

## IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.D-4859 of 2018

**PRESENT:**

Mr. Justice Khadim Hussain M. Shaikh  
Mr. Justice Arshad Hussain Khan

***Naeem Adil Shaikh vs. Returning Officer & another***

Petitioner: Through Mr. Jam Zeeshan Ali  
Advocate.

Respondents: Mr. Abdullah Hinjrah, Law Officer ECP.  
Mr. Jawad Dero, Additional Advocate General.  
Mr. Muhammad Javed KK, Assistant Attorney  
General.  
Ms. Rukhsana Durrani, State Counsel.

Date of hearing: 09.07. 2018

**JUDGMENT**

**Arshad Hussain Khan, J.** The petitioner through instant petition challenging the orders, passed by Returning Officer and learned Election Appellate Tribunal, whereby the nomination papers of the petitioner for contesting the forthcoming general election-2018 was rejected, has sought the following reliefs:

- “(i) Set aside the orders of the Returning Officer and the Election Tribunal and declare that the Petitioner may contest the General Elections 2018.
- (ii) Direct the Returning Officer to accept the Petitioner’s nomination form.
- (iii) Suspend the order of the Returning Officer and the Election Tribunal pending decision of this petition and direct the Election Commission to provisionally include his name in the final list of candidates and allot him an election symbol.
- (iv) Grant any other relief that this Honourable Court in the interests of justice determines.”

2. Brief facts of the petitioner’s case are that the petitioner filed his nomination form to contest the forth coming general

election for the seat of the Member of National Assembly for NA-238. The petitioner did not disclose any liabilities in the form. The Returning Officer, during scrutiny, while relying upon a report from the State Bank of Pakistan, rejected the nomination form of the petitioner on the ground that he had willfully concealed his liabilities in the nomination paper. The petitioner challenged the said decision of the Returning Officer before the learned Election Appellate Tribunal in Election Appeal No. 76 of 2018, however, said appeal was dismissed on 25.06.2018. The petitioner has challenged both the aforesaid orders through instant constitution petition.

3. Learned counsel for the petitioner during the course of his argument has contended that the orders impugned in the instant proceedings are not sustainable in law and liable to be set aside as the Returning Officer as well as the learned Election Appellate Tribunal while passing the impugned orders have failed to appreciate the law and have incorrectly applied the provisions of the Election Act, 2017, and the constitution. Further contended that section 62(10) of the Election Act, 2017, clearly states that if at the time of scrutiny of nomination form, a candidate deposits any amount of loan, taxes or government dues and utility expanses payable by him of which he is unaware at the time of filing nomination paper, such nomination paper shall not be rejected on the ground of default in payment of such loan, taxes or government dues and utility expanses. Further contended that the petitioner was not aware the subject outstanding liabilities against him, had the subject liability come into the knowledge of the petitioner, he would have cleared the said liability. It is also contended that the petitioner has never received any notice from any of the four banks listed in the State Bank's report even none of these banks have filed any proceedings against him. Further contended that once the Returning Officer came to know about the alleged outstanding liability against the petitioner, she was under obligation to give the petitioner an opportunity to pay such amount. Failure to give any such opportunity is contrary to the spirit of the Election Act, 2017, and renders the impugned orders

illegal. It also argued that the petitioner was only made aware about the subject liability at the time of second date hearing of his appeal before the learned Election Appellate Tribunal and on that date the petitioner showed his willingness to make partial payment to bring the alleged outstanding amount below Rs.2 million, threshold for disqualification, in the light of Section 63(10) of the Elections Act 2017. Learned counsel while referring Article 63 (n) of the Constitution of Pakistan whereby any person can be disqualified from being elected as member of Majlis-e-Shoora (parliament) if he has obtained loan for an amount of Rs.2million or more, which remained unpaid for more than one year from the due date, submitted that the petitioner never obtained loan of Rs.2 million, therefore, the rejection of the nomination of the petitioner is also in violation of the said Article of the Constitution of Pakistan. Further contended that Returning Officer as well as learned Election Appellate Tribunal while passing the impugned orders have also failed to appreciate the fact that the petitioner has not concealed any material fact from the Returning Officer in his nomination form as the loan under an amount of Rs.2 million has already been exempted for the purpose of disqualification of member to be elected for parliament under Article 63 (n) of the Constitution of Pakistan. It is also argued that the impugned orders are in violation of fundamental rights of the petitioner as guaranteed under the Constitution of Pakistan. Failure on the part of the forums below to give an opportunity to rectify and amend any infirmity within his nomination form as provided in Section 62 (9 (d) (ii) of the Election Act 2017 is in violation of the law.

