfer application vide order dated 10.06.2024 where-after the Election Petition was transferred by allowing the application. Subsequently respondent, Mr. Muhammad Shoaib Shaheen



challenged the order of Commission dated 10.06.2024 before the Islamabad High Court through a Writ Petition No. 1977 of 2024 titled Muhammad Shaoib Shaheen Vs. ECP etc. The Hon'ble High Court passed the order in following terms,

“Having said that, the important aspect of the matter is that ECP seems to have proceeded with the transfer application in haste without providing opportunity of filing affidavits and counter-affidavits/ replies to the allegation of ‘bias’ or misapplication of law. Proper opportunity should have been granted to the petitioners; failure on part of ECP to grant such opportunity to present the case, apparently is in violation of Article 10-A of the Constitution. It is settled that ECP is not a ‘judicial forum’; it is not even purely executive, as noted, it is a constitutional body, which has some quasi-judicial powers to perform while deciding certain issues. The power of transfer is supervisory and administrative in nature and has to be exercised after providing opportunity to everyone concerned. There is nothing on record to show that the same was done and in one of the writ petitions (W.P. No.1981-2024), while allowing the transfer application, even merits were touched and finding on the same was rendered, which is surely not the mandate of ECP. In such view of the matter, it is only appropriate that ECP revisits the matter because it does have the authority and mandate to decide transfer application under section 151 and also can transfer petitions suomoto but has to give reasons for the same. However, where the application has been filed for transfer, naturally all parties are to be heard, which in the instant case, was not done as such, in a proper manner, hence the impugned orders are not sustainable and merit setting aside.

31. For what has been stated above, W.P. No. 1977-2024, W.P.No.1981-2024 & W.P. No.1984-2024, are allowed and transfer orders dated 10.06.2024 passed by ECP are set aside; consequently, transfer applications filed by private respondents, shall be deemed to be pending and decided in accordance with law and observations made hereinabove. W.P No.1796-2024, W.P. No.1797-2024 & W.P. No.1798-2024, challenging vires of section 151 ibid, are dismissed for the reasons stated above.

04. On receipt of the order of the Islamabad High Court, Notices were issued to the parties for appearance. The applicant filed amended application/ Supplemental submissions. On the other hand respondent also filed a written reply. On original record of the E.P No. 73 of 2024 was called from the Election Tribunal for perusal. After hearing argument from the parties in detail the Transfer Application was reserved for order.



FACTS IN BRIEF

05. The Learned Counsel appeared on behalf of the applicant contended that the proceedings in the Election Petition No. 73 of 2024 titled as Mr. Shoaib Shaheen Vs. Dr. Tariq Fazal Ch. and others as conducted so far by the Learned Tribunal are against the law and rules. He raised a number of grounds for transfer of Election Petition before this Commission gist of which is follows:-

- i. That the election petition has been filed before a wrong forum as Registrar Islamabad High Court, Islamabad was not competent to entertain the election petitions without proper notification from the Election Commission of Pakistan;*
- ii. That Rule 140 of the Election Rule 2017 has already been amended by ECP vide SRO 452(1) 2023 on 07-04-2023, however, the Learned Tribunal exercised, power for affording 7 days to the election petitioner, for removing deficiencies occasioned therein the Election Petition which is no more available but even then Learned Tribunal exercised a power not vested in it, thereby afforded 7 days grace period to the present respondent for removing the patent legal infirmities and deficiencies occurred in the said petition, in order to make maintainable the same;*
- iii. That no doubt the Election Petition is still subjudice before the Learned Tribunal which require adjudication in accordance with law, but commencement of trial over an Election Petition is subject to fulfillment of prescribed conditions well mentioned under the provision of Section 142 to 144 of the Act, 2017 and Rules 140 of the Rules, 2017 but the Learned Tribunal without affording opportunity of hearing over the maintainability and competency of the Election Petition, admitted the said petition by bypassing the mandatory provision of the Act, 2017 which is hopelessly time barred, incompetent and non-maintainable. Such conduct of the trial has created an actual perception of biasness towards the Learned Election Tribunal. While adoptingsuch procedure has prejudiced the legal rights of the Applicant.*
- iv. That in the reported judgment of PLD 1973 SC 327 titled Muhammad Nawaz Vs. Ghulam Qadir and 3 others and referred that the Hon'ble*



Supreme Court of Pakistan has upheld that any irregularity or illegality during the filing of election petition is not curable and the same may be rejected summarily;

