JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Election Appeal No.85359 of 2017

Malik Muhammad Shahid & another

Versus

Election Tribunal Gujranwala & others

J U D G M E N T

Date of Hearing.	16-11-2017
APPELLANTS BY:	M/s Mubeen Uddin Qazi and Malik Muhammad Awais Khalid, Advocates.
RESPONDENTS BY:	M/s Muhammad Ramzan Chaudhry and Anas Ghazi, Advocates.

Shahid Karim, J:- This judgment will decide an election appeal under Section 46 of the Punjab Local Government Act, 2013 (**"the Act, 2013"**). The order which has been called in question in this appeal is dated 03.10.2017 passed by the Election Tribunal, Gujranwala and in conclusion it was directed that:-

> *"The upshot of above discussion is that the petitioners have succeeded to prove the contentions put forth in the election petition which is hereby accepted. The two votes, one was shown by Muhammad Idrees voter to the polling agent of Respondents No.1 and 2 and the other containing the sign of identification with thumb mark are excluded from the count. After excluding the aforesaid two votes admittedly counted in favour of Respondents No.1 and 2, the number of votes secured by the Respondents No.1 and 2 remains as 11 as compared to petitioners who secured 13 votes.*
>
> *Hence, the result announced by the RO and the notification of the ECP declaring the Respondents No.1 and 2 as returned candidates of Chairman/Vice Chairman in Municipal*

> *Committee Shakargarh, District Narowal is hereby set aside while the petitioners namely Inam ul Haq and Naeem ur Rehman are declared as returned candidates of Chairman/Vice Chairman in Municipal Committee Shakargarh, District Narowal. The copy of the order be sent to ECP through the office of REC, Gujranwala for its notification accordingly."*

2. Thus, the election petition filed by the respondents No.2 and 3, herein, was allowed and the result announced by the Returning Officer and the ensuing notification of the Election Commission of Pakistan declaring the appellants as returned candidates for the seat of Chairman/Vice Chairman, Municipal Committee Shakargarh, District Narowal was thereby set aside and the respondents No.2 and 3 were declared as returned candidates.

3. The respondents No.2 and 3 filed a petition under rules 59 and 62 of the Punjab Local Government (Conduct of Election) Rules, 2013 (**"the Rules, 2013"**) by which the elections for the seat of Chairman and Vice Chairman of Municipal Committee Shakargarh, District Narowal was challenged. The said elections were held on 22.12.2016 for which the appellants as well as the respondents No.2 and 3 were candidates. The symbol allotted to the respondents No.2 and 3 was *Guldan* whereas the appellants were allotted the

symbol of *Calculator*. There were 26 votes to be cast in the elections under consideration. At the end of the ballot, both the candidates polled equal number of votes, that is, 13 each, upon which draw of lot was held in terms of rule 37 of the Rules, 2013 and as a result of the draw, the appellants were held as successful candidates. As stated above, on an election petition brought by the respondents No.2 and 3, the election of the appellants was annulled and held to be void and the respondents no.2 and 3 were declared as successful candidates.

4. At the heart of the controversy are two votes to which a challenge was laid by the respondents No.2 and 3 and on which the entire controversy turns. With respect to one of those votes, it has been alleged that the ballot paper was not folded properly and the voter clearly showed the ballot paper to the polling agent of the appellants and after demonstrating clearly his intent to vote for the appellants, inserted the ballot paper in the ballot box. This infringed the secrecy which underlies the entire electoral process and, therefore, the said ballot paper ought to have been discarded and taken out of consideration. The second challenge is with regard to a ballot paper

which was found to be smeared and contained a mark other than the official mark which too in the contention of the election-petitioners (respondents No.2 and 3 herein) ought to have been taken out of consideration and could not have been counted as a valid vote cast in favour of the appellants.

5. There are intervening events between the day on which the polling took place and the filing of the election petition which will be adverted to briefly although at this juncture any of those events does not have a substantial bearing on the outcome of this appeal.

6. The statement of count was prepared on 22.12.2016 by which the candidates had equal number of votes. Although a challenge was laid by the respondents No.2 and 3 to the efficacy and sufficiency in law to the two votes cast in favour of the appellants, the objections so raised by the said respondents were dismissed by the Returning Officer and the votes were counted in favour of the appellants. Thereafter, a draw of lot was held to which I shall advert at a later stage. On 22.12.2016 notices were issued by the Returning Officer to both the parties for conducting the consolidation proceedings to be held on 23.12.2016 in terms of rule 36 of the Rules, 2013.

On 23.12.2016, the unofficial result was issued by the Returning Officer declaring the appellants as returned candidates. This was done on the basis of draw of lot and it is the case of the appellants that the said draw was held with the consent of the respondents No.2 and 3 and thus the respondents are estopped by their own conduct from challenging the result of the draw and bringing an election petition. A constitutional petition W.P No.40619 of 2016 was filed by the respondents No.2 and 3, in which an interim injunction was granted and the Election Commission of Pakistan was restrained from issuing the notification. This was finally disposed of on 06.02.2017 by which the matter was referred to the Election Commission of Pakistan. This was assailed before the Supreme Court of Pakistan which on 27.3.2017 issued a direction to the Election Commission of Pakistan to decide the matter within a certain period of time as also to attend the question of jurisdiction. The Election Commission of Pakistan's short order was handed down on 27.4.2017 by which the petition filed by the respondents was dismissed and they were advised to approach the Election Tribunal by way of an election petition. Once again, the respondents

No.2 and 3 filed W.P No.21957 of 2017 on 02.05.2017 against the short order announced by the Election Commission of Pakistan on which an interim order was passed restraining the Election Commission of Pakistan from issuing the notification. The said petition was decided on 09.05.2017 on the basis that the Election Commission of Pakistan had issued a notification of the appellants as the returned candidates and a direction was issued that the election petition filed by the respondents No.2 and 3 be decided within a period of one month.

7. On 16.05.2017, election petition No.38 of 2017 was filed. It is the case of the appellants that the election petition was pre-mature and could only be filed after the election result had been published whereas by that time no publication had taken place. Nothing turns on this aspect since the election petition was filed in any case though it may be pre-mature and filed prior to the issuance of the result in the official gazette but the fact remains that the election petition was finally determined and decided by the Election Tribunal and no infirmity in the entire process can be attributed on this account. During the course of the proceedings before the Election Tribunal, the

appellants filed two applications, one under Order VII, Rule 11 CPC for the rejection of the election petition and the second application was under Order XXXIX, Rule 4 CPC for the recall of the order passed by the Election Tribunal by which the notification issued by the Election Commission of Pakistan was suspended. Vide order dated 29.05.2017, the Election Tribunal dismissed the applications filed by the appellant which order was assailed in W.P No.30413 of 2017, which was dismissed by a learned Single Judge of this Court on 04.07.2017 and the direction to decide the election petition within 30 days was reiterated. Vide order dated 04.07.2017, it was observed by the learned Single Judge that the appellants herein had failed to file a written reply despite various opportunities.

