

Judgment Sheet
IN THE LAHORE HIGH COURT,
BAHAWALPUR BENCH, BAHAWALPUR
JUDICIAL DEPARTMENT

....

Election Appeal No.6 of 2023/BWP.

Kashif Mehmood.

Versus

Election Commission of Pakistan & 02 others.

J U D G M E N T.

Date of hearing: **13.04.2023.**

Appellant by: M/s Muhammad Saleem Faiz, Mian
Muhammad Haroon, Shakeel Ahmad
Malik & Imran Ahmad Kamboh,
Advocates.

Respondent No.1 by: Muhammad Jaffer, Law Officer for ECP.

Respondent No.3 by: Ch. Sohail Akhtar Alkara, Advocate.

AHMAD NADEEM ARSHAD, J. Through this Election Appeal under Section 63 of the Election Act, 2017 (Act XXXIII of 2017) read with Rule 54 of the Election Rules, 2017 (Amended on 2021) appellant has challenged order dated 20.03.2023 passed by respondent No.2/Returning Officer Constituency PP-244 Bahawalnagar-VIII whereby his nomination papers against the seat of MPA PP-244, were rejected on the objection petition filed by respondent No.3.

2. Facts in brevity are that the Election Commission of Pakistan called upon the voters of the Constituency PP-244, Bahawalnagar-VIII, to elect a Member from the said Constituency for Punjab Asembly and the schedule of the election was announced. Appellant submitted his nomination papers for the seat of Member Provincial Assembly (MPA) PP-244 Bahawalnagar-VIII before the Returning Officer. Respondent

No.3 filed an objection petition against the appellant by maintaining that latter has not correctly filled the nomination papers and also submitted false affidavit. He maintained in his petition that Islamabad High Court has disqualified the appellant from the seat of MPA and he has been disqualified for life and this verdict was maintained by the august Supreme Court of Pakistan. Respondent No.2/Returning Officer while relying upon case titled “Sami Ullah Baloch V. Abdul Karim Nousherwani (PLD 2018 SC 405)” accepted the objection petition and consequently rejected nomination papers of the appellant *vide* impugned order/notification dated 20.03.2023. Being aggrieved, appellant approached this Tribunal through instant appeal.

3. Learned counsel appearing on behalf of the appellant *inter-alia* contends that impugned order is against the facts & law, arbitrary, fanciful, having no legal effect and result of mis-reading/non-reading of available record; that permanent disqualification under Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan, 1973 requires declaration by any competent Court of law and in the instant case neither any declaration has been made by competent Court of law nor appellant has been declared that he is not sagacious, righteous, and non-profligate; that appellant submitted his nomination papers in accordance with law and neither any fact was concealed nor any misrepresentation was made; that previous disqualification of the appellant is never hurdle to contest any future election; that Returning Officer wrongly accepted the objection petition of respondent No.3 which was made after scrutiny process and prayed for acceptance of appellant’s appeal, setting aside of impugned order and acceptance of nomination papers.

4. Contrarily, learned counsel for respondent No.3 assisted by Mr. Muhammad Jaffar, Law Officer, Election Commission of Pakistan has opposed this appeal by contending that appellant did not meet the requirements of law to contest the election; that he submitted wrong declaration in his nomination papers and also appended false affidavit; that he did not remain Sadiq & Ameen in terms of Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan, 1973 and his nomination papers were rightly rejected; that appellant was de-seated/de-notified by Election Commission of Pakistan through notification dated 26.07.2022 in the light of judgment passed by Hon'ble Islamabad High Court which was maintained by august Supreme Court of Pakistan and prayed for dismissal of appeal.

5. I have heard learned counsel for the parties as well as learned Law Officer for ECP and gone through the record with their able assistance.

6. The question for determination in instant appeal is that whether observations made by Hon'ble Islamabad High Court in the previous round of litigation that *“respondent No.4 (appellant) wrongfully mentioned his qualification as BBA and made a false declaration in this behalf and he is entitled to be disqualified in terms of Article 62(1)(f) of the Constitution”* is permanent in nature and as such he is not eligible to contest the election in future?

7. Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan, 1973, provides that a person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora, unless he is sagacious, righteous and non-profligate, honest and ameen, there being no declaration to contrary

by a Court of law. For ease of reference, the language of Article 62(1)(f) is reproduced hereunder:

“(f) he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law;”

The afore-referred provision of the Constitution, in clean terms, describes that only upon a declaration from a competent Court of law, someone can be considered as being not sagacious, righteous, non-profligate, honest and ameen.

8. Although the expression “*a Competent 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 having power to record evidence and give a declaration on the evidence so recorded. Such a Court would include a Court exercising original, appellate or revisional jurisdiction in civil and criminal matters. August Supreme Court of Pakistan in its judgment titled “Imran Ahmad Khan Niazi V. Mian Muhammad Nawaz Sharif (PLD 2017 Supreme Court 265), held as under:

“20. The next question emerging for the consideration of this Court is what are the fora provided by the Constitution and the law to deal with the questions emerging from Articles 62(1)(f) and 63(2) of the Constitution. To answer this question we will have to fall back upon Articles 62 and 63 of the Constitution. A careful reading of the said Articles would reveal that the one deals with 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) or Article 184(3) of the Constitution of Pakistan, 1973 as was held 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 Mehmood 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 in view 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 itself proceeds to give the requisite declaration on the basis of 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 on the basis of 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.”

9. The right to contest election is a fundamental right in terms of Article 17 of the Constitution of Islamic Republic of Pakistan, 1973 and it has to be read into the language of Article 17(2). Declaring someone as disqualified for any term to become a member of the parliament is a penalty, depriving him of his constitutional rights. In order to deprive a citizen of his fundamental right to contest election, the requirement of a declaration by a competent Court of law as provided in Article 62(1)(f) of

the Constitution of Islamic Republic of Pakistan, 1973 has to be strictly construed. Without declaration by a competent Court of law, after adopting due process through fair trial, would be against his fundamental right guaranteed by the Constitution and he cannot be termed to be no longer sagacious, righteous, non-profligate, honest and ameen.

In this regard, august Supreme Court of Pakistan in case titled Supreme Court Bar Association of Pakistan through President and another V. Federation of Pakistan through Ministry of Interior Islamabad and others (PLD 2023 Supreme Court 42) held as under:

“Declaring someone as disqualified for any period to become a member of the Parliament is a penalty, depriving him of his constitutional rights. Without declaration by a competent Court of law after adopting due process through fair trial, determining any right and obligation of a person would be against his fundamental right guaranteed by the Constitution.”

10. Perusal of record reflects that appellant earlier contested General Election of Punjab Assembly from the constituency PP-241, Bahawalnagar (v), Tehsil Chishtian, District Bahawalnagar and declared return candidate by Election Commission of Pakistan *vide* notification dated 28.07.2018. His rival candidate Malik Muhammad Muzaffar Khan filed Election Petition before the Election Tribunal of the Lahore High Court Bahawalpur Bench, Bahawalpur which was dismissed *vide* order dated 19.11.2018 and his appeal is pending before august Supreme Court of Pakistan. In the meanwhile, Mr. Abdul Ghaffar filed a Writ Petition (No.4715 of 2018) titled “Abdul Ghaffar V. Election Commission of Pakistan etc.” before the Hon’ble Islamabad High Court. It was maintained that in the Bye-Election of 2006, appellant mentioned his