- v. *That the Election Tribunal is deciding the election petition in haste without following the procedure laid down under the Elections Act, 2017 and Rules framed there under;*
- vi. *That the attending circumstances, prima facie give rise to a strong inference, that the Learned Tribunal is determined to decide the fate of the Election Petition, on the basis of affidavits, already filed by some of the respondents including the Election Commission of Pakistan under the direction of the Learned Tribunal which gave rise to and created apprehension in the mind of the applicant that Learned Tribunal is bent upon by adopting a novel procedure for disposal of and decision over the fate of the subjudice Election Petition, which is nowhere, prescribed there under any of the provision of the Act, 2017. thereby causing prejudice to the vested and legal rights accrued to the applicant by afflux of law;*
- vii. *That the Learned Tribunal could not exercise the jurisdiction to put to trial an Election Petition presented beyond 45 days, well prescribed thereunder the provision of section 142 of the Election Act, 2017 whereas such hopelessly time barred Election Petition shall be summarily rejected in term of the sub-section 1 of section 145 of Election Act, 2017 but the Learned Tribunal, issued notices for appearance of respondents therein, and also directed respondents therein to file the original Forms-45 and 46 alongwith affidavits which is a clear deviation therefrom the prescribed law and rules and such kind of illegalities which otherwise, are not curable, give an inference that Learned Tribunal is going to decide the said Election Petition in favor of the present respondent, irrespective of merit of the case. such conduct of pre-trial of an Election Petition has raised serious apprehension of bias and partiality of the Learned Election Tribunal on account of which the applicant has lost his confidence in Learned Tribunal, that applicant would not be treated in accordance with law and in term of Article 10-A of the Constitution of Pakistan, therefore, under such attending facts and circumstances of the case, the applicant is constrained to invoke the*



jurisdiction of the Commission conferred upon it in term of section 151 of the Election Act, 2017 for transfer of the Election Petition No. . 73 of 2024 titled as Shoaib Shaheen vs. Dr. Tariq Fazal Choudhary and others from the Election Tribunal where, the election petition is pending adjudication, to any other already established Election Tribunal anywhere, within the Pakistan or to any Election Tribunal which it may be constituted, in term of amended provisions of law;

- viii. *That application for rejection of the election petition was moved by the applicant which is still pending and not decided by the Election Tribunal;*
- ix. *That the provisions of the limitation Act, 1908 shall not apply to election petitions as the petitions are dealt under the special law as specific time of 45 days has been mentioned in Section 142 of the Elections Act, 2017;*
- x. *Section 151 of the Election Act, 2017 is intra vires the Constitution hence statutory power of ECP to transfer cases has been upheld;*
- xi. *That there is no specified list of grounds mentioned in the Election Act, 2017 on which a transfer of Election petition can be sought are granted, there is not restriction placed on the power of this Hon'ble Commission to transfer an election petition from one election tribunal to another. Even Election Commission has administrative/supervisory power to transfer Election Petition and entrusted to another tribunal.*
- xii. *That the Presiding Officer is proceeded the matter in a hasty manner. Once an election petition is filed. The law provides clear step which cannot be ignored. If the statutory scheme is ignored and the manner of trial is altered in procedural as well as substantive terms which is a legitimate ground for loss of confidence. This is a sufficient to transfer a case. On the following orders passed by the Election Tribunal, the applicant has loss of trust and confidence.*
- a. *02.05.2024: The Election Tribunal admitted the election petition without first demining the question of limitation and inter alia, directed the respondents to submit written statement along with he original Form-45 and 46.*
- b. *20.05.2024: The Election Tribunal issued a warning to the Returning Officer, stating that arrest warrants would be issued if he failed to appear at the next hearing.*



- c. **29.05.2024:** *The Election Tribunal imposed a cost of PKR 15,000/- on the Returning Officer for his non-appearance at the pervious hearing. The Returned Candidate was again directed to submit the original Form 45 and 46.*
- d. **30.05.2024:** *The Election Tribunal overruled the office objection and observed that it would be addressed at the time or arguments. The Election Commission of Pakistan objected that a complete copy of the Election Petition has not been served. The Election Tribunal, instead of dismissing the Election Petition summarily under section 145, rectified the issue; and*
- e. **17.07.2024:** *The Election Tribunal imposed a cost of PKR 20,000/- on the Returned Candidate*

- xiii. *That the Learned Tribunal has harassed the Returning Officer by imposing a fine of Rs. 15000/- on account of a single time non-appearance and also warned him of issuance of warrant of arrest;*
- xiv. *Even ECP has a soumoto power to transfer an Election Petition to one Tribunal to another if prima facie there is a violation of Election Act;*
- xv. *That applicant has granted fundamental right Under Article 10-A to dealt with accordance with law and fair opportunity be granted;*

06. He further contends that he has no bias against the Presiding Officer of Election tribunal. Fair trial is substantive right and it must be given to the parties with fair opportunity. He further submitted that the applicant had clearly raised objection regarding the maintainability of the Election Petition which is clearly time barred. That there is no bar for transfer of Election Petition to another Tribunal. In the last he prayed that the instant application may kindly be allowed and E.P No. 73 of 2024 titled as Mr. Shaoib Shaheen Vs. Dr. Tariq Fazal may graciously be transferred from the Election Tribunal, Islamabad to any other Election Tribunal for its disposal. The learned Counsel pointed out that the Election Petition is not proceedable, yet the learned Presiding Officer continues the hearing without adverting to the preliminary issues.