5. On the other hand, learned counsel appearing on behalf of the respondents while supporting the impugned orders have vehemently opposed the petition. It has been submitted that petitioner knowingly and deliberately concealed fact about the subject outstanding liability in the nomination papers and further he also failed to pay outstanding amount due against him in time, therefore, the petitioner is not entitled for any relief and his petition may be dismissed.

6. We have heard the learned counsel for the parties, perused the material available on record, considered the submissions and the case law cited by them at the bar.

7. From the perusal of the record, it appears that admittedly the petitioner in his nomination form, for contesting the forthcoming general election from constituency of NA.238 District Malir, did not mention his financial liability in Form 'B' regarding details of overdue/write off amount. However, at the time of scrutiny of the nomination form of the petitioner, from a report submitted by the Statement Bank of Pakistan pursuant to a request sent through ECP (SBP portal), it revealed that the petitioner is a defaulter of four separate banks amounting to over Rs.2.00 million. From the record, it also appears that initially petitioner denied that he had any outstanding liability against him, however, subsequently at the time of filing Election Appeal petitioner took the stance that meager amount was overdue in the year 2002-2003, however, the same was repaid in the year 2005-2006 and that was the reason he contested the General Election 2013 without any objection raised from any quarter. Whereas in the present petition, the petitioner has shown his willingness to pay, without prejudice an amount of Rs.500,000/- in order to bring the outstanding liability below the amount of Rs.2.00 million, disqualification threshold.

8. Before going into further discussion, it would be appropriate to reproduce Article 63(1)(n) of the Constitution of Pakistan relating to disqualification of a member of Majlis-e-Shoora (Parliament):

Article 63(1)(n) of Constitution of Pakistan states as under:-

**“63. Disqualifications for membership of Majlis-e-Shoora (Parliament).--(1) A person shall be disqualified from being elected or chosen as, and from being, a member of the Majlis-e-Shoora(Parliament), if-**  
(a).....  
(b).....  
.....

"(n) he has obtained a loan for an amount of two million rupees or more, from any bank, financial institution, cooperative society or cooperative body in his own name or in the name of his spouse or any of his dependents, which remains unpaid for more than one year from the due date, or has got such loan written off".

The above Article provides for a disqualification on the ground that if a candidate has obtained a loan for an amount of Rs.2 million or more from any bank etc. which remains unpaid for more than one year from the due date the said candidate stands disqualified from being elected or chosen as Member of the Parliament. The word "remains" in the above Article connotes a continuous default, which means, that the loan must continue to remain unpaid for a period of over one year and till the time the candidate opts to present himself to be elected to the Parliament. The above disqualification is not attracted if the loan simply remains unpaid for more than one year from the due date, but stands attracted if the loan 'remains' unpaid at the time when the candidate presents himself for election. It is the entry point for a candidate to step into the electoral process and in the wisdom of the Constitution the candidate must not only be qualified but must also be free from any taint of disqualification at this initial stage.

9. Learned counsel for the petitioner during the course of arguments also referred to sub-section (9) and (10) of Section 62 of the Election Act 2017, for the convenience's sake the same are reproduced as under:

**“62. Scrutiny.**---(1) Any voter of a constituency may file objections to the candidature of a candidate of that constituency who has been nominated or whose name has been included in the party list submitted by a political party for election to an Assembly before the Returning Officer within the period specified by the Commission for the scrutiny of nomination papers of candidates contesting election to an Assembly.

