

BEFORE THE ELECTION COMMISSION OF PAKISTAN

PRESENT:

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

Case No. F. 8(3)/2024-Law-III

In Ref: ELECTION PETITION UNDER SECTION 142 OF THE ELECTION ACT, 2017 READ WITH ALL OTHER ENABLING PROVISIONS OF LAW

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

Raja Khurram Shehzad Nawaz,

....Petitioner

Versus

Syed Muhammad Ali Bokhari

.....Respondent

For the Petitioner : In person along with Raja Faisal, Advocate

For the Respondent : In person along with Hassan Sajjad, ASC and Zakir Arif, ASC,

Date of Hearing : 07-06-2024

ORDER

JUSTICE (R) IKRAM ULLAH KHAN Petitioner has filed the instant petition for transferring of Election Petition No 72/2024 titled "Syed Muhammad Ali Bokhari vs. Election Commission of Pakistan and others" pending before learned Election Tribunal (herein after referred as "the Tribunal"), Islamabad to any other Tribunal, on various legal and factual grounds mentioned in the transfer application.

02. The Election Petitioner Syed Muhammad Ali Bokhari (respondent herein) has challenged the Election to National Assembly of Pakistan (NA-48 ICT-III) before the learned



Election Tribunal Islamabad. During the course of pendency of the election petition, the applicant being aggrieved from the conduct of the proceedings before the Tribunal on various factual and legal grounds has approached this Commission by filing the instant application for transfer of the Election petition under Section 151 of the Elections Act, 2017 (herein after referred as "the Act, 2017").

03. On receipt of the subject application, the Commission fixed the application for preliminary hearing on 05-06-2024. After hearing the learned counsel for the applicant, the application was admitted for regular hearing and it was directed to issue notices to all the respondents for 06-06-2024. In the meanwhile, it was further directed that record from the Election Tribunal Islamabad be requisitioned.

04. Learned counsel for the applicant contended that the proceedings before the Learned Election Tribunal is in contravention of the provisions of the Act and Rules, 2017 framed there under; he further contended;

1. *that the Learned Election Tribunal has treated the subject election petition as a civil suit in utter disregard of law of elections whereby, a hopelessly time-barred and incompetent petition is admitted for regular hearing;*
2. *that, the applicant has been declared as a returned candidate under section 98 of the Act, 2017 by the Commission on 11.02.2024 and the notification has been published in the official gazette on 13.02.2024;*
3. *that any contesting candidate is required under the provisions of section 142 of the Act, 2017, if he so advises, may challenge the elections by filing an election petition within 45 days, which is a mandatory requirement, entailing penal consequences, mentioned under section 145(1) of the Act, 2017 and in term of Rules 140 of the Rules, 2017, neither the Learned Election Tribunal nor office of the Learned Tribunal is vested with the jurisdiction, to provide any grace period for removing any legal defect in the election petition;*
4. *that the registrar Islamabad High Court being unauthorized authority has extended time for seven days to the Respondent to cure the defects in the Election Petition filed before the Election Tribunal which is against the spirit of Law and Rules;*
5. *that election petition in term of section 142 of the Act, 2017 shall be presented before the Learned Election Tribunal, notified for the purpose,*



however, in accordance with Rule 140 of the Rules, 2017, the office of the Learned Tribunal for the purpose, as to whether before presentation of the petition, the mandatory legal requirements are fulfilled or not, for such purpose a Registrar shall be officially notified;