8. The learned counsel for the appellants alluded to the aspect of bias on the part of the presiding officer of the Election Tribunal and in this regard admitted to refer to the various aspects on the basis of which this allegation was sought to be substantiated. In this regard, a transfer application was also filed with the Election Commission of Pakistan which was dismissed on 17.7.2017. An application dated 24.7.2017 was

also filed before the Election Tribunal requesting for the recusal of the adjudication of the election petition which, too, was dismissed on 26.7.2017. On 20.06.2017, a written reply was filed to the election petition. Once again, a second transfer application was filed on 01.08.2017 which was also dismissed on 05.09.2017. The learned counsel for the appellants laid great stress on the fact that against the order passed by the Election Commission of Pakistan, constitutional petition W.P No.77216 of 2017 was filed. This petition was allowed and the order of the Election Commission of Pakistan was set aside on 02.10.2017 with a direction to the Election Commission of Pakistan to decide the transfer application afresh through a speaking order. However, before the Election Commission of Pakistan could decide the case on remand by this Court, the impugned order was passed by the Election Tribunal although an application for adjournment had been filed on 27.9.2017. The Election Tribunal proceeded to record the statement of official witness District Returning Officer as RW.6. Much emphasize was laid on the fact that the appellants' counsel was not provided sufficient opportunity to direct the examination-in-

chief of the said witness which was the witness summoned by the petitioner and which, in turn, adversely affected the rights of the appellants. However, once again it is important to note that the said witness had been summoned by the appellants and the appellants' counsel was not required to lead in any manner the said witness into recording his examination-in-chief and it was in fact the right of the respondents No.2 and 3 to cross examine the said witness. Thus no prejudice was caused to the appellants thereby. The case was adjourned to the next day for the submission of documentary evidence and final arguments which was 3.10.2017. Once again the appellants' counsel filed an application seeking an adjournment which was declined by the Election Tribunal and after hearing the arguments of the respondents, proceeded to pass the impugned order. In declining adjournment request, the Election Tribunal was swayed by the need to comply with the direction of this Court to decide the petition within one month. This direction was issued on 9.5.2017 and the case had gone well past that deadline. No infirmity can e attributed to the impugned judgment on this account and a lacunae,

if any, can be dealt with in the present appeal which is a rehearing on questions of fact and law.

9. On 04.07.2017, the Election Tribunal framed the following issues:-

1) *Whether the election of respondents No.1 and 2/Returned Candidates is liable to be set aside for illegal and corrupt practices as mentioned in the instant petition? O.P.P.*
2) *Whether the instant petition is liable to be dismissed for preliminary objections as raised in the written reply? O.P.D.*
3) *Relief.*

10. The onus of issue No.1 was on the respondents No.2 and 3 whereas the onus of the issue No.2 was on the appellants. The decision of issue No.1 hinged upon the determination of the validity and lawfulness of the two votes cast in favour of the appellants and the said issue and its determination made by the Election Tribunal is being taken up firstly.

11. The aspects which affected the validity or otherwise of the two votes will be dealt with separately. Firstly, I shall deal with the vote with respect to which it was alleged that secrecy of the vote was seriously compromise in that one of the voters exhibited and demonstrated in public the vote proposed to be cast by him by showing the ballot paper to the polling agent of the appellants.

Thus, on the basis of the relevant rules and settled principles, the said vote ought to have been discarded and taken out of consideration. The voter whose vote was called in question was Muhammad Idrees and who appeared as RW.3. Inam ul Haq, the respondent No.2 appeared as PW.1. The relevant portions of his examination-in-chief which was given in vernacular are reproduced as under:--

4۔ مظہر حلفا بیان کرتا ہے کہ مورخہ 16-12-22 کو سارا دن دوران پولنگ، پولنگ اسٹیشن کے باہر موجود رہا۔

5۔ مظہر حلفا بیان کرتا ہے کہ مظہر مورخہ 2016-12-22 کو مابعد پولنگ بوقت گنتی بیلٹ پیپرز موقعہ پر موجود تھا۔

6۔ مظہر حلفا بیان کرتا ہے کہ دوران پولنگ ووٹر محمد ادریس اپنا بیلٹ پیپر سٹیمپ کرنے کے بعد لہراتے ہوئے پولنگ بوتھ سے باہرآیا اور پولنگ ایجینٹ (خالدمنظور) ملک محمد شاہد و قمرالزمان بٹ امیدواران چیئرمین و وائس چیئرمین کو اپنا سٹیمپڈ بیلٹ پیپر دکھایا جس کو مظہر کے پولنگ ایجینٹ حافظ رضوان مسعود ایڈووکیٹ نے بچشم خود دیکھا اور ساتھ ساتھ محمد عامر نثار ووٹر ممبر بلدیہ نے بھی دیکھا۔

7۔ مظہر حلفا بیان کرتا ہے کہ مظہر کے پولنگ ایجینٹ نے بابت شو کیئے جانے شور مچایا اور سخت اعتراض کیا توپرزایئڈنگ آفیسر نے مظہر کے پولنگ اجیینٹ کا شور سن کر محمد ادریس ووٹر کو کہا کہ بیلٹ پیپر فولڈ کر کے بیلٹ باکس میں ڈالو۔ اسی دوران نعمان تارڑ صاحب بھی موقع پر آ گئے۔

8۔ مظہر حلفا بیان کرتا ہے کہ مظہر شور کی آواز سن کر فورًا پولنگ سٹیشن کے اندر چلا گیا اور اس کے پولنگ ایجینٹ اور عامر نثار نے سارا واقعہ شو کرانے ووٹ محمد ادریس ووٹر مظہر کو بتلایا۔

9۔ مظہر حلفا بیان کرتا ہے کہ مظہر نے فورًا ایک تحریری درخواست با بت شو کیے جانے پریزائیڈنگ آفیسر اور ایک تحریری درخواست ریٹرننگ آفیسر کو دیں۔

10۔ مظہر حلفا بیان کرتا ہے کہ پولنگ ختم ہونے کے بعد دوران گنتی ملک محمد شاہد و قمرالزمان بٹ امیدواران چیئرمین و وائس چیئرمین میونسپل کمیٹی شکر گڑھ کا ایک ووٹ/بیلٹ پیپر ایسا تھا جس پر نشان مہر کے علاوہ نشان انگوٹھا بھی موجود تھا۔

11۔ مظہر حلفا بیان کرتا ہے کہ مظہر کے پولنگ ایجینٹ حافظ رضوان مسعود ایڈووکیٹ نے فورًا اسی وقت ایک تحریری درخواست بابت نشان زدہ ووٹ ریٹرننگ آفیسر کو گزاری کہ نشان زدہ ووٹ ووٹوں میں شمار نہ ہو سکتا ہے۔ اسے علیحدہ رکھا جائے۔

12. In the statement of PW.1, he states that Muhammad Idrees after stamping the ballot paper came out of the polling booth and exposed his ballot paper to the polling agent Khalid Manzoor of the appellants which clearly showed the stamp affixed against the name of the said appellants which was printed at the ballot paper as candidates. However, to this extent, the statement of the PW.1 is not a direct evidence and can only be termed as hearsay and the entire episode was

narrated to him by Hafiz Rizwan Masood Advocate. It was only upon hearing the noise that he rushed into the place where votes were being cast and he did see that his polling agent was raising hue and cry over the casting of the vote by Muhammad Idrees and upon his objections, the presiding officer asked Muhammad Idrees to fold his ballot paper and then insert it in the ballot box. In the cross examination, PW.1 admits that at the time when Muhammad Idrees cast his vote he was not in the room as also that the ballot paper was not shown in his presence and that the entire fact was disclosed to him by his polling agent.