07. In this respect the learned counsel placed reliance on the following case laws:

SECTION 151, ELECTION ACT, 2017



- i. Syed Muhammad Ali Bokhari Vs. FOP, Writ Petition No 1796/2024
- ii. PLD 2015 Sindh 408

TRANSFER OF CASES/ LOSS OF CONFIDENCE AND TRUST.

- i. PLD 1973 SC 327
- ii. PLD 2001 SC 568
- iii. PLD 1995 Lahore 89
- iv. 2012 MLD 501
- v. 2005 YLR 2496
- vi. PLD 1996 Lahore 199.
- vii. PLD 1996 Lahore 238
- viii. 2014 (11) ADJ 414
- ix. AIR 1990 SC 113
- x. AIR 2008 SC 1333

JUSTICE HURRIED IS JUSTICE BURRIED

- i. 1993 SCMR 550
- ii. 2015 PCr. L J 869 Sindh
- iii. 2015 YLR 1279

POWER OF A QUASI-JUDICIAL BODY

- i. 2023 SCMR 603
- ii. 2022 SCMR 25
- iii. 2010 SCMR 1933
- iv. (2007) 3MLJ982) Indian Judgment.

08. On the other hand, learned counsel appeared in person and argued the case at length and raised objection over the bench that as the Commission is itself party therein, therefore this Commission could not exercise the jurisdiction conferred open the ECP in terms of section 151 the Election Act, 2017. The learned counsel for the respondent has raised following objections in response of the application filed by the applicant.

- i. *That in so far as the question of maintainability is concerned such issues are still subjudice before the Learned Tribunal whereas the Learned Tribunal has put on notice the present respondent for hearing over, the objections preferred by the applicant in this regard;*
- ii. *That the election petition is based on documentary evidence and it excludes oral evidence. The Tribunal has extended its jurisdiction to give relief to the Commission while reviewing its order to submit attested copies of Form 45 and 46 instead of original record;*



- iii. *That mere perception is not enough to transfer an election petition from one Tribunal to the other. Even mere apprehension or perception of biasness in regard to a legally constituted forum, may not be a good ground for invoking the jurisdiction of this Commission however, there shall be solid and tangible evidence of biasness;*
- iv. *That it is the mandate of law that trial in an Election Petition shall be concluded as soon as possible within 180 days and keeping in view the mandate of law the proceeding conducted by the learned tribunal, is in accordance with law;*
- v. *That the Election Tribunal is required to decide the election petition subject to Act and Rules and in accordance with the procedure laid down under CPC "as nearly as possible", the judgment reported in 2016 SCMR 1 provides that the Election Tribunal can devise its own procedure;*
- vi. *That as there is no other established Election Tribunal at Islamabad, while the instant Election Petition could not be transferred outside Islamabad on mere whims and wishes of the applicant without any valid and legal reasons, therefore, the petition in hand being infructuous, baseless, filed with malafide intention is liable to be dismissed with cost;*
- vii. *That the objection of learned counsel for applicant that Learned Tribunal is bent upon to dispose of the election petition in a very expeditious mode and manner without adhering thereto the provisions of order 14 of CPC being out of context and not sustainable in eye of law for the sole reason that the provision of Election Act, 2017 shall prevail over the CPC in term of Section 148 of the Elections Act, 2017, which conferred exclusive jurisdiction over the Tribunal to prove or disprove of any fact on affidavit or for the purpose of expeditious disposal as the circumstances of the case may warrant adopt any procedure;*
- viii. *That even otherwise applicant has no solid grounds for transfer of election petition from one tribunal to another;*



- ix. *That one election tribunal has sought reply from the applicant he approached the ECP for transfer of Election Tribunal and cause in ordinate delay which effect the rights of the respondents;*
- x. *That even Notification of the Returned Candidate was also issued rush earlier then the issuance of Form 48 and 49. The respondent has taken a specific stance against the ECP and the RO appointed by the ECP in his Election Petition which is pending before the Election Tribunal, there is a clear conflict of interest of taking cognizance of the instant transfer application;*
- xi. *That the current Election tribunal was constituted with the consultation of the Chief Justice of Islamabad High Court therefore, there is no reason for transfer of Election Petition;*
- xii. *That the Election Tribunal has not still fixed for arguments regarding maintainability of the Election Petition, therefore, the ground raised by the applicant has no force. The Election Tribunal is proceeding by keeping all the provision of the Election Act. The Election Tribunal has acted in a complete impartial and unbiased manner;*
- xiii. *The applicant's right was not violated by the Election Tribunal. The applicant has not shown any malafide intention against the Judge of Election Tribunal, the applicant will not suffer irreparable as there is no legitimate reason for the transfer of the Election Tribunal;*
- xiv. *Loss of Confidence/ trust is no ground to transfer the election tribunal as the applicant is himself adopting the delay tactics. No illegality has been committed by the election tribunal therefore, this application is premature, liable to be dismissed. Even the Commission is not appellate authority;*
- xv. *No new ground is existed for transferring the Election Petition. Applicant is evading the proceeding and takes lame excuse;*
- xvi. *Mis-application of law is no ground of Election Petition;*



xvii. *RO is necessary party he must be impleaded party;*

xviii. *If applicant has any biasness against the Judge of Election Tribunal, he must file an application before the Judge of Election Tribunal. Biasness is not a good ground for transfer of Election Petition.*

