

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Election Appeal No.150 of 2024

Date

Order with signature of Judge

For hearing of main case

Date of hearing and order: 08.1.2024

Mr. Akhlaq Khan Mandokhail and Mr. advocate for the appellant
M/s. Khalid Javed advocate, Mr. Rana Mashood Khan advocate, Mr.
Munnawar Juna advocate and Mr. Yousuf Makda advocate
Mr. M. Yasin Khan Azad advocate for respondent No.2.
Mr. Jawed Khalid Raan advocate
Mr. G.M Bhuto Assistant Attorney General along with
Mr. Sarmad Sarwar Assistant Director (Law) Election Commission of
Pakistan

ORDER

Adnan-ul-Karim Memon, J Appellant Masood Khan Mandokhail has called in question the order dated 29.12.2023 passed by the Returning Officer NA-242 District Keamari, Karachi by which the nomination paper submitted by respondent No.2 has been accepted and the objections filed by the appellant on the nomination paper of respondent No.2 were dismissed, hence the appellant filed the instant appeal against the order dated 29.12.2023, an excerpt whereof is reproduced as under:-

- “(1) No substantial evidence produced
(2) Application is based on only allegations
(3) Thus a candidate is validly nominated.**

Mr. Akhlaq Khan Mandokhail learned counsel for the appellant has submitted that the impugned order dated 29.12.2023 passed by the Returning Officer is without having proper justification and the same has been passed hurriedly, furthermore, the impugned order is silent on the objections raised by the appellant; that respondent No.2 in his nomination papers dated 21.12.2023 made a false statement and concealed the facts to the effect that he fulfills the qualification specified in Article 62 of the Constitution; and, he is not subject to any disqualification specified in Article 63 of the Constitution or any other law; that the impugned order has been passed by respondent No.1 / Returning Officer, accepting the nomination form of respondent No.2, which is improper, void ab-initio and per in-curium in nature, therefore, liable to be set aside. Learned counsel further contends that the impugned order is passed in violation and derogation of the fundamental rights of the objector/appellant as guaranteed under the Constitution. He emphasized that under the Elections

Act 2017, a candidate whose nomination papers had been accepted is a defaulter of various dues and he failed to disclose travel expenses and has wilfully concealed such facts. Per learned counsel, this Tribunal, on its motion, can call upon such candidate to show cause as to why his nomination papers may not be rejected on the premise that respondent No.2 failed to prove the money trails of foreign immovable property; that in his affidavit dated 21.12.2023, he has made tremendous changes in the constituency NA-137 by “improvement of municipal facilities”, without any details; that the NAB cases/inquires are pending against him; that number of times he has visited on Government expenses but he has failed to declare such expenses; that issue of iqama is still unsolved; that he failed to mention the details of loan and their money trajectory which he mentioned in the nomination paper of National Assembly; that there is the number of immovable property owned by him has not been mentioned in the nomination form. Learned counsel referred to various documents attached with the memo of appeal and submitted that respondent No.3 has failed to disclose all the facts in his tax return thus he is not entitled to contest election in term of Article 62 of the constitution of the Islamic Republic of Pakistan 1973. Learned counsel further submitted that the nomination papers of respondent No.2 have erroneously been accepted by the Returning Officer. Learned counsel has also pointed out Authority Letter authorizing Mr. Nawaz Chaudhary, Talha Barqi, and Muhammad Jawed Khalid to represent and appear before Returning Officer for scrutiny, however, the same Authority Letter is silent about valid authentication by the respondent No.2 as such respondent No.2 ought to have appeared before the Returning Officer but failed to do so as such his nomination papers were not validly filed, therefore, prayed for setting aside the impugned order dated 29.12.2023.