13. Hafiz Rizwan Masood appeared as PW.2. Hafiz Rizwan Masood was the polling agent for the respondents No.2 and 3 and has given eyewitness account regarding the allegation of breach of security of ballot paper on the part of Idrees. He has made a statement without equivocation that Idrees came out of the polling booth while clearly showing his ballot paper and exposed his stamp to the polling agent of the appellant Khalid Manzoor and by which act the stamp in favour of the appellants could be clearly seen. He has also stated in his examination-in-chief that Amir Nisar who was a voter waiting for

his turn to cast his vote was also present in the polling station and awaiting his turn to cast his vote. He was also witness to the entire episode. He further went on to state that he raised serious objections to the casting of the said vote in favour of the petitioner upon which the presiding officer asked Idrees to fold his ballot paper and then insert in the ballot box. In the meantime Returning Officer Nauman as well as the respondent No.2 also entered the polling station and witnessed the latter part of the entire incident. In the cross examination he, while replying to a question, stated that Amir Nisar who was one of the voters and an eyewitness cast his vote after the vote of Idrees. This was a question specifically asked to him by the counsel of the appellants and in reply to which the said fact was clearly stated by PW.2. He did not deny the fact that the respondent No.2 was not present at the time when Idrees came out waiving his ballot paper but upon commotion raised by him entered the polling station and was a witness thereafter.

14. PW.3 Amir Nisar also claims to be an eyewitness to the entire incident relating to showing of his ballot paper by Idrees and thus falling in breach of the secrecy of the ballot. He

supports in material particulars the statement made by PW.2. The following portion of the examination-in-chief is pertinent for our purposes and is reproduced hereunder:-

3۔ مظہر حلفا بیان کرتا ہے کہ جو بیلٹ پیپر محمد ادریس (ممبر بلدیہ ووٹر) نے پولنگ ایجینٹ (خالد منظور) ملک محمد شاہد امیدوار چئرمین و قمرالزمان بٹ امیدوار وائس چیئرمین میونسپل کمیٹی شکرگڑھ کو کیا بلکل واضح نظر آ رہا تھا کہ بیلٹ پیپر پر کیلکولیٹر کے نشان پر مہر لگی ہوئی ہے۔

4۔ مظہر حلفا بیان کرتا ہے کہ محمد ادریس ووٹر کا خالد منظور پولنگ ایجینٹ کو اپنا ووٹ شو کروانے کا واقعہ مظہر اور حافظ رضوان مسعود ایڈووکیٹ نے بچشم خود دیکھا۔

5۔ مظہر حلفا بیان کرتا ہے کہ پولنگ ایجینٹ انعام الحق وغیرہ حافظ رضوان مسعود ایڈووکیٹ نے بابت شو کیے جانے شورمچایا اور محمد ادریس ووٹر کے عمل پر پریزایئڈنگ آفیسر سے اسی وقت اعتراض کیا تو پریزایئڈنگ آفیسر نے حافظ رضوان مسعود ایڈووکیٹ (پولنگ ایجینٹ) انعام الحق کے شور اور سخت اعتراض کے بعد محمد ادریس ووٹر کو کہا کہ اپنا بیلٹ پیپر فولڈ کر کے بیلٹ باکس میں ڈالو۔

6۔ مظہر حلفا بیان کرتا ہے کہ اسی دوران انعام الحق امیدوار چیئرمین اور ریٹرننگ آفیسر نعمان تارڑ بھی موقعہ پر آ گئے۔

7۔ مظہر حلفا بیان کرتا ہے کہ انعام الحق امیدوار چیئرمین کو مظہر اور حافظ رضوان مسعود ایڈووکیٹ (پولنگ ایجینٹ) نے واقعہ کی بابت بتایا تو انعام الحق نے اسی وقت ایک تحریری درخواست بابت شو کئے جانے پریزایئڈنگ آفیسر اور ایک درخواست ریٹرننگ آفیسر کو گزاری۔

15. Clearly, he deposed that he was inside the polling station and was waiting for his vote to be

cast while Idrees was casting his vote. He was also unflinching in his statement regarding the incident as narrated by the PW.2 and recites the incident in the same terms substantially. He also stated in his examination-in-chief that the ballot paper was in the hand of Idrees and which he clearly showed to the polling agent of the appellants and could clearly be seen and identified and which, PW.3, in fact did. According to his visual assessment, the ballot paper was stamped against the election symbol of "Calculator" which was the symbol allotted to the appellants. He also reiterated that the polling agent of the respondents No.2 and 3 raised serious objection to the manner in which the vote was being cast by Idrees and on which the presiding officer required Idrees to fold his ballot paper and insert in the ballot box. The following portion from his cross examination would be pertinent for our purposes:-

یہ درست ہے کہ جو ووٹر اپنا بیلٹ پیپر لیتا تھا وہ اس پر اپنی پسند سے نشان لگا کر بکس میں ووٹ کاسٹ کر دیتا تھا۔ از خود کہا کہ جب ایک ووٹر پولنگ بوتھ میں جاتا تھا تو اس دوران دوسرا ووٹر بیلٹ پیپر لینے کے لئے کمرہ پولنگ میں آ جاتا تھا۔ محمد ادریس نے مجھ سے پہلے اپنا بیلٹ پیپر حاصل کیا تھا۔ محمد ادریس کے بیلٹ پیپر لینے کے بعد دوسرے نمبر پر میں نے بیلٹ پیپر لینے کی غرض سے کمرے میں گیا تھا اور اسی دوران محمد ادریس نے اپنا بیلٹ پیپر مسئول علیہ کے پولنگ ایجینٹ خالد منظور کو دکھایا جس

پر واضح نظر آ رہا تھا کہ کیلکولیٹر پر مہر لگی ہوئی ہے۔ جس پر شور پڑ گیا اس شور پر پولیس اندر آ گئی اور ہمیں باہر نکال دیا۔ انعام الحق سائل بھی اسی دوران اندر آ گیا۔ مجھے ابھی تک بیلٹ پیپر جاری نہ ہوا تھا۔ تقریبا 10/15 منٹ تک الیکشن رک رہا۔ یہ غلط ہے کہ محمد ادریس نے اپنا ووٹ ظاہر نہ کیا تھا۔ یہ بھی غلط ہے کہ میں کمرہ میں موجود نہ تھا۔ یہ غلط ہے کہ اس نے میرا نام محض سائیلان کے حمایت یافتہ ہونے کی وجہ سے بعد میں متعارف کروایا گیا ہے۔

16. It can be seen that in reply to the questions put by the learned counsel for the appellants, PW.3 clearly stated that when a voter would enter the polling booth to cast his vote, the next voter would enter the polling station and the process of issuing of ballot paper to him would start at that time. Therefore, his turn was after Idrees and so he was inside the polling station while Idrees was in the polling booth going through the process of affixing a stamp on the ballot paper and thus when he came out he saw the entire incident and could see the ballot paper on which a stamp had been affixed against the symbol of Calculator. He remained unshaken during the cross examination conducted by the learned counsel for the appellants. One of the aspect which requires to be flagged with regard to PW.3 is that he is an independent eyewitness and no question was put during the cross examination with regard to his credibility or his

relationship with the respondents No.2 and 3 which would taint his deposition in any manner. Malik Muhammad Shahid, the petitioner No.1 appeared as RW.1. He admits in his examination-in-chief that there were 26 votes in total to be cast. He also admits that equal number of votes were cast in favour of both the candidates and the result was not declared on 22.12.2016 and the election was decided on the basis of draw of lot and the result was announced on 23.12.2016. He also admits in his cross examination that the polling agents of both the candidates were present inside the polling station. However, he also does not deny the fact that he is not an eyewitness to the entire incident regarding breach of secrecy of vote on the part of Idrees and came inside the polling station upon hearing noise. He also admits that commotion took place inside the polling station while Idrees was casting his vote and upon hearing noise he entered the polling station. Therefore, he is an important witness from the aspect of narrating of contemporaneous event and at least to the extent that some kind of commotion took place and serious objections were raised by the polling agent of the respondents No.2 and 3 and therefore, the fact that the happening of the event is not