09. Lastly he further stated that order dated 19.09.2024 in writ petition No. 1977/2024 titled as Muhammad Shoaib Shaheen Vs. ECP passed by the Hon'ble Single Judge of Islamabad High has been challenged before the ICA. He requested to dismiss the transfer application filed by the applicant. He reliance on case law PLD 2014 SC 585, 2015 YLR 544, 2022 YLR note 93, 2015 PCRLJ 81 and 2000 YLR 1067.

10 We have given due consideration to the arguments advance by the learned Counsel for both the parties and have gone through the available record,

11. Article 4 and 10-A of Constitution of Pakistan are reproduced as under-

“4. Right of individuals to be dealt with in accordance with law, etc. (1) *To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*

10-A. Right to fair trial: *For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process.”*

12. Sections 4, 145 to 151 of the Elections Act, 2017 and Rule 140 of the Election Rules, 2017 are reproduced as under-

4. Power to issue directions.—(1) *The Commission shall have the power to issue such directions or orders as may be necessary for the performance of its functions and duties, including an order for doing complete justice in any matter pending before it and an order for the purpose of securing the attendance of any person or the discovery or production of any document.*

(2) *Any such direction or order shall be enforceable throughout Pakistan and shall be executed as if it had been issued by the High Court.*

(3) *Anything required to be done for carrying out the purposes of this Act, for which no provision or no sufficient provision exists, shall be done by such authority and in such manner as the Commission may direct.*

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) *If an election petition is not rejected under sub-section (1), the Election Tribunal shall issue notice to each of the respondents through—*

(a) *registered post acknowledgement due;*

(b) *courier service or urgent mail service; 1 Substituted vide Elections (Second Amendment) Act, 2023, dated 5th August, 2023.*



(c) any electronic mode of communication, which may include radio, television, email and short message service (sms);

(d) affixing a copy of the notice at some conspicuous part of the house, if any, in which the respondent is known to have last resided or at a place where the respondent is known to have last carried on business or personally worked for gain;

(e) publication in two widely circulated daily newspapers at the cost of the petitioner; and

(f) any other manner or mode as the Tribunal may deem fit.

151. Power to transfer petition.—*The Commission may at any stage, on its own motion or on an application of a party and for reasons to be recorded, transfer an election petition from one Election Tribunal to another Election Tribunal and the Election Tribunal to which the election petition is transferred—*

(a) shall proceed with the trial of the election petition from the stage from which it is transferred; and

(b) may, if it deems fit, recall and examine any witness who has already been examined

Rule 140. 1 Processing the Petition.—*Every petition shall be processed by the office of the Tribunal and in case the petition is not in accordance with the provisions of sections 142, 143 or 144, it shall be laid before the Tribunal for orders under sub-section (1) of section 145.*

13. Election Commission of Pakistan is a Constitutional body constituted under Article 218(2) of the Constitution of 1973. The Commission is charged with the duty to organize and conduct the elections and to make such arrangements that elections are conducted honestly, justly, fairly and in accordance with law. Similarly, Article 219^(c) of the Constitution read with Section 140 of the Elections Act, 2017 empowers the Commission to appoint the Election Tribunals for trial and disposal of election petitions arising out of elections between the parties. After the conduct of General Elections 2024, the Commission started the process of appointment of Election Tribunals as provided under Section 140 of the Elections Act, 2017 in consultation with the Chief Justice of the concerned High Courts. Mr. Justice Tariq Mehmood Jahangiri was appointed as Election Tribunal for trial and disposal of Election Petitions of the Constituencies of Islamabad Capital Territory (ICT). Transfer application in the subject matter was received on 03.06.2024 to the Commission for transfer of the Election Petition from the appointed Election Tribunal ICT to another Election Tribunal on various grounds. The said transfer application was decided by the Commission vide order dated 10.06.2024 which was challenged by the present Respondent before the Islamabad High Court. The Islamabad High Court decided the matter on 19.Sep.2024 and remanded the case to the Commission to decide afresh after providing opportunity of hearing.

14. Section 140 of the Elections Act, 2017 empowers the Commission to appoint as many as Election Tribunals as may be necessary for the swift disposal of Election Petitions.