qualification as graduate (BBA from Al-Khair University), whereas, in the General Election of 2013, he mentioned his qualification as intermediate in the nomination papers and in the General Election, 2018, he again mentioned his qualification as BBA from Al-Khair Univeristy, therefore, as he concealed the material facts, he did not remain honest and ameen. Further pointed out that according to the letter dated 14.05.2006 issued by Registrar, Al-Khair University (AJK) he is not a bona fide student of the university and Detailed Marks Certificate issued on 06.04.2006 is not correct, therefore, affidavit tendered pursuant to the order of Honourable Supreme Court of Pakistan he made deliberately false statement. The Islamabad High Court in the light of submission made through writ petition sought report from Al-Khair university and in response, the said university through letter dated 25.09.2019 reported that appellant has neither been student of Al-Khair University Bhimber (AJK) nor graduated in the course of Bachelor of Business Administration. In the light of said letter, the Honourable Islamabad High Court observed that the appellant tendered a false affidavit.

Hon'ble Islamabad High Court while discussing various judgments of august Supreme Court of Pakistan observed as under:

“In view of the above position of law and facts, respondent No.4 wrongfully mentioned his qualification as BBA and made a false declaration in his behalf he is entitled to be disqualified in terms of Article 62(1)(f) of the Constitution.

*For the above reasons, the instant petition is **allowed** and respondent No.4 is declared to be disqualified from holding the position of Member Provincial Assembly, Punjab (PP-241, Bahawalnagar-V). The Election Commission of Pakistan is directed to de-notify respondent No.4 as a successful candidate and do the needful forthwith in accordance with law.”*

Being aggrieved, petitioner filed Civil Appeal No.1271 of 2021 titled “Muhammad Kashif V. Abdul Ghaffar & others” which was dismissed by august Supreme Court of Pakistan *vide* order dated 23.11.2021. His review petition also met the same fate and dismissed *vide* order dated 20.10.2022.

Any judicial declaration by a competent Court of law must necessarily be based on evidence, oral or documentary. Perusal of judgment of Hon’ble Islamabad High Court reveals that neither any evidence was recorded nor any positive evidence was on record to establish either the qualification mentioned in the declaration was false or the appellant referred to the same knowingly and deliberately. In this regard august Supreme Court of Pakistan in its judgment titled “Sardar Yar Muhammad Rind V. Election Tribunal Balochistan Quetta and othes (PLD 2020 Supreme Court 137), held as under:

“Article 62(1)(f) of the Constitution requires that the disqualification of an election candidate must be founded on a declaration by a Court of law that such person is “not honest”. Any judicial declaration must necessarily be based on evidence, oral or documentary. A perusal of the judgment of the learned Appellate Tribunal and the impugned judgment by the learned Division Bench of the High Court do not refer to any positive evidence on the record to establish either that the Sanad of Shahad-ul-Aalmia claimed by the petitioner in his nomination papers in 2008 is bogus, forged or fake or that the petitioner referred to the same knowingly and deliberately as being equivalent to a graduate or postgraduate degree.”

From the language of the judgment of Hon’ble Islamabad High Court, which appears to have persuaded the Returning Officer (Respondent No.2), it is clear and obvious that there was no definite declaration issued by the said Court of the nature required to attract the provisions of Article 62(1)(f) of Constitution of Islamic Republic of Pakistan, 1973. The language was in the nature of observation.

11. It is settled law that the Returning Officer has no power to issue any declaration by itself in a summary jurisdiction. In the present case, the only declaration against the appellant under Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan, 1973, was given in a summary proceeding by the Returning officer on 20.03.2023 without recording evidence and giving reasons for invoking disqualification. In similar type of situation the august Supreme Court of Pakistan in case titled “ROSHAN ALI BURIRO V. SYED MURAD ALI SHAH AND OTHERS (2019 SCMR 1939) held as under:

“Be that as it may, in Sami Ullah Baloch and others v. Abdul Karim Nousherwani and others (PLD 2018 SC 405) we have held that the disqualification of an election candidate or a holder of elected office under Article 62(1)(f) of the Constitution comes into existence when he is declared by a Court of law to lack any of the qualities mentioned in clause (f) of Article 62(1) of the Constitution. In the present case, the only declaration against the respondent under Article 62(1)(f) of the Constitution was given in summary proceeding's by the Returning Officer on 06.04.2013. As already noted above, no evidence was recorded by the Returning Officer to sustain his finding nor he recorded reasons for invoking disqualification under Article 62(1)(f) of the Constitution. He is not a Court of law but a statutory forum of limited jurisdiction. Therefore, the condition that only a Court of law can issue a declaration of disqualification under Article 62(1)(f) of the Constitution is not met in the present case. Moreover, the learned Election Tribunal has not declared the respondent, directly or indirectly, to lack any of the qualities mentioned in Article 62(1)(f) of the Constitution. Although the judgment of this Court dated 02.5.2013 resurrected the order by the Returning Officer, we do not consider that the said order passes the test of effectiveness laid down in Sami Ullah Baloch's case (ibid) for declaring a disqualification under Article 62(1)(f) of the Constitution. This Court has held there that:

"32. Secondly, on the other hand, a candidate for election who has committed misconduct falling within the terms of Article 62(1)(f) of the Constitution, in particular, misrepresentation, dishonesty, breach of trust, fraud, cheating, lack of fiduciary duty, conflict of interest, deception, dishonest misappropriation, etc, as declared by a Court of civil jurisdiction has on the Islamic and also universal criteria of honesty, integrity and probity, rendered himself unfit to hold public office. ... It is in such circumstances that a person declared to be dishonest or in breach of his trust or fiduciary duty or being non-righteous or profligate must suffer the burden of that finding of incapacity or as long as the Court decree remains in force. ..."

10. No finding in terms of the wrongs identified above in the quoted text is recorded in the order dated 06.04.2013 by the

Returning Officer. As such, the said order is ineffective to impose a disqualification under Article 62(1)(f) of the Constitution, Accordingly, the respondent does not suffer from a lifetime bar under Article 62(1)(f) of the Constitution as contended by the learned counsel for the petitioner. Therefore, the respondent was eligible to contest the General Election of 2018.”

12. A Division Bench of this Court observed that the question whether the declaration/statements of the nomination papers were false or incorrect cannot be ascertained without carrying out factual probe and could not be done by the Returning Officer in summary jurisdiction and in the case titled “Syed Fida Hussain Shah V. Election Tribunal and other (PLD 2018 Lahore 788), held as under:

“In the case of Rai Hassan Nawaz supra, this Court has observed that the question whether the declaration/statements of the candidate in the nomination papers were false or incorrect in any material particular, cannot be ascertained without carrying out a factual probe. This exercise cannot be undertaken in constitutional jurisdiction and could not have been gone into by the Returning Officer or learned Appellate Tribunal in summary jurisdiction.”

13. In view of above discussion, there is no declaration issued by a competent Court of law in terms of Article 62(1)(f) of the Constitution of Islamic Republic of Pakistan, 1973, therefore, the impugned order/notification dated 20.03.2023 is not sustainable in the eyes of law.

14. For the foregoing reasons, this appeal is **allowed** and impugned order/notification dated 20.03.2023 passed by respondent No.2/Returning Officer is **set-aside**. Consequently, Returning Officer, Constituency PP-244, Bahawalnagar-VIII is directed to accept the appellant's nomination papers. Notwithstanding anything stated above, it is clarified that the findings recorded and observations made herein are based only on a tentative assessment of the material before the Tribunal, in the facts and circumstances brought to the notice of the Tribunal, for the limited purpose of deciding this appeal. The Election Commission of Pakistan and

other competent Authorities/Courts/Functionaries shall, however, be at liberty to independently exercise their power, if any material is placed before them, initiate proper proceedings and pass orders under the provisions of Election Act, 2017 and other relevant laws without being influenced by observations made and findings recorded in this judgment.

(AHMAD NADEEM ARSHAD)
JUDGE/APPELLATE TRIBUNAL.

APPROVED FOR REPORTING.

JUDGE/APPELLATE TRIBUNAL.

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*M. Arsalan**