denied by RW.1 shows that the incident in fact did take place and the polling agent PW.2 did raise serious concerns regarding the vote being cast by Idrees. To this extent the statements made by PW.2 and 3 are corroborated by the statement of RW.1. He also admits that when he entered the polling station, Hafiz Rizwan Masood PW.2 had placed his hands on the ballot box and was insisting that the vote of Idrees be restrained from being cast. He also states that PW.2 was of the view that since the ballot paper had been shown by Idrees, he had serious objections to ballot paper to be cast by Idrees and, therefore, it was imperative that the said ballot paper be taken out of consideration. From the cross examination of RW.1, it is clearly evident that he does not deny the entire incident regarding the raising of objection by PW.2 and also witnesses the incident as he entered the polling station and saw that PW.2 had placed his hands on the ballot box clearly trying to prevent the casting of vote by Idrees. Thus, the only question which requires proof was whether the ballot paper was shown in public by Idrees and could clearly be seen by all those present at that time in the polling station. In this regard, there are four persons who were

eyewitnesses and who have all been produced as witness before the Election Tribunal. The eyewitness account of two of those witnesses has been discussed hereinabove. The third eyewitness of the entire incident was Khalid Manzoor, the polling agent of the appellants. In his examination-in-chief, Khalid Manzoor denies that Idrees showed his ballot paper to any one or that he came out waiving that ballot paper. In his cross examination he denies that the ballot paper of Idrees could clearly be seen. More importantly he outrightly denies that the ballot paper of Idrees was not folded and that when he came out of the polling booth he had already folded the ballot paper. The importance of this denial will be brought forth when we juxtapose his statement with that of PW.2 and 3 as well as the statement of RW.4 and RW.5, one of which was the presiding officer.

17. Muhammad Idrees appeared as RW.3. His statement makes an interesting reading. He himself admits in his examination-in-chief that when he came out of the polling booth and moved towards the ballot box, the presiding officer specifically asked him to fold his ballot paper upon which he was constrained to fold that ballot paper.

He however denies that any one actually saw the ballot paper or the stamp affixed on that ballot paper before he cast his vote. This is a material contradiction to the statement made by RW.2 who was the polling agent for the appellants. In the examination-in-chief, RW.3 denies that he came out of the polling booth waiving his ballot paper meaning thereby that he had already folded his ballot paper inside the polling booth and this in fact contradicts his examination-in-chief where he admits that he was required to fold his ballot paper by the presiding officer. He denies as well any objection having been raised by Hafiz Rizwan Masood to the vote being cast by him on account of breach of secrecy. Once again, this aspect is contradicted by not only the statement of PW.2 but also the statement of the presiding officer who have both stated that Hafiz Rizwan Masood raised vehement opposition to the vote being cast by Idrees and the manner in which it was done. The most significant contradiction made by RW.3 is when he denies in his examination-in-chief that the presiding officer required him to fold his ballot paper and then to cast his vote. This not only runs counter to the statement of other witnesses but to his own examination-in-chief in which he clearly

states that the presiding officer required him to fold his ballot paper and then to cast his vote. Therefore, the statement of Idrees as RW.3 is replete with contradictions and when considered for comparison with the statements made by the PW.2 and 3, it has a lesser probative value and must yield in favour of the statements made by other witnesses to the entire incident.

18. RW.4 was the presiding officer Nauman Farooq. He merely deposed with regard to the draw of lot in his examination-in-chief and this part of his examination will be adverted to when dealing with the aspect of draw of lot on which much emphasis was laid by the learned counsel for the appellants. However, in his cross examination he makes some interesting observations. Firstly, he concedes that if a person shows a ballot paper on which he has affixed a stamp against a candidate of his choice then that vote has to be taken out of consideration as it offends the Rules, 2013. Thus, he is starkly aware of this legal position. He also admits the making of an application on the part of the polling agent of the respondents No.2 and 3 for discarding the vote cast by Idrees. That application was marked to the Assistant Returning Officer and the application

Ex.P.7 was marked by the Assistant Returning Officer to the presiding officer. He also admits that on the said application the Assistant Returning Officer did not give his independent opinion and merely relied upon the report of the presiding officer. He also admits that he did not as a Returning Officer call the Assistant Returning Officer with regard to the entire incident nor did he conduct any inquiry on the application Ex.P.7 made by the respondents No.2 and 3. He also admits at the end of his cross examination that during the process of the election he had been suspended on the orders of the Chief Minister. The rest of the portion of the cross examination will not be adverted to at this stage. However, for the present purpose, the portion of his cross examination which was relevant has been referred. It is evident that despite the fact that the said witness was fully aware of the state of law with regard to secrecy of voting and its breach by any voter he did not take any steps to have the vote of Idrees discarded nor did he make any inquiry on his own in order to satisfy himself whether the vote was properly cast or not or suffered from any illegality.

19. Maqbool Ahmad appeared as RW.5 and he was the presiding officer for the elections in question. Although he refers to a video recording of the electoral process but did not produce any such recording during the course of his evidence. It may be pertinent to mention here that the learned counsel for the appellants laid great stress on the efficacy and evidential value of a video recording which purportedly took place both on the electoral process as well as process of draw of lot. However, the facts remains that none of the recordings were brought in evidence nor were they exhibited at any stage and, therefore, no reliance can be placed on any such recording. This question was sought to be raised during the course of cross examination of RW.5 but was turned down by the Election Tribunal. The appellants did not file any application by way of additional evidence for the production of these recordings either before the Election Tribunal or before this Court in appeal. Nothing turns on the said recordings and no reliance can be placed on them. With regard to the act of Idrees of showing his vote he denies in his cross examination that he showed his ballot paper to Khalid Manzoor the polling agent of the appellants and in which it

could be seen that he had affixed the stamp against the election symbol of Calculator. He also denied the raising of strong protest by Hafiz Rizwan Masood with regard to the fact that Idrees was showing his ballot paper to Khalid Manzoor. He also denies that Hafiz Rizwan Masood raised a commotion on the incident and further that Amir Nisar also did not witness the entire incident. Therefore, it is strange indeed that RW.5 chose to deny the facts regarding the entire incident. It would be advantageous at this stage to refer to some of the observations of RW.5 while acting as the presiding officer and when an application Ex.P.4 was made to him with regard to the breach of secrecy on the part of Idrees. In the said report, which is Ex.p.6, it has been mentioned as follow:-

ممبر بلدیہ محمد ادریس نے اپنا بیلٹ پیپر سٹیمپ کرنے کے بعد جب بیلٹ بکس کی طرف بڑھنے لگا تو میں نے اسے بولا کہ بیلٹ پیپر فولڈ کر کے آگے آو اس پر مخالف ایجینٹ نے شور مچایا کہ ووٹ شو کروایا گیا ہے حالانکہ اس میں کوئی حقیقت نہ ہے اور یہ سب ووٹر سے لاشوری طور پر ہوا ہے۔

20. It is clear that the report of the witness in his capacity as the presiding officer is materially different from his statement as RW.5. In the report itself, which was prepared on the very next day of the elections, it has clearly been stated that Idrees

came out of the polling booth with his ballot paper not folded properly and the witness RW.5 directed him to fold his ballot paper and then to cast his vote. On this, the polling agent of the respondents No.2 and 3 raised hue and cry and strenuously objected to the said vote being cast. Interestingly, in the said report, the presiding officer tries to justify the act of Idrees.