Mr. Khalid Jawed learned counsel representing Respondent No.2 has raised the question of maintainability of the captioned Election Appeal by the objector on the ground that nothing has been concealed by Respondent No.2 in terms of Articles 62 and 63 of the Constitution of Pakistan 1973. Per learned counsel, the powers of the Returning Officer are summary in nature and he just concluded the scrutiny papers of respondent No.2 and found nothing substantial to call into question the nomination papers, which is a discretion of the Returning Officer. He has further added that this Tribunal in exercising powers under Section 63 of the Elections Act 2017 cannot venture to differently interpret the already interpreted provisions by the Supreme Court of Pakistan in terms of Article 189 of the Constitution of the Islamic Republic of Pakistan. Learned counsel referred to the certificate dated 20.06.2023 issued by the

office of the Accountant General Pakistan Revenue Islamabad and submitted that it has already been certified that respondent No.2 has not drawn any pay and allowances for the period from 1st July 2022 to 30th June 2023 during the financial year 2022-2023 from Prime Minister Office. Learned counsel also referred to the letter dated 28.12.2023 issued by the office of the Accountant General Pakistan Revenue Islamabad and submitted that respondent No.2 has not drawn any pay and allowances for the period 11th April 2022 to 30th June 2022 during financial 2021-2022. Learned counsel also referred to the letter dated 19.09.2022 issued by National Assembly Secretariate and submitted that respondent No.2 has not received any amount on account of salary TA/DA for the 15th tenure of National Assembly i.e from 13.08.2018 to 10.04.2022 as he has been elected as Prime Minister of Pakistan w.e.f 11.04.2022. He prayed for the dismissal of this appeal.

The learned Assistant Attorney General assisted by the learned law officer representing the Election Commission of Pakistan has supported the Impugned order passed by the Returning Officer and opposed this appeal.

I have heard the learned counsel for the parties and perused the record with their assistance.

The grounds agitated by the learned counsel for the appellant require a thorough probe and this Tribunal has a limited jurisdiction and can pass an order within the specified period thereafter the proceeding stand abated and the order of the Returning Officer is deemed to have become final. Besides, the points raised require fact-finding inquiry which is not permissible at this stage in terms of Section 63 of the Elections Act 2017 which is only permissible before the proper Election Appelle Tribunal under Section 140 of the Elections Act 2017 after the completion of the first phase of the election.

Additionally, Sub-section (9) of Section 62, provides for the rejection of nomination papers on one of four grounds: (9)(a) the candidate is not qualified to be elected as a member, (b) the propose or the seconder is not qualified to subscribe to the nomination paper; (c) any provision of section 60 or Section 61 has not been complied with or the candidate has submitted a declaration or statement which is false or incorrect in any material particular; or (d) the signature of the proposer or the seconder is not genuine. However, at the same time under the election law, the contesting candidates needed to incorporate details of bank transactions from December 8, 2023, or bank statements that would be

used for election expenses. It is only a material defect or omission in the declaration of assets, if willfully, knowingly, or deliberately made that can result in the rejection of the nomination papers.

Under section 62(9) of the Elections Act, 2017, the Returning Officer shall not reject a nomination paper on the ground of any defect that is not substantial and may allow such defect to be remedied forthwith and failure on the part of the returning officer to allow rectifying and amending any infirmity within his/her nomination form as provided in Section 62 (9) (d) (ii) of the Elections Act 2017 violates the law.

Progressing on the issue of qualification and disqualification of the candidate to contest the election, primarily, Articles 62 and 63 of the Constitution reveal that one deals with the qualifications of a person to be elected or chosen as a member of Parliament while the other deals with disqualifications of a person not only from being elected or chosen but also from being a member of Parliament. If a candidate is not qualified or is disqualified from being elected or chosen as a member of Parliament in terms of Articles 62 and 63 of the Constitution, his nomination could be rejected by the Returning Officer or any other forum functioning in the hierarchy. But where the returned candidate was not, on the nomination day, qualified for or disqualified from being elected or chosen as a member, his election could be declared void by the Election Tribunal constituted under Article 225 of the Constitution. While election of a member whose disqualification was overlooked, illegally condoned or went unquestioned on the nomination day before the Returning Officer or before the Election Tribunal, could still be challenged under Article 199(1)(b)(ii) of the Constitution of Pakistan, 1973 as was held by the Supreme Court in the cases of Lt. Col. Farzand Ali and others v. Province of West Pakistan through the Secretary, Department of Agriculture, Government of West Pakistan, Lahore (PLD 1970 SC 98) and Syed Mahmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1054). However, disqualifications envisaged by Article 62(1) (f) and Article 63(2) of the Constitution because of words used therein have to be dealt with differently. In the former case, the Returning Officer or any other fora in the hierarchy would not reject the nomination of a person from being elected as a Member of Parliament unless a court of law has given a declaration that he is not sagacious, righteous, non-profligate, honest and Ameen. Even the Election Tribunal, unless it proceeds to give the requisite declaration based on the material before it, would not disqualify the returned candidate where no declaration, as mentioned above, has been given by a court of law. The