Before the promulgation of Ordinance No. 5/2024 sitting judge of the High Court was to be appointed as a judge of Election Tribunal in consultation with the Chief Justice of the concerned High Court, however, amendment in Section 140 of the Elections Act, 2017 was made through Election Amendment Ordinance 2024 whereby, the word "is" or "has been" was inserted in clause (a) and clause (b). It was also clarified through substitution in clause (3) of Section 140 of the Act *ibid* that the Commission shall consult with the Chief Justice of the High Court concerned in case of appointment of sitting judges as Election Tribunal. Later-on, this Ordinance was laid before the Parliament and it became an Act and called as Election Amendment Act 2024 on 08.07.2024.

15. Similarly, Section 151 of the Act gives powers to the Commission to transfer an Election Petition at any stage of the proceedings before the Election Tribunal on its own motion or by an application of a party to any other Election Tribunal. This Section did not confine the limit of the power of the Commission only to the extent of administrative grounds nor has given specific grounds for transfer of an Election Petition. The only requirement to transfer an Election Petition by the Commission is recording of detailed reasons. The Commission can also exercise this power by its own motion to provide right of fair trial and justice to a party. The objections raised by the Respondent in his reply regarding jurisdiction of the Commission to transfer an Election Petition to any other Election Tribunal including to the other province is not maintainable. There is no bar in the Elections Act, 2017 and specifically in Section 151 of the Elections Act, 2017 to transfer an Election Petition to any other Tribunal including any other province. We have precedents whereby the Election Petitions have been transferred by the Commission to any other province for provision of complete justice to the parties. Furthermore, after the enactment of Election Amendment Act 2024 the Commission has the exclusive power. to constitute Election Tribunals comprising of retired judges of the High Courts for trial and disposal of Election Petitions.

16. Article 10-A of the Constitution provides that any person is entitled for equal opportunities, fair trial and due process in the process of litigation. The Elections Act, 2017 is enacted by the Parliament and there are certain requirements to do certain acts in specific manner. It is a settled principle of law that all the legal defects apparent on the face of the record shall be decided initially before further proceedings. The Election Petition has to be presented before the Election Tribunal in a specific manner provided under Section 140 to 144 of the Elections Act, 2017. It is also categorically provided that if an Election Petition is suffering from any legal defect/ deficiency and mandatory requirement of law, such petition shall be summarily rejected in term of Section 145 of the Elections Act, 2017. Similarly, Rule 140 of the Election



Rules, 2017 also bounds the Tribunal to summarily reject the Election Petitions presented before it if the basic requirements of Section 142 to 144 of the Elections Act, 2017 are not fulfilled. No relaxation can be given by the Tribunal or by the Registrar High Court to cure the defects in the Election Petition presented by the parties. It is also observed that the Tribunal in the instant matter has not followed the due process of law and by ignoring the basic requirements provided under Section 142 to 144 of the Elections Act, 2017 and without framing of issues, issued notices to the parties and summoned the original record from the R.O and the Election Commission of Pakistan. The Tribunal cannot cure the defect in the Election Petition. The Respondent himself objected that the Tribunal has given undue favor to the Applicant for submission of written statement more than given time of seven days which is against the principle of law and favor has been granted by the Tribunal to the Applicant. According to the Respondent the favor cannot be granted by the Tribunal as it is not a curable defect and law provides specific time to do the needful.

17. The Respondent also objected that the Commission cannot allow the Petitioner to amend his application without issuing of notices to the parties. In this regard it is mentioned here that notices were issued to both the parties after announcement of order by the Islamabad High Court, however, due to non-serious attitude of the Respondent by ~~using~~ ^{using} delaying tactics has lingered on the Election Petition. Additionally, Section 3 of the Elections Act, 2017 provides that the Commission shall regulate its own procedure for decision of pending matter before it. No specific procedure has been provided under Section 151 of the Elections Act, 2017 to deal with the Applications for transfer of an Election Petition. It is also clarified by the Counsel for the Applicant that he has submitted the additional/ supplementary submissions and not the amended application it is not the type of amendment that can change the nature of the Petition only additional submissions are given which according to counsel for the applicant may be ignored. Furthermore, the Respondent has been given full opportunity to file reply/ amended reply in response to the additional submissions submitted by the counsel for the Applicant.