21. It is incredulous indeed that the presiding officer was able to know the intent of the voter and to gauge the mindset under which the act was performed by the voter. The word " could be translated as 'unconsciously' in English and is a state of mind of a person. It is fantastic indeed that the presiding officer considered the act to have been done unintentionally and without malice or bad faith or with an intent to show his vote on purpose. The only inference that can be drawn is that the presiding officer/ RW.5 bent over backwards to justify an act which was actually performed by Idrees and which could not be denied by him in his report. That effort to clumsily put a cover on the act of Idrees was denied in the cross examination by him while appearing as RW.5. This fact alone enough to discard the evidence of RW.5 although he was an

official witness and ought to have been truthful in his deposition without being partial. The least that was required of RW.5 was to act in a bipartisan manner without taking sides and by making his evidence truthfully.

22. From the analysis of the evidence done in the preceding paragraphs, I have no doubt in my mind that the respondents No.2 and 3 in their election petition have been able to prove that the act of Idrees was in breach of secrecy of his vote. The entire act has been brought forth without any contradiction in the evidence of PW.2 and 3. Muhammad Idrees appearing as RW.4 was not forthcoming with regard to the entire episode and his deposition is an amalgam of contradictions which cannot be reconciled. The other eyewitnesses to the entire incident RW.5 who was the presiding officer was less than truthful in his evidence. Once again, he contradicted himself by stating a different version in his cross examination from the one which was brought forth in his report Ex.P.6. The Returning Officer admitted while appearing as RW.4 that he did not conduct any inquiry with regard to the incident although an application was promptly made to him and believed in toto the inquiry held by the presiding officer as well as the report made by him.

This was a blatant breach of his duties as a Returning Officer since the presiding officer had already permitted Idrees to cast his vote and his report was biased in any case and ought not to have been relied upon. It was a mistake on the part of the Returning Officer to have relied upon the report of the presiding officer.

Marked ballot paper:

23. The second limb of issue No.1 relates to a ballot paper which bore a mark other than the official mark so as to be caught by rule 35(4)(c)(ii) of the Rules, 2013. The said rule reads as under:-

> *"35. Proceedings at the close of the poll.—(1) The Presiding Officer shall count the votes immediately after the close of the poll, in the presence of such of the contesting candidates, election agents and polling agents as may be present.*
>
> *(2).....*
>
> *(3).....*
>
> *(4) Subject to the directions of the Election Commission, the Presiding Officer shall:*
>
> *(a).....*
>
> *(b).....*
>
> *(c) count the votes cast in favour of each contesting candidate excluding from the count the ballot papers, which bear:*
>
> *(i) no official mark and signature of the presiding officer;*
>
> *(ii) any writing or any mark other than the official mark, the signature of the presiding officer and the prescribed mark or to which a piece of paper or any other object of any kind has been attached;*

> *(iii) no prescribed mark to indicate the contesting candidate for whom the voter has voted; or*
>
> *(iv) any mark from which it is not clear for whom the voter has voted; provided that a ballot paper shall be deemed to have been marked in favour of a candidate if the whole or more than half of the area of the prescribed mark appears clearly within the space containing the symbol of that candidate; and*
>
> *(v) where the prescribed mark is divided equally between two such spaces, the ballot paper shall be deemed to be invalid."*

24. Therefore, the presiding officer is obliged to count the votes cast in favour of each contesting candidate and to exclude from the count the ballot papers which suffer from any of the infirmities mentioned in clauses (i) to (v). This was clearly not done by the presiding officer in the instant case although an application was promptly made to the presiding officer which was transmitted to the Returning Officer who required the presiding officer to file his report. Ex.P.7 is an application filed by the polling agent Hafiz Rizwan Masood and which was filed to the Returning Officer on 22.12.2016. In the application serious objections were raised to the vote with a mark having been counted in favour of the appellants. Therefore, on the basis of rule 35, reproduced above, it was sought to be taken out of consideration and not to be included as a valid ballot paper in favour of the appellants. A report was called for by the Returning Officer from the

presiding officer wherein the presiding officer brought forth his version in the following words:-

کیونکہ ووٹر کا نشان انگوٹھا/دھبہ بیلٹ پیپر کے انتہائی کارنر پر ہے
اور یہ سب اس سے لاشعوری طور پر بیلٹ پیپر پکڑتے ہوئے
انگوٹھے پر لگی سیاہی کا نشان معلوم ہوتا ہے۔

اعتراض فرد۔کیا گیا جس پر صاحب اور دیگر سرکاری نمائیندگان
موقع پر موجود نے میری رائے پوچھی تو میں نے اس نشان کو
ہونے کی نفی کی جس پر انہوں نے مجھے ووٹ شامل
کرکے رزلٹ تیار کرنے کا حکم دیا جس پر میں نے رزلٹ تیار کیا
اور ڈکلئیر کر کے اس کی کاپیاں جناب اور آپکو مہیا کر دی گئ
اور اس سب کاروائی میں میرا ضمیر مطمئن ہے۔

25. Therefore, the presiding officer was of the opinion that the thumb mark on the corner of the ballot paper seemed to have been affixed inadvertently and on account of the stain of ink on his thumb and according to his opinion was due to the fact that while holding the ballot paper the ink on his thumb got transferred to the ballot paper and thus was not an deliberate act to identify the ballot paper. To complete the narration of the statutory rules on the subject, a reference may also be made to rule 36, which reads as under:-

> *"36. Consolidation of results.– (1) The Returning Officer shall give the contesting candidates and their election agents a notice of the day, time and place fixed for the consolidation of the results and publish the same at a conspicuous place in his office.*

> *(2) Before consolidating the results of the count, the Returning Officer shall examine the ballot papers excluded from the count by the Presiding Officers and if he finds that any such ballot paper should not have been so excluded, count it as a valid ballot paper cast in favour of the contesting candidate for whom the vote had otherwise been cast.*
>
> *(3) The ballot papers rejected by the Returning Officer under sub-rule (2) shall be shown separately in the consolidated statement.*
>
> *(4) The Returning Officer shall consolidate in Form-XIII, separately for each category of seats, the results of the count furnished by the Presiding Officers.*
>
> *(5) The Returning Officer may recount the valid ballot papers before consolidation of results: -(a) upon the request or challenge in writing made by, a contesting candidate or his election agent and if, the Returning Officer is satisfied that the request or the challenge is reasonable; or*
>
> *(b) if so directed by the Election Commission."*

26. It is evident from a reading of rule 36 above that prior to consolidating the result of the count, the Returning Officer too is obliged to examine the ballot paper excluded from the count by the presiding officer and in case he found that any such ballot paper should not have been so excluded, count it as a valid ballot paper caste in favour of the contesting candidate for whom the vote had otherwise been cast. It is not apparent from the record as to whether the Returning Officer on his part complied with his duty cast in terms of sub-rule (2) of rule 36. It seems that he merely asked for a report from the presiding officer and mechanically and concluded as follows:-

> *"Agreed with the explanation of presiding officer and report of ARO. May be filed."*

27. This conclusion finds mention on the application Ex.P.7. It was argued on behalf of the learned counsel for the appellants that the smeared ballot paper was not produced in evidence and this omission has rendered the entire exercise with regard to the legality or otherwise of the ballot paper as unlawful and without any legal basis. This, in my opinion, was not necessary since the fact that there was a mark other than the official mark on the ballot paper in dispute is an admitted fact and not only that it s admitted by the witnesses of the appellants but also by the official witnesses. It has also been admitted in the report Ex.P.8 of the presiding officer in which the presiding officer concedes that there was a thumb mark on the ballot paper which was quite apart from the official mark against the name of the appellants. Reference may also be made to another application made on behalf of the respondents No.2 and 3 to the District Returning Officer for excluding from count the ballot paper which was thumb marked. That application was made on the same day. The order passed on that application by the District Returning Officer is Ex.P.10 by which the said application was dismissed.