expression “a court of law” has not been defined in Article 62 or any other provision of the Constitution but it essentially means a court of plenary jurisdiction, which has the power to record evidence and give a declaration based on the evidence so recorded. Such a court would include a court exercising original, appellate, or revisional jurisdiction in civil and criminal cases. But in any case, a court or a forum lacking plenary jurisdiction cannot decide questions of this nature at least when disputed. In the latter case when any question arises whether a member of Parliament has become disqualified it shall be dealt with only by the Election Commission on a reference from the Speaker of the Parliament in terms of Articles 63(2) and 63(3) of the Constitution.

The reasoning of the Returning Officer that no substantial evidence was produced on the allegations seems to be aligned with the law and does not call for indulgence of this Tribunal for the simple reason that the Supreme Court in the case of *Khawaja Muhammad Asif v. Muhammad Usman Dar* [2018 SCMR 2128] has held that the provisions of election laws are designed to facilitate the general public to know what assets the contesting candidates own, what liabilities they owe before they are elected, and what variation has taken place in their assets and liabilities on a year on year basis after being elected. Hence the election laws require every contesting candidate to file his or her statement of assets and liabilities and when elected required to declare his/her assets and liabilities every year with the Election Commission. In case an asset not declared by an elected member comes to light, his details of assets and liabilities would help in ascertaining whether concealment was intended to cover some wrongdoing. The whole purpose behind seeking details of assets and liabilities under the election laws is to discourage persons from contesting elections for a seat in the Parliament or a Provincial Assembly who have concealed assets acquired through some wrongdoing. Simultaneously it also aims at those members as well who hitherto may have held untainted records, be discouraged from indulging in corruption and financial wrongdoings after entering upon their office. Hence whoever contests an election for a seat in the Parliament or a Provincial Assembly, is mandatorily required by law to be forthright in declaring all the assets that he/she owns and all liabilities he/she owes. However, all non-disclosures of assets cannot be looked at with the same eye as no set formula can be fixed about every omission to list an asset in the nomination paper, make a declaration of dishonesty, and impose the penalty of disqualification. It is well-settled law that any plausible explanation that exonerates, inter alia, the misdeclaration of assets and liabilities by a contesting candidate should be confined to unintended and minor errors that do not confer any tangible

benefit or advantage upon the contesting candidate. Where assets, liabilities, earnings, and income of the contesting candidate are camouflaged or concealed by resorting to different legal devices including benami, trustee, nominee, etc. arrangements for constituting holders of title, it would be appropriate for a learned Election Tribunal to probe whether the beneficial interest in such assets or income resides in the elected or contesting candidate to ascertain if his/her false or incorrect statement of declaration is intentional or otherwise. There is a public interest object behind the statutory prescription for obtaining the said statements and declaration. It is to ensure integrity and probity of contesting candidates and therefore all legislators.

The above-discussed essential element of disqualification about non-declaration of an asset within the ambit of Article 62(1)(f) of the Constitution has also been recognized in the judgment of the Supreme Court in the case of *Muhammad Hanif Abbasi v. Imran Khan Niazi* (PLD 2018 SC 189) and in the present, there is no such declaration against the respondent No. 2 by the competent Court of law as such the findings of the Returning Officer that no substantial evidence was produced holds the field for the simple reason that the Returning Officer has limited jurisdiction and at this stage cannot be said to be false or perverse until and unless it is brought on record that respondent No.2 has intentionally and deliberately violated the qualification clause as provided under Articles 62 and 63 of the Constitution of the Islamic Republic of Pakistan 1973 in the absence of such material nothing could be said for and against at this stage, however, such issue can be raised before the Election Appellate Tribunal to be constituted under Section 140 of the Elections Act 2017 if the respondent No.2 succeeds ensuing election,

For the aforesaid reasons, this appeal is dismissed.

JUDGE