18. The Islamabad High Court while deciding the writ petition filed by the Respondent Election Petition has also acknowledged the powers of the Commission to transfer an Election Petition from one Tribunal to another Tribunal and has further held that Section 151 of the Elections Act, 2017 is not in violation of the Constitution. The only ground for setting aside the order of the Commission dated 10.06.2024 was that "the Commission has proceeded with the transfer application in haste without providing opportunity of filing affidavits and counter affidavits/ replies to the allegation of biased or mis-application of law." Proper opportunity should have been granted to the Petitioners. The court has also observed that "power



of transfer is supervisory and administrative in nature and has to be exercised after providing an opportunity to every concerned person". No other ground has been mentioned by the High Court for setting aside the order of the Commission. In the present case which is the second round of litigation, the Commission has provided ample opportunity to the parties to defend their stance by filing additional grounds, written replies, amended replies and extensive arguments. It is also highlighted that the previous order of the Commission was not based on the ground of biasness of the Hon'ble Presiding Officer of the Election Tribunal. Admittedly, there are certain points whereby the law has not been followed by the Presiding Officer of the Election Tribunal which has caused loss of confidence and fear of loss to the Applicant in the present case. The Commission is bound to ensure provision of fair trial as provided under Article 10-A of the Constitution to the parties in the petition, while exercising power under Section 151 of the Elections Act, 2017.

19. The apex Courts in various judgments have held that the procedure and mandatory provision of law for filing of Election Petitions are necessary to follow in letter and spirit, in case these provisions are not followed, the petition requires to be dismissed summarily.

Some of the important judgments are reproduced below:-

2015 SCMR 1585

10. Admittedly both the election petitions filed by the respondents in the aforementioned appeals were not verified on oath in the manner prescribed under the afore-quoted provision. If the law requires a particular thing to be done in a particular manner it has to be done accordingly, otherwise it would not be in-compliance with the legislative intent. Non-compliance of this provision carries a penal consequence in terms of section 63 of the Representation of the People Act whereas no penal provision is prescribed for non-compliance with Order VI, Rule 15 of the Civil Procedure Code.

PLD 2019 Balochistan 68

11. The provisions of Section 145 of the Act has made it clear that if any provision of Sections 142, 143 or 144 has not been complied with, the Election Tribunal shall summarily reject the election petition. Admittedly, the petition in hand is hit by the above referred provisions of law. Neither the petitioner could explain the reasons for filing a time barred petition nor he was in a position to explain the reasons for non-verification of petition along with its annexures on oath and have also could not satisfy this Tribunal for not dispatching the copies of petition and its annexures to the contesting respondents. The legal defects are apparent on the face of record, thus further trial in the matter would be nothing, but a futile exercise and wastage of precious time of this Tribunal. According to consistent view of the Hon'ble Supreme Court and has also held in the above referred case of Zia ur Rehman, that if the law requires a



particular thing to be done in a particular manner it has to be done accordingly, otherwise it would not be in compliance with the legislative intent.

2016 SCMR 1312

---S. 52---Election petition---Objection with regard to maintainability of an election petition for non-compliance of a mandatory provision---Election Tribunal should decide such an objection first because if such objection sustained then the Tribunal was left with no option but to dismiss the election petition.

PLD 2005 SC 600

The verification on oath of the contents of an election petition, is provided under section 55(3) of the Representation of the People Act of 1976, (hereinafter to be referred to as the Act). It provides that every election petition and every schedule or annexure to petition shall be signed by the appellant and verified in the manner laid down in the Code of Civil Procedure, 1908. The Code contains such provisions under Order VI, rule 15, which requires the verification of pleadings, on oath. Such verification is not to be signed in routine by the deponent but being on oath, it requires to be attested either by the Oath Commissioner or any other authority competent to administer oath. It needs hardly to be emphasized that every oath is to be practically administered.

So far as, the provisions of civil law are concerned, such verifications generally are of directory nature. An omission to do so can be rectified subsequently during trial and even the Court can direct such rectification. While, on the other hand, under election laws such verification on oath is mandatory because of being followed by penal consequences under section 63(a) of the Act that makes it mandatory for the Tribunal to dismiss election petition if the provisions of sections 54 and 55 of the Act have not been complied with. Similar view was taken by this Court in Iqbal Zafar Jhagra's case (2000 SCMR 250), though related to the Senate elections. It is, therefore, settled that the verification on oath of an election petition though mannered in accordance with civil law yet it entails upon penal consequences and hence is mandatory.

11. For what has been discussed above, this appeal is allowed, impugned judgment dated 18.07.2014 passed by the Election Tribunal is set aside and the election petition filed by the Respondent No.1 is hereby dismissed under section 63 of the ROPA, 1976 as not being in conformity with the mandatory provisions of section 55 of the ROPA, 1976.

2014 SCMR 1015

7. When the law prescribes a certain format of an Election Petition and its verification on oath and entails a penal consequence of its non-compliance, it is a mandatory provision. If an objection is raised with regard to maintainability of such a petition for non-compliance of a mandatory provision, the Court/Tribunal should decide that preliminary objection. Because if that objection is sustained then the Court is left with no option but to dismiss the petition. In view of this legislative intent, we are minded to decide the appeals primarily on issue No.1.