28. As stated above, the fact that there was a mark on one of the ballot papers is admitted in his examination-in-chief by the appellant No.1, Malik Muhammad Shahid who appeared as RW.1 in which he admits that it was mark of a thumb and was affixed inadvertently due to the fact that the thumb had ink on it and while holding the ballot paper that ink had transferred to the ballot paper. It has also been admitted by the other witnesses. Moreover, the question of bringing on record the tainted ballot paper and for the Election Tribunal to have a look at the ballot paper in person would only become relevant in case the question arises regarding a mark through which it is not clear for whom the voter had voted and which is the subject matter of sub-clause (iv) of clause (c) of sub-rule (4) of rule 35. In this case, it is not denied that there was an official mark within the space containing the symbol of the appellants. Therefore, nothing turns on the objection raised by the learned counsel for the appellants on this basis as well. The only question that boils down for determination is a legal question regarding the validity of the vote which was admittedly thumb marked.

29. The relevant provision of law regarding the count of such a vote in favour of the contesting

candidate has been reproduced above. The votes which are required to be excluded from count by the presiding officer have been categorized in clause (c) of sub-rule (4) of rule 35. We are here concerned with the rule 35(4)(c)(ii) of the Rules, 2013 which obligates the presiding officer to exclude from the count any ballot paper which bears any writing or any mark other than the official mark, the signatures of the presiding officer and the prescribed mark or to which a piece of paper or any other object of any kind has been attached. Thus, the mandate of law is clear and unequivocal. It is that any ballot paper which is caught by the mischief of the rule brought forth above has to be excluded from the count. There is a remedy available to a voter in case his ballot paper has been spoiled and that remedy has been delineated in rule 33, which was not resorted to by either the voter or the presiding officer. In case, the voter was of the opinion or that the presiding officer thought that the ballot paper had been spoiled, the voter could have obtained another ballot paper and cast his vote by such a ballot paper and the presiding officer was to cancel the ballot paper returned to him. However, since the voter did not apply for obtaining another ballot paper, the presumption would be that the said voter put a mark

on the ballot paper deliberately and in order to identify his vote and did not at all consider it as a spoiled ballot paper. Simultaneously, the presiding officer could also have required the voter to cast his vote which too was not done by the presiding officer. Be that as it may, the intention of the law seems to be clear. It is that any ballot paper which bears any kind of a mark other than the official mark, is to be excluded from the count and it was a fallacy on the part of the presiding officer to have cast the vote in favour of the appellants. The same mistake was repeated by the Returning Officer before consolidation of the results of the count who also fell into dereliction of duty to notice the said ballot paper and to exclude it from the count. Strangely, the presiding officer tried to justify the act of casting of such a vote by putting the blame on the ink on the thumb of that particular voter. This reflected on the *bona fides* of the presiding officer as well as the Returning Officer who agreed with the report of the presiding officer. If this were to be accepted, why did the mark not got transferred in respect of the other voters who also had ink on their thumbs and why was only one vote singled out with a mark on it. The explanation offered by the presiding officer was tendentious and without any

legal basis. The presiding officer was not required to offer any explanation and was only to see whether the ballot paper in question suffered from the infirmity mentioned in rule 35(4)(c)(ii) of the Rules, 2013. In the face of clear intention of the legislature there was no room for any justification to be offered by the presiding officer as the act of the presiding officer has rendered the entire exercise as subjective and not objective based on the letter of the law. This cannot be countenanced and the presiding officer as well as the Returning Officer were only to look at the law and not to resort to a construction based on their whims. I have no doubt in my mind that the ballot paper in question which bore the thumb mark of the voter had to be taken out of the count by the presiding officer as well as the Returning Officer and since they have not done that, the act suffer from illegality which cannot be sustained.

30. The learned counsel for the appellants invoked the doctrine of *estoppel* against the respondents No.2 and 3 on the ground that there was a draw of lot at the conclusion of the polling and which was consented to by the said respondents and that they cannot now turn around and allege anything to the contrary. In this regard, Ex.PW.1/1

has been produced in evidence by which it seems that the decision regarding draw of lot was with the consent of the contesting candidates and bears their signatures. Firstly, this fact has been denied by the respondents No.2 and 3 by contending that the signatures were affixed on a blank paper and was intended for the purpose of consolidation of the count. Irrespective of this fact the wrongness of the argument can very well be established with reference to rule 37 which deals with equality of votes and draw of lot. It says that:-

> *"37. Equality of votes.– (1) Where, after consolidation of the results of the count under rule 36, it appears that there is equality of votes between two or more contesting candidates and the addition of one vote for one such candidate would entitle him to be declared elected, the Returning Officer shall forthwith draw a lot in respect of such candidates, and the candidate on whom the lot falls shall be deemed to have received the highest number of votes, entitling him to be declared elected.*
>
> *(2) The lot shall be drawn in the presence of such contesting candidates and their election agents as may be present.*
>
> *(3) The Returning Officer shall keep a record of the proceedings in writing, and obtain thereon the signatures of such candidates and election agents, as have been witness to the proceedings and if any such person refuses to sign, such fact shall be recorded."*

31. The rule 37 in its entirety is to the effect that the draw of lot is an inevitable act on the part of the Returning Officer where after consolidation of the results of the count it appears that there is equality

of votes between contesting candidates. In such circumstances, the Returning Officer shall forthwith draw a lot in respect of such candidates. There is no concept of giving a concurrence to the process since the process has been enacted by law and has necessarily to be followed in case of equality of votes. Therefore, noting turns on the question whether a consent was given to the process of draw of lot or not. Clearly, no such consent is required.

Issue No.2:

32. The learned counsel for the appellants has strenuously urged that no finding was returned on issue No.2 by the Election Tribunal. This issue relates to the competence and maintainability of the election petition. Certain preliminary objections were raised in the reply to the election petition. Although the said issue was not specifically adverted to by the Election Tribunal, I shall take up the said issue at this stage. The first objection was regarding the non-compliance of rule 60 of the Rules, 2013 with regard service on the contesting candidates as well as on other respondents to the election petition personally or by registered post with a copy of the petition. Firstly, there is no penalty for non-compliance of this provision and in my opinion nothing turns on its compliance or

otherwise. However, the election petition specifically makes a mention of the fact that the notices as required under rule 60 had, in fact, been sent to the respondents through registered post etc (it is pertinent to mention that rule 60 of the Rules, 2013 does not refer to any such requirement and perhaps the appellants in their reply were making a reference to rule 63). The second objection is with regard to the breach of rule 63(2) by which it is barred to make the Election Commission, the District Returning Officer, Returning Officer as parties to the election petition. Once again, nothing turns on this aspect as the breach of the said rule is not visited with any penalty and, therefore, simply because the Election Commission or any of its officers have been made a party to the election petition will not render the said election petition as incompetent and liable to be dismissed on this account. The third objection relates to the issue regarding *estoppel* which has already been dealt with hereinabove. To reiterate, even if consent was given to the draw of lot by the respondents No.2 and 3, that is not established and they cannot be estopped from challenging the result through an election petition. Lastly, the onus to prove the issue No.2 was on the appellants and there is nothing on

record to indicate that the appellants brought any material on record to prove the said issue.