6. that no doubt, according to the provisions of section 140(3) of the Act, 2017 a sitting judge of a High Court be appointed as Election Tribunal, but, no official of High Court, without, prior notification may entertain or receive any election petition;
7. that respondent has not presented the election petition in the office of Learned Election Tribunal but before the Registrar of Islamabad High Court;
8. that the provisions of CPC, 1908 has been applied to the trial of an election petition in term of sub Section-1 of Section 148 of the Act, 2017, as well as the provisions of Qanoon-e-Shahadat, Order 1984, meaning thereby that before framing of the factual and legal issues, the Learned Tribunal could not ask for documents or oral evidence;
9. that framing of issues in an election petition is the mandatory requirement, after the submission of pleadings of the contesting parties;
10. that there are no provisions available in Elections Act, 2017 that before commencement of trial, either original documents pertaining to elections or witnesses be summoned;
11. that record of election, sealed by District Election Commission (DEC) could not be summoned by an Election Tribunal, without fulfillment of legal requirement envisaged there under, Rule 90 of the Rules, 2017;
12. that official witnesses could not be ordered to produce the original record pertaining to elections except during the course of trial of election petition;
13. that the Learned Election Tribunal is not vested with the jurisdiction, either to examine or to compose copies of election document, provided by contesting candidate;
14. that the Learned Election Tribunal has not given attention to follow the provisions of law, and in a very slip shod manner, bent upon to conclude the trial and decide the fate of the petition, which has given rise to strong inference that petitioner will not be treated in accordance with law, which is clear violation of Article 10-A of the Constitution;
15. that the petitioner for aforesaid reasons has lost confidence in the Learned Election Tribunal;



16. that the mode and manner as adopted for the conduct of trial has seriously created perception of biasness of the Tribunal in the mind of applicant;

17. therefore, the election petition bearing No.72 may be transferred to any other Election Tribunal;

05. On other hand, learned counsel for the respondent, argued that the application filed by the applicant is based on sheer malafide intention;

1. that there are no solid reasons, put forward by the applicant for transferring of the election petition;
2. that reasons placed by the applicant for transfer of petition are general in nature, non-specific which have no nexus with the conduct of the Learned Election Tribunal;
3. that applicant with malafide intention and to cause delay in the disposal of the election petition, has filed this petition just to malign the integrity of the Learned Tribunal;
4. that all legal objections raised herein, by the applicant on one hand still require to be resolved during the course of trial while on other hand, any procedural defect in the trial, could not be equated with substance of biasness;
5. that no application for rejection of the petition has been moved by the applicant before the Election tribunal;
6. that a judge of the Election Tribunal acts as Persona Designata. Though he is appointed as a judge of Election Tribunal but he is still a judge of Honorable Islamabad High Court.
7. That the election petition has been filed before the Election Tribunal well within time and no objection whatsoever in respect of limitation has been raised by the applicant before the Election Tribunal.
8. That the transfer application may be dismissed on the ground that it is not maintainable. The Election Tribunal has not passed any order through which the applicant is aggrieved and even baseless allegations of biasness have been raised without any support of evidence.
9. That no prejudice has been caused to the applicant on obtaining attested copies of Form-45 from the Commission as original record is still under the safe custody of Election Commission. All the attested copies of From-45 have been attached with the election petition.



10. *That the grounds raised by the applicant are not valid grounds for transfer of an election petition. However, final judgment can be challenged in an appellate forum.*
11. *That the orders passed by the Election Tribunal have not been challenged by the applicant before any form including supreme Court of Pakistan and it is the case of documentary evidence which can be decided after recording of evidence.*
12. *That the effect of any law will not be effective retrospectively. The Tribunals have already been appointed and the Commission has no power to appoint or withdraw the Election Tribunal after period of 45 days.*
13. *That the jurisdiction to the tribunal has already been assigned by the Commission to the Election Tribunal Islamabad through notification dated 17-02-2024 therefore no other Election tribunal exists and the Commission cannot appoint fresh tribunals at this stage nor can transfer the election petition to any other election Tribunal in the provinces;*
14. *That period of 180 days has been mentioned under section 148(5) of the Elections Act, 2017 and de-novo trial cannot be conducted in the subject election petition.*
15. *The Counsel for the petitioner rebutted the judgments referred by the applicant and stated that all the judgments are irrelevant and against the orders of appellant tribunals. He requested for dismissal of the application by imposing heavy cost.*

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06. We have given consideration to the arguments advanced by the learned counsel for both the parties and have gone through the available record.

07. In order to give reference to the rights of the citizen, in matters exclusively falling within the ambit of election disputes, Article 225 of the Constitution (herein after referred as "the Constitution") may be given reference which provides that election dispute relating to either House of Parliament or a Provincial Assembly can only be questioned by an Election Petition, presented to such Tribunal in such manner as may be determined by the Act of Parliament. Meaning thereby that adjudication of disputes with regard to trial of election petition is taken away from the jurisdiction of the ordinary courts and under special procedures has been prescribed for adjudication of election petitions, under the Act, 2017 and the Rules, 2017. An



election petition has to be presented to such a Tribunal and in such a manner as may be prescribed by an Act of the Parliament. It is not a mere formality, to file an election petition before Learned Election Tribunal but the same shall be presented strictly in accordance with the provisions prescribed under the law and it is also a legal requirement that petitioner shall file his petition within 45 days in term of section 142 of the Elections Act, 2017.