2019 MLD 294

---Validity---Object of requiring verification of election petition was to fix the responsibility for the averments and allegations in the petition on the person



signing verification and, at the same time, discouraging wild and irresponsible allegations unsupported by facts---Verification of contents of the election petition was required to be made on oath to be administered by the Oath Commissioner, who was bound to record and to endorse verification/attestation, that oath had been actually, physically and duly administered to petitioner---Perusal of the rubber stamp of the Oath Commissioner, in the present case, made it clear that the petitioner was not present at the time of verification before the Oath Commissioner because he was not identified with reference to his computerized national identity card and was not clear from the stamp as to at what place, the oath was practically and physically administered---Words "declared on oath before me" used in the stamp of Oath Commissioner were not sufficient being ambiguous as they did not indicate as to what was declared on oath or whether the contents of the verification were made on oath before the Oath Commissioner and said statement being patently ambiguous did not meet with the criterion for due attestation of verification---Non-verification of the election petition in accordance with S.144(4) of Elections Act, 2017 was fatal and such defect after the expiry of limitation could not be allowed to be rectified---Election petition was rejected under S.145 of the Elections Act, 2017, accordingly.

PLD 2023 Lahore 458.

---Rejection of petition---Scope---Chapter IX of the Elections Act, 2017, lays down a procedure for the settlement of election disputes---In terms of S. 139, no election shall be called in question except by an election petition filed by a candidate for that election---For the trial of election petitions under the Elections Act, 2017, the Election Commission of Pakistan appoints as many Election Tribunals as may be necessary for swift disposal of election petitions---Election petition is to be presented in a manner provided under S. 142, and S. 144 lays down necessary pre-conditions for the election petition---Subsection (4) of S. 144 ordains that an election petition and its annexures shall be signed by the petitioner and the petition shall be verified in the manner laid down in the Civil Procedure Code for the verification of pleadings---Section 145 prescribes a procedure before the Election Tribunal---Subsection (1) of S. 145 contemplates if any provision of S. 142, 143 or 144 has not been complied with, the Election Tribunal shall summarily reject the election petition---Once the Election Tribunal reaches the conclusion that petition is not proceedable it cannot wait till the culmination of the proceedings through regular trial---Mandate of law is to nip the evil in the bud---Civil Procedure Code also bestows power upon the Civil Court to reject the plaint summarily in terms of O. VII, R. 11, if it suffers with the flaws mentioned in the said provision---Election Tribunal, thus, can proceed on the same parimateria and reject the election petition at any stage---Tribunal is even vested with the power to adopt any other procedure for the expeditious disposal depending upon the circumstances of the case---Provisions of the Elections Act, 2017, are unequivocal and clear to this extent that a petitioner while presenting the election petition is obliged to adhere the mandate of Ss. 142, 143 & 144 of the Elections Act, 2017---Non-compliance of any of the said provisions renders automatic rejection of the election petition.

PLD 2007 SC 362

---Ss. 63, 52(2), 54 & 55(3)---Civil Procedure Code (V of 1908), S.139, O.VI, Rr.15(1)(a) & 17---Oaths Act (X of 1873), S.6---Non-verification of election petition and its annexures on oath or solemn affirmation before person authorized to administer oath---Effect---Application seeking amendment to remove such defect



in verification---Validity and scope---Ignorance of law would be no excuse---Such petition would be deemed not duly verified' on oath---While approaching Election Tribunal, petitioner would be bound to fulfil requirement of law including verification of petition in terms of S.55(3) of Representation of the People Act, 1976---Provision of S.55(3) of the Act for having prescribed a penalty of dismissal of petition for its non-compliance had become mandatory---Such defect in verification, whether pointed out by respondent or not, Tribunal would be bound to ensure compliance of such mandatory provisions---Where such amendment was sought during period of limitation prescribed for filing of election petition, then Election Tribunal could consider same according to settled principle relating to amendment in pleadings---Where such limitation period for its expiry had created a hurdle, then such amendment would not be allowed on condoning delay, particularly in absence of request to enlarge such period---Such amendment could not be regarded as an amendment essential to determine on merits real issues between parties---Principles.

20. The Sindh High Court in a case reported in PLD 2015 Sindh 408 have held that the powers to transfer an Election Petition from one Tribunal to the another Election Tribunal is vested with the Election Commission of Pakistan and this power is administrative and supervisory in nature. The Election Commission of Pakistan is the appointing authority of the Election Tribunal and the power to appoint the Tribunal is granted by the Constitution of Islamic republic of Pakistan in terms of Article 219. The Commission has the exclusive jurisdiction to decide the application for transfer of an Election Petition.

21. The question of expediency would depend on the facts and circumstances of each case but the paramount consideration for the exercise of power must be to meet the ends of justice. The mere convenience of the parties or any one of them may not be enough for the exercise of power but it must also be shown that trial in the chosen forum shall not result in denial of justice and fundamental right. The Parliament has therefore, invested this Commission with the discretion to transfer the case from one Tribunal to another Tribunal in terms of the Section 151 of the Elections Act, 2017; if that is considered expedient to meet the ends of justice.