(2)-----

(3)-----

(4)-----

(5)-----

(6)-----

(7)-----

(8)-----

(9) Subject to this section, the Returning Officer may, on either of his own motion or upon an objection conduct a summary enquiry and may reject a nomination paper if he is satisfied that \_

(a)-----

(b)-----

(c)-----

(d) the signature of the proposer or the proposer or the seconder is not genuine:

provided that \_

(i) the rejection of a nomination paper shall not invalidate the nomination of a candidate by any other valid nomination paper; or

(ii) the Returning Officer shall not reject a nomination paper on the ground of any defect which is not of a substantial and may allow any such defect to be remedied forthwith including an error in regard to the name, serial number in the electoral roll or other particulars of the candidate of his proposer or seconder so as to bring them in conformity with the corresponding entries in the electoral roll.

(10) Notwithstanding anything contained in subsection (9), where a candidate deposits any amount of loan, tax or government dues and utility expenses payable by him of which he is unaware at the time of filing of his nomination paper, such nomination paper shall not be rejected on the ground of default in payment of such loan, taxes or government dues and utility expenses.

[emphasis supplied]

A perusal of the above provision indicates that the powers of the Returning Officer have been controlled for not rejecting the nomination papers on any defect, which is not of substantial nature and the defect, which may be remedied forthwith.

10. In the present case, the petitioner cannot take refuge of the above provisions as firstly; he concealed the

material facts about his outstanding liability in his nomination form, secondly when the said fact came to the surface instead of depositing the said liability the petitioner shown his unawareness and in Election Appeal stated that the said amount of liability was repaid in 2005-2006, whereas no documents in respect thereof has been placed on record. The petitioner though in the present petition, shown his willingness to pay Rs.500,000/- just to bring his liability below Rs.2million, the disqualification threshold, however, the said offer of the petitioner at this stage does not cure the disqualification of the petitioner as held by the two forums below.

11. The petitioner has invoked the Constitutional jurisdiction which is discretionary in nature. It is now a well settled that Article 199 of the Constitution casts an obligation on the High Court to act in the aid of law and protects the rights within the frame work of Constitution, and if there is any error on the point of law committed by the courts below or the tribunal or their decision takes no notice of any pertinent provision of law, then obviously this court may exercise Constitutional jurisdiction subject to the non-availability of any alternate remedy under the law. This extra ordinary jurisdiction of High Court may be invoked to encounter and collide with extraordinary situation. This Constitutional jurisdiction is limited to the exercise of powers in the aid of curing or making correction and rectification in the order of the courts or tribunals below passed in violation of any provision of law or as a result of exceeding their authority and jurisdiction or due to exercising jurisdiction not vested in them or non-exercise of jurisdiction vested in them. The jurisdiction conferred under Article 199 of the Constitution is discretionary with the objects to foster justice in aid of justice and not to perpetuate injustice. However, if it is found that substantial justice has been done between the parties then this discretion may not be exercised. So far as the exercise of the discretionary powers in upsetting the order passed by the forum below is concerned, this court has to comprehend what illegality or irregularity and or violation of law has been committed by the

courts below which caused miscarriage of justice. Reference may be placed to the case of *Muslim Commercial Bank Ltd. through Attorney v. Abdul Waheed Abro and 2 others* (2015 PLC 259).

12. Reverting to the case in hand, we have examined the orders rendered by the two forums below and find that the impugned orders are legal, unexceptionable, apt to the facts and circumstances of the case, which suffering from no jurisdictional defect, do not call for any interference by this Court in exercise of its Constitutional jurisdiction.

The upshot of the above, we are of the view that the present petition is devoid of merit, thus, we are constrained to dismiss the petition with no order as to costs.

13. Before parting with this order, it may be observed that we have refrained ourselves from dilating upon other contentions raised by learned counsel for the petitioner as the same patently, involving the factual controversy cannot be gone into the constitutional jurisdiction under article 199 of the Constitution of Islamic Republic of Pakistan, 1973.

**JUDGE**

**JUDGE**