33. The learned counsel for the appellants lastly broached an issue of law to which I shall allude. According to him, the power to declare an election void has been vested by section 42 and in none of those grounds are the grounds taken in this case can be deemed to be included and thus no election can be declared void on this basis. This argument implies that notwithstanding that the two votes were not valid, *stricto senso*, that would not lead to the conclusion that the election has been procured or induced by any corrupt or illegal practice. His emphasis was particularly on the effect of sub-section (2) of section 42. For facility, section 42 is reproduced below:

> ***"42. Ground for declaring election of returned candidate void***.– *(1) The Election Tribunal shall declare the election of the returned candidate to be void if it is satisfied that–*
> *(a) the nomination of the returned candidate was invalid; or*
> *(b) the returned candidate was not, on the nomination day, qualified for or was disqualified from, being elected as a member; or*
> *(c) the election of the returned candidate has been procured or induced by any corrupt or illegal practice; or*
> *(d) corrupt or illegal practice has been committed by the returned candidate or his election agent or by any other person with the connivance of the candidate or his election agent.*
>
> *(2) The election of a returned candidate shall not be declared void if the Election Tribunal is satisfied that any corrupt or illegal practice was committed without the consent or connivance of*

> *that candidate or his election agent and that the candidate and the election agent took all reasonable precaution to prevent its commission."*

34. Section 42 delineates grounds for declaring election void while sub-section (1) enumerates grounds and sub-section (2) apparently creates an exception. These two will have to be reconciled. Clearly clause (c) of sub-section (1) is a general ground and gives power to declare the election void if "the election of the returned candidate has been procured or induced by any corrupt or illegal practice". Here we will revert to rule 35(4)(c) which casts duty on the presiding officer to exclude from count the ballot paper which bears any writing or any mark other than official mark. Also by rule 36(2), the Returning Officer, before consolidating the result of the count, is required to examine the ballot papers excluded from the count by the presiding officer. In this case, the presiding officer had not excluded the ballot paper with a mark on it from the count and so the presiding officer had no occasion to examine it. Similarly, while recounting, the Returning Officer shall only recount the valid ballot papers. Apparently, no application for recount of ballot papers was made or if made, the Returning Officer considered the vote as valid. At both these stages, the ballot paper in question was

declared as valid by the said officer and counted as vote cast in favour of the appellants. What if the challenge to the election is on the basis that that ballot paper ought to have been excluded and this is the mandate of law. By taking this ground, the election petitioner is relying on either clause (c) or (d) of section 42 of the Act, 2013. In this case, the allegation is not that the candidate himself committed the corrupt or illegal practice or was done by his election agent or any other person with the connivance of the candidate. Thus the case falls under clause (c) and must be viewed in that context. However sub-section (2) of section 42 is something of an enigma and must be reconciled with sub-section (1). It must be borne in mind that the provisions of rule 35(4)(c)(ii) is not a painting to be looked at, without more. If the law provides for the exclusion of the ballot paper which bears any other mark, then failure to do so is to perpetrate an illegality. A similar line of argumentation will be employed in case of breach of secrecy of vote. Section 55 makes it an offence to interfere with the secrecy of voting and so inevitably and, without doubt, it is an illegal act and so covered by clause (c) of sub-section (1) of section 42.

35. Sub-section (2) of section 42, in my opinion, is relatable to clause (d) of sub-section (1) of section 42 and this is the only way it can be reconciled in the scheme of section 42, as a whole. As adumbrated, clause (c) of sub-section (1) of section 42 deals with a general situation where the election can be declared void because it has been procured or induced by corrupt or illegal practice. The candidate may or may not have been involved (and this is extraneous in respect of this provision). The situation that is envisaged by rule 35(4)(c)(ii) is one of the grounds covered by this provision. More importantly, it may be that the element of *mens rea* or a deliberate attempt be completely missing in the whole act which constitutes an illegality. Take for example the case in hand where admittedly, the ballot paper was marked by a thumb impression. There is no evidence that the act was intentional or was brought about with the connivance of the candidate. But the law renders such a ballot paper as invalid and thus an illegal practice. Therefore, quite clearly, clause (d) is a separate species of voidness and sub-section (2) merely elaborates upon the ground given in clause (d) which deals with corrupt or illegal practice committed by the returned candidate or his election agent or any other person

with the connivance of the candidate. Sub-section (2) merely says that the election shall not be declared void if other person committed the illegality or corrupt practice without the connivance of the candidate. Thus the *male animo* or deliberate attempt on the part of the other person may be apparent but that will not be sufficient to declare the election void. The crucial difference between clauses (c) and (d) in my opinion is that in case of clause (c) the intention is not a relevant factor and it is enough if the election is induced by an illegality, pure and simple. The case of the smeared vote in the instant appeal is such as illegal practice which is caught by clause (c). Clause (d) on the other hand pre-supposes a deliberate act and an intention to commit the act. This is all too clear from the use of the words "corrupt or illegal practice has been committed by…..any other person". It is under these circumstances that the law provides a safeguard to the returned candidate by raising the bar of the burden of proof.

Secrecy of ballot/voting:

36. Secrecy of voting is at the heart of electoral process. Article 226 of the Constitution is the primary law on the subject and provides that:-

> ***226****. All elections under the Constitution, other than those of the Prime Minister and the Chief Minister, shall be by secret ballot."*

37. The elections of the local governments is election under the Constitution and the Election Commission of Pakistan is charged with the duty of preparing and conducting the elections to the local governments. The Constitution of Pakistan therefore mandates that all elections under the Constitution shall be by secret ballot and there could not be more clearer expression of solemnity of secrecy of vote. The same principle permeates the entire length and breadth of the Act, 2013. Sections 55 and 56 and the Act, 2013 provides for an offence with respect to interference with the secrecy of the voting and failure to maintain secrecy. Section 57 (e) exposes a presiding officer and other officials performing duty in connection with an election to penal consequences in case they fail to maintain or aid in maintaining the secrecy of voting. Likewise, by rule 26(6) of the Rules, 2013, a presiding officer is obliged to make arrangement at the polling station so that every voter is able to mark the ballot paper in secret before the same is folded and inserted in the ballot box. The vote of Muhammad Idrees falls foul of the requirement of secrecy of voting and on that account to be taken out of consideration as a valid

vote in favour of the appellants. This is precisely what has been done by the Election Tribunal as there could not have been a more glaring instance of illegal and corrupt practice. This should have been done by the Returning Officer but unfortunately the Returning Officer as well as the presiding officer did not fulfill their duties in this regard and despite clear evidence that the presiding officer had to rebuke Muhammad Idrees into folding his ballot paper, the presiding officer did not think it important enough to discard his ballot paper. Clearly, the officials were not aware of their duties under the law and in particular the duties cast by section 57(e) and (g) of the Act, 2013.