22. The High Court of Allahabad while deciding the transfer application No. 519/2014 in case titled Amit Agrawal Vs. Atul Gupta has held that

“The paramount consideration must be to see that justice according to the law is done; if for achieving that objective the transfer of the case is imperative, there should be no hesitation to transfer the case even if it is likely to cause some inconvenience to the plaintiff. The petitioner’s plea for the transfer of the case must be tested on this touchstone. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the court to consider when a motion for transfer is made.”

23. In another case the Supreme Court of India in Civil Appeal No. 338/2008 (Arising out of SLP (C) No. 21147/2006) in case titled Kulwinder Kaur Vs. Kandi Friends Education



Trust and Ors.” Has held that right to fair trial is the paramount consideration and it is the duty of the court to provide justice to the parties in the trial.

“14. Although the direct discretionary power of transfer of cases cannot be imprisoned within a strait-jacket of any cast-iron formula unanimously applicable to all situations, it cannot be gainsaid that the power to transfer a case must be exercised with due care, caution and circumspection. Reading Sections 24 and 25 of the Code together and keeping in view various judicial pronouncements, certain broad propositions as to what may constitute a ground for transfer have been laid down by Courts. They are balance of convenience or inconvenience to plaintiff or defendant or witnesses; convenience other point involved in the suit; issues raised by the parties; reasonable apprehension in the mind of litigant that he might not get justice in the court in which the suit is pending; important questions of law involved or a considerable section of public interested in the litigation; ‘interest of justice’ demanding for transfer of suit, appeal on other proceeding, etc. Above are some of the instances which are germane in considering the question of transfer of a suit, appeal or other proceedings. They are, however, illustrative in nature and by no means be treated as exhaustive. If on the above or other relevant considerations, the court feels that the plaintiff or the defendant is not likely to have a ‘fair trial’ in the Court from which he seeks to transfer a case, it is not only the power, but the duty of the Court to make such order.”

24. The Commission without going into the merits of the case nor dilating upon the integrity and repute of the Hon’ble Presiding Judge of the Election Tribunal, holds that transfer of an Election Petition from one tribunal to another tribunal can be granted where it is in the interest of justice. The applicant intends to seek a fair trial in the Election Petition pending adjudication before the Election Tribunal which can only be possible if he has confidence in the Tribunal. The proprietary demands that for the smooth and swift trial of the Election Petition and to ensure the fair trial in all respects within reasonable time fair opportunity is being provided to the parties to defend their case.

25. Aiming at enforcement of Article 10-A of the Constitution, the august Supreme Court of Pakistan in case titled “The Federation of Pakistan through Secretary Finance Islamabad & another Vs. E-Movers (Pvt.) Limited and another” reported in 2022 SCMR 1021 has held that:-

“The due process requirement must be met in the determination of rights and obligations. The Constitution does not define due process. Therefore, it would not be appropriate to limit its scope by defining it. But this does not mean that the due process requirement is a meaningless concept. Rather due process incorporates universally accepted standards of justice and is not dependent upon any law or laws. It is an all-encompassing expression which may not be curtailed with reference to particular laws. Due process is to be understood holistically by keeping in mind the entire Constitution, which excludes arbitrary power, authoritarianism and autocratic rule.”




26. Similarly, The High Court of Lahore in case titled Nadeem Sultan and another Vs. Hamza Shaneem and 2 others reported in PLD 2023 Lahore 334 also discussed the importance of right to fair trial in following terms:-

“---Art. 10-A---Right to fair trial---Scope---Concept of due process rests in the idea that the legal proceedings be carried out in accordance with the established rules, express statutory provisions and settled principles for deciding the rights of litigants. [p. 343] M

12. With the insertion of Article 10-A in the Constitution of Islamic Republic of Pakistan, 1973 through Eighteenth Amendment, the fair trial and due process is the entitlement of every person. The concept of due process rests in the idea that the legal proceedings be carried out in accordance with the established rules, express statutory provisions and settled principles for deciding the rights of litigants.”

27. In view of the above mentioned reasons and in exercise of powers conferred upon the Commission in terms of Article 218(3), Article 10-A of the Constitution read with Section 3, 4 & 151 of the Elections Act, 2017, the transfer application is accepted and the election petition No. 73/2024 is hereby transferred to the Election Tribunal for Rawalpindi Division comprising of Mr. Justice (R) Abdul Shakoor Paracha and he is conferred the jurisdiction of Islamabad Capital Territory for trial and disposal of Election Petitions. The previous notification of Election Tribunal comprising of Justice Tariq Mehmood Jahangiri for Islamabad Capital Territory is hereby withdrawn.

28. Office is directed to take follow up action accordingly.


SIKANDAR SUI TAN RAJA
Chairman


NISAR AHMED DURRANI
Member


SHAH MUHAMMAD JATOI
Member


JUSTICE (R) IKRAMULLAH KHAN
Member