08. Article 222 of the Constitution, for the purpose mentioned herein above has also mandated the parliament to make laws for conduct of election petition, which reads as;

**222. Subject to the Constitution [Majlis-e-Shoora (Parliament)] may by law provided for-**

- a) ....
- b) ....
- c) ....
- d) *the conduct of elections and election petitions the decision of doubts and disputes arising in connection with election;*
- e) ....
- f) ....

*but not such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this part.*

*Sd*

09. In the like manner there is a duty cast upon every judicial Tribunal to apply its mind properly to all aspects of the dispute which come before it. Any lapse in this respect may create serious doubts, in minds of parties before it, which in turn creates serious misgiving in dispensation of justice.

10. Every such Tribunal entrusted with sacred duty to protect rights of parties being custodian of their rights may be conscious, and to avoid all such actions which, otherwise may raise questions in the mind of parties. Any deviation or contravention of law and rules shall be rectified in the first instance in order to remove any suspicion may arise in the mind of parties. There shall be no excuse to compromise the principles of natural justice at any cost. Any patent illegality or error apparent on the face of the record, which otherwise gives an inference of frustration of law shall be cured before commencement of a trial, in order to fulfill end of justice.



11. It is high expectations of parties towards a legally constituted, Tribunal that every party therein be treated equally in so far as the application of laws are concerned and without any favor and fear.

12. Equal treatment and protection of law, is not only the legal right of a party but also constitutional rights, enshrined under Article 4, particularly under Article 10-A of the Constitution, 1973 which stipulated as:-

*10-A 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.*

13. The rights conferred upon a citizen, litigating for civil rights or enforcing of obligation or facing criminal charges, are not only legal but fundamental rights, falling under Chapter-I of the Constitution.

14. In *Mrs. Anisa Rahman vs. PIA and other (1994 SCMR 2232)* it is held that “audi alteram partem” would be applicable to judicial as well as to non-judicial proceedings and it will be read into every statute as its part if right of hearing has not been expressly provided therein.

15. It is a settled principle of law that wherever, there is violation of provisions of Law, the principle of fair trial become questionable while fundamental rights in no circumstances should be compromised.

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16. It is also well settled principle of law that rules have the status of subordinate and delegated legislation deriving authority and legal cover from the provisions of the delegated legislation deriving authority and legal cover from the provisions of the statute under they are framed. It is also well settled that rules have the same force as the provisions of the statute under which they are framed. Reliance may be placed in this regard on case of *Khuwaja Ahmed Hussain vs. Government of Punjab and other (2005 SCMR 186)*.

17. However, in case, a judge has unconsciously followed an incorrect view of the law, he has by conscious application of mind, the freedom to adopt the correct view of the law subsequently, in order to remove, any apprehension in the mind of parties pertaining to biasness etc.



18. It is mandatory provision of Rule 140 of the Election Rules, 2017 (herein after referred as "the Rules") which prescribe the manner that how an election petition be processed which on re-production would be read as under:-

*140. **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.*

19. There is no option available to a Tribunal to remove any legal defect occasioned therein the election petition, prescribed under Section 142 to 144 of the Elections Act, 2017 and in case, if any provision of Section 142, 143 or 144 of the Elections Act, 2017 is not complied with. Such election petition shall be summarily rejected in terms of Section 145(1) of the Act, 2017. However, in so far as the statutory time limitation prescribed under Section 142 of the Act, 2017 is concerned, the same defect could not be remedied, in slip shod manner, subsequently without application of mind to take away legal rights of other party accrued by implications of law without following due course of law.

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20. It is express provision of law envisaged thereunder, Section 148 of the Elections Act, 2017 that provision of civil procedure code, 1908 shall apply as nearly as possible, to trial of an election petition subject to Elections Act or Rules, 2017 as well as the provisions of the Qanun-e-Shahadat Order 1984.