Case Law:

38. A plethora of precedents were cited by the counsel for both the parties. However, I shall deal with only the most relevant ones for the purpose of resolving the controversy in hand. Any discussion must begin with the case of *Mian Jamal Shah v. The Member Election Commission, Government of Pakistan, Lahore and others* (**PLD 1966 SC 1**). The said judgment has often been cited in the precedents that developed over the years. Although the issue before a Full Bench of the Supreme Court of Pakistan related to the validity of a ballot paper

which contained a mark other than the official mark against the place reserved for the candidate and the question arose whether these ballot papers ought to be counted in favour of that candidate or not, however, certain observations of Kaikaus J., have an important bearing on the issues involved in the instant appeal as well. The provision of law required the Returning Officer to reject ballot papers which suffered from certain defects such as no official mark or initial of presiding officer; any mark by which the elector can be identified; no prescribed mark indicating for whom the elector had voted; or any mark from which it was not clear for whom the elector had voted. Kaikaus J. had the following observations in respect of the rejection of ballot papers on the ground that it bore a mark by which the elector could be identified with regard to secrecy of the ballot:-

> *"The upshot of the above discussion is that if we adopt the first of the two interpretations stated above neither the Returning Officer nor the Member, Election Commission, will be able to reject any ballot paper on the ground that it bears a mark by which "the elector can be identified". The result will be that there will be a licence to all concerned to freely use marks for the purpose of identification of voters. Secrecy of the ballot will come to an end and bargaining about votes will be easy. He who is able to exert undue influence on a voter will have ample means to ensure that the-vote is cast in accordance with his directions. This is a matter of vital importance for the country and if the second of the two interpretations stated above is not accepted the only proper course for the Government will be to secure an amendment of the .law.*

> *If the first interpretation be wholly unacceptable then the second should be adopted as long as it is a possible interpretation, but it is not only a possible interpretation, it is a reasonable one. It invalidates all ballot papers which bear such marks as can be used for identification. It provides a simple rule and creates no difficulty in the way of the Presiding Officers and Returning Officers. An elector is to make only one mark on the ballot paper that is the mark for indicating the candidate for whom he l is voting and if any other mark which he makes in spite of the knowledge that he is to make only one mark invalidates the l ballot paper he has no cause for grievance. The only objection taken to the second interpretation is that if this was the intention of the Legislature section 38 should have said that every mark will invalidate a ballot paper instead of saying "a mark by which the voter can be identified". The answer is that it is possible to concieve of a mark which may not be used as an identifying device. It may be too insignificant. It may be accidental. Or, the Legislature may have employed these words without coming to a conclusion whether there could or could not be marks which were incapable of use as identifying devices. The qualification of mark as a mark "by which the elector could be identified" is a proper one and what is being urged is that as all marks can be used for identification the qualification was unnecessary. This is not a serious objection particularly when the only other interpretation is an impossible one."*

39. It can be seen that the Supreme Court of Pakistan adopted the simple interpretation and which it considered the reasonable one also to invalidate ballot papers which bore such marks as can be used for the identification. It was further held that an elector is to make only one mark on the ballot paper for indicating the candidate for whom he is voting and if any other mark is made by him that invalidates the ballot paper. It must be borne in mind that at the relevant time and the provision of law under consideration, there was no provision *in pari materia* with rule 35(4)(c)(ii) of the Rules,

2013, which was added later on and perhaps was the result of the findings rendered in *Jamal Shah*. The next case which requires consideration is reported as *Dr. Sher Afghan v. Aamar Hayat Khan and 2 others* (**1987 SCMR 1987**). Once again the issue related to the voting procedure and the manner of casting a vote. The duty of the presiding officer/Returning Officer to ascertain the unambiguous intention of the voters came into focus and the question was whether even if the prescribed mark had not been placed in the appropriate chamber but had been placed somewhere else on the ballot paper, how were those ballot papers to be counted in the context of section 38 of the Representation of the People Act, 1976. Section 38(4)(ii) is similar to the provision relating to any writing or any mark on the ballot paper under consideration in the Act, 2013. Once again, the question relating to any writing or any mark other than the official mark was not directly in issue but the following observations of the Supreme Court of Pakistan support the issues of law raised in the instant appeal. It was held that:-

> *"Having laid down the general principle the learned Judges noticed that in section 2 of the main Act the only direction to the voter was to secretly mark his vote on the paper and fold it up to as to conceal his vote. This was considered an absolute mandate of law the breach of which would render the vote invalid. Emphasis was made on the requirement of secrecy."*

> *"...No one can deny that secrecy of the ballot is since qua non of an election held under a method of secret ballot. A distinction must be drawn between a provision requiring the rejection of a ballot paper in order to preserve the principle of secrecy and a provision which rendered a ballot paper invalid for violating mandatory provisions if any, in regard to the manner of marking a ballot paper."*
>
> *...The relevant provision in regard to violation of secrecy is clause (ii) of section 38 (4) (c) and that clause would obviously be attracted on a plain reading of its contents when any writing or any mark other than, inter alia, the prescribed mark is borne on a ballot paper. It is in this context that the interpretation of the words "prescribed mark" advanced by the learned counsel becomes relevant. If prescribed mark means a mark appropriately affixed in the place reserved for a candidate, then a mark outside that space would constitute a mark other than the prescribed mark on the ballot paper within the mischief of this clause."*

40. It was held that secrecy of ballot was an essential mandate of law and the breach of which would render the vote invalid. Further, that the secrecy of ballot was a *sine qua non* of an election. The crucial finding of the Supreme Court of Pakistan was that the mischief of law would be attracted when any writing or any mark other than the prescribed mark was borne on a ballot paper and which was held to render the ballot paper as invalid.

41. The cases of *Jamal Shah* and *Dr. Sher Afghan* were followed in *Faqir Abdul Majeed Khan v. District Returning Officer and others* (**2006 SCMR 1713**) and it will suffice to reproduce the following observations:-

> *"13. Thus, in view of these observations in both the judgments we are of the opinion that in the instant case admittedly the mark of circle placed on the*

> *symbol of respondent No.5 would indicate that the right of vote has not been exercised by a voter because such identification on the paper is against the concept of election of secret ballot. It is to be noted that in such-like situation where a voter due to inadvertence had not used the marking aid rubber stamp, he can request for another ballot-paper in terms of Rule 33 of the Rules 2005 and if such request has not been made then such vote would be excluded being a spoiled ballot-paper and would not be counted in favour of any of the candidates. However, if marking aid rubber stamp has been used and there is some defect in its affixation then Returning Officer, on examining the same in his judicial discretion, can direct to count the same in favour of any of the candidates. As Returning Officer had counted invalid votes, instead of excluding them, therefore, such conclusion would be deemed contrary to the provisions of Rule 30(6)(ii) of the Rules, 2005 and were not liable to be counted in favour of respondent No.5.*

42. Further, in *Sohail Akhtar Abbasi v. Syed Amir Ali Shah* (**2007 SCMR 18**), the reason underlying the intention of the law for making invalid a ballot paper which contained a mark other than the official mark was bought forth in the following words:-

> *"The underlying principle laid down in the cited case appears to be that any initials, writing or mark as distinguished from required figure or mark appearing in the ballot-paper was ex facie an attempt to disclose the identity of the voter. In the case in hand in pursuance of rule 30(6)(ii) a voter was required to put one official rubber stamp in the space between the name and symbol of the candidate of his choice. The rule did not specifically provide that voter would not put second stamp by the official rubber stamp or any other mark figure or initial but such would not imply that the ballot-paper could be marked by a voter in a manner other than provided by rule 30(6)(ii) of the rules. Furthermore double stamping of a ballot-paper by a voter who is matriculate could not by any imagination be held to be an innocent act which was merely done on account of exuberance and eagerness of the voters for the success of the petitioner or for emphasizing or clarifying voter's choice of candidate."*

43. The other precedents relied upon by the learned counsel for the appellants are not germane to the issue and need not be adverted to in detail.

44. In view of the forgoing discussion, the Election Tribunal has rightly concluded that the election-petitioners before the Election Tribunal (respondents No.2 and 3 herein) have proved the said issue No.1 and they discharged the burden which was placed on them and the issue was rightly decided in favour of the respondents No.2 and 3 and against the appellants. Likewise, the issue No.2 was also rightly decided in favour of the respondents No.2 and 3 and against the appellants herein. In the result, the instant appeal is without merit and is hereby ***dismissed***.

(SHAHID KARIM)
JUDGE

Announced in open Court on 06.12.2017

JUDGE

Approved for Reporting

JUDGE

⋆ *Rafaqat Ali*