21. Non observance of either law or rules, during the course of trial of an election petition or adopting a procedure, before commencement of the trial, not prescribed under the Act, 2017 would create in mind of parties concerned doubts that they are not treated in accordance with law which gives rise to sense of prejudice.

22. A right legally accrued to a person, could not be taken away, except in due course of law.

23. The Commission at this stage may not arrogate to itself the role of an appellate forum to answer all the grounds agitated by the petitioner. However, for disposal of subject application we mentioned the law and the rules, for the purpose of disposal of the subject application. The applicant has alleged that the Election Tribunal is determined to decide the





Election Petition without following and adhering to the prescribed procedure of law, which has created serious doubts in petitioner's mind thereby compromising the fair trial of the petition. This has resultantly created a perception of biasness, but once a party to litigation raises serious objections over conduct of trial with regard to the mode and manner and conduct of proceedings in violation of provisions of law, then justice demands, that such doubts shall be vindicated in the first instance for ensuring confidence over the judicial system of the country.

24. It is evident from the record that the notification of the Returned Candidate was issued on 13.02.2024 in the official gazette. The law provides that under Section 142 of the Act, 2017, it is mandatory to file the election petition before the Election Tribunal within 45 days of the notification of name of Returned Candidate in the official gazette. The subject petition was filed by the respondent with diary No. 5922 on 25.03.2024 before the Registrar Islamabad High Court, Islamabad. The last date for filing of the election petitions after the notification of the name of Returned Candidate was 29.03.2024. The petition filed by the respondent was returned with remarks to resubmit till 27.03.2024. However, the respondent resubmitted the election petition on 16.04.2024 after lapse of 16 days which is hopelessly time barred.

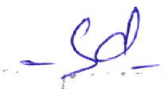
25. Section 151 of the Elections Act, 2017 empowers the Commission to transfer the Election Petitions from one Election Tribunal to another Election Tribunal at any stage on its own motion or on an application of a party. It is the exclusive domain of the Commission for providing complete justice to the parties in the petition and for fair decision in the matter in accordance with the Law and Rules framed thereunder. The Commission has the jurisdiction to appoint fresh Election Tribunal or to withdraw any Election Tribunal for swift disposal of the Election Petitions. There are number of examples available with the Commission where fresh Election Tribunals have been appointed during the trial of the election petitions on one or the other grounds.


26. An election petition is a statutory proceeding to which the rules made by the statute applies and it is a special jurisdiction which can be exercised in accordance with the statute for trial of election disputes. The arguments advanced by the learned counsel for the respondent regarding the status of a presiding officer of the Election Tribunal being "Persona Designata" is incorrect and misconceived. The judge of the Election Tribunal has to deal with the election Petitions strictly in accordance with the procedure laid down under Elections Act, 2017.

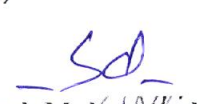



27. We have utmost respect and regard for the presiding officer of the Tribunal under consideration. However, to fulfill the ends of justice, and to remove all kinds of apprehension borne in the mind of petitioner and, some apparent illegalities and irregularities, occasioned therein, during the process of presentation of the petition on one hand, the office of the Learned Tribunal has extended the period for presentation of the petition beyond the prescribed period provided under Section 142 of the Act, 2017 while no court or tribunal could exercise a jurisdiction not legally vested in him.

28. In view of the above mentioned reasons, we in the exercise of powers conferred under Section 151 of the Act, 2017 accept the application for transfer of the subject election petition in the interest of justice and to ensure a fair trial in terms of Article 10-A of the Constitution hereby transfer the subject election petition from the Learned Election Tribunal, Islamabad, appointed vide notification No. 23(8)/2024-O/o-DD-Law dated 17.02.2024 to the Election Tribunal, appointed vide Notification No. 23(8)/2024-O/o-DD-Law-I dated 07.06.2024. Office is directed to send the original record to the office of Election Tribunal.

  
(Sikandar Sultan Raja)  
Chairman

  
(Nisar Ahmed Durrani)  
Member

  
(Shah Muhammad Jatoi)  
Member

  
(Justice (R) Ikram Ullah Khan)  
Member

Date of Announcement 10<sup>th</sup> of June 2024.

