

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE SH. AZMAT SAEED

MR. JUSTICE MUSHIR ALAM

MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL

CIVIL PETITION NO.3131 OF 2017

(On appeal from judgment dated 15.8.2017, passed by the Peshawar High Court, Peshawar, in W.P. No.1687-P of 2017)

Sher Alam Khan ... Petitioner (s)

Versus

Abdul Munim and others ... Respondent (s)

For the Petitioner (s) : Mr. Muhammad Akram Sheikh,
Sr. ASC and
Mr. M.S. Khattak, AOR

For Respondent No.1 : S. Naeem Bokhari, Sr. ASC with
Ch. Akhtar Ali, AOR

For Respondent No.2 : Barrister Qasim Wadood,
Addl. Advocate General, KPK

On Court's Notice : Rai M. Khan, D.E.O., Kohistan
Mr. Aftab Ali, Accounts Officer,
A.G. Office, KPK
Mr. M. Ibrahim,
Asstt. Accounts Officer,
A.G. Office, KPK
Abdul Maroof,
Circle Officer, Anti-Corruption
M. Jamil, ACO, Dassu Kohistan

On Court's Notice on behalf of Federation : Mr. Sajid Ilyas Bhatti, DAG

Other Respondents : N.R.

Date of Hearing : 23.02.2018

JUDGMENT

SH. AZMAT SAEED, J.- This Civil Petition for Leave to Appeal is directed against the judgment dated 15.08.2017 of the learned Peshawar High Court, whereby Constitutional Petition i.e. Writ Petition bearing No.1687-P of 2017, filed by Respondent No.1, was allowed.

2. The brief facts necessary for adjudication of the *lis* at hand are that Respondent No.1 contested the election for the Provincial Assembly of the Province of Khyber Pakhtunkhwa (KPK) from the Constituency PK-88, Shangla-II in the General Elections held on 11th May, 2013. The said Respondent No.1 was declared elected and notified as a Returned Candidate by the Election Commission of Pakistan (ECP). It appears that eventually the Respondent No.1 was appointed as Special Assistant to the Chief Minister, Government of KPK.

3. On 28.12.2016, the present Petitioner filed an application before the ECP purportedly under Article 6 of the Election Commission Order, 2002

read with Articles 63 and 218(3) of the Constitution of the Islamic Republic of Pakistan, 1973 and Section 99 of the Representation of the People Act, 1976 (ROPA of 1976) alleging therein that Respondent No.1 was employed as a Primary School Teacher with the Government of KPK and was holding the said post and drawing salary at the relevant point of time i.e. when he filed his Nomination Papers. He allegedly resigned from such post with effect from 31.03.2013. Thus, he had been employed by the Government of KPK and two years had not passed since his resignation when he contested the elections, therefore, the said Respondent was disqualified in view of Article 63(1)(k) and further not qualified under Article 62(1)(f) having made a false declaration in his Nomination Papers.

4. The Election Commission of Pakistan after hearing the parties and examining the relevant record concluded that in fact Respondent No.1 at the time of submitting his Nomination Papers on 29.03.2013 was indeed employed as a Primary

School Teacher and was drawing salary as such. As per record his date of appointment in Government Service was 14.03.1987 and the date of resignation was 31.03.2013, hence, Respondent No.1 was disqualified from contesting the elections. Consequently, the ECP vide Order dated 19.04.2017 held that the Petitioner had violated Article 63(1)(k) of the Constitution as well as Section 99(1A)(k)(l) of the ROPA of 1976. Therefore, the election of Respondent No.1 was declared null and void and the Notification withdrawn. Aggrieved, the Respondent No.1 challenged the aforesaid Order of the ECP by filing Writ Petition No.1687-P of 2017 before the learned Peshawar High Court, which has been allowed vide the impugned judgment dated 15.08.2017.

5. It is contended by the learned counsel for the Petitioner that it is a matter of official record with a presumption of truth attached therewith that Respondent No.1 was employed as a Primary School Teacher for that too more than two decades when he submitted his Nomination Papers for the

elections to the Provincial Assembly in May, 2013, hence, was obviously disqualified. The learned counsel further contended that Respondent No.1 was admittedly appointed as the Special Assistant to the Chief Minister, KPK and was thus entitled to draw salary. It is reiterated that in the Pay Slip of Respondent No.1 as an MPA/Special Assistant to the Chief Minister, Government of KPK, the same Personal Number is mentioned as in the Pay Slip as a Primary School Teacher as well as the fact that he was in the Government Service for more than two decades. The Respondent No.1 having received the salary for several years on the aforesaid Pay Slip cannot feign ignorance of its contents to deny his employment as a Primary School Teacher. Thus, leaving no manner of doubt the Respondent No.1 was employed as a Primary School Teacher when he submitted his Nomination Papers. It is added that the findings arrived at by the learned High Court by way of the impugned judgment dated 15.08.2017 that some other person, namely, Bakht Jehan son of Jehan Faraz, had misused the educational

testimonials of Respondent No.1 to obtain the said employment as a Primary School Teacher and the thumb impression on the Service Book reflecting the name of Respondent No.1 matches with the thumb impression of Bakht Jehan are based on an inquiry conducted by the Anti-Corruption Establishment of the Provincial Government wherein the Respondent No.1 was a Special Assistant to the Chief Minister. Such inquiry and its findings are thus not worthy of any credence nor could form the basis of any adjudication by the learned High Court in its Constitutional jurisdiction.

6. The learned counsel further contended that the findings of the learned High Court by way of the impugned judgment dated 15.08.2017 *qua* lack of jurisdiction of the ECP to de-notify Respondent No.1 is misconceived and against settled law. It is the case of the Petitioner that such powers are vested with the ECP under Article 218(3) of the Constitution and as has been held by this Court in the judgments reported as Mian Najeeb-

ud-Din Owasi and another v. Amir Yar Waran and others (PLD 2013 SC 482) and Workers' Party Pakistan through Akhtar Hussain, Advocate, General Secretary and 6 others v. Federation of Pakistan and 2 others (PLD 2012 SC 681).

By relying upon the aforesaid judgments, it was further contended that even otherwise, once it has been established on record that Respondent No.1 was not qualified to be a Member of the Provincial Assembly and has sneaked into the House through deliberate concealment of material facts and by making a false declaration, Respondent No.1 was disqualified under Articles 62(1)(f) and 63(1)(k) of the Constitution, this Court as well as the learned High Court are vested with the jurisdiction to pass appropriate orders under Articles 184(3), 187 and 199 of the Constitution, respectively to ensure that a disqualified person does not enter the Parliament or the Provincial Assembly. The learned counsel also contended that the learned High Court, even otherwise, has blatantly erred in law by assuming that the

provisions of Articles 62 and 63 of the Constitution do not apply to the Members of the Provincial Assembly. The said judgment, in this behalf, has totally ignored the provisions of Article 113 of the Constitution.

7. Sahibzada Naeem Bokhari, learned Sr. ASC for the private Respondent i.e. Respondent No.1 controverted the contentions raised on behalf of the Petitioner by contending that the ECP had no jurisdiction to pass an order de-notifying the Respondent No.1 and the same has been rightly set aside by the learned High Court by way of the impugned judgment. It is contended that with regard to an alleged pre-election disqualification, an objection could have been taken before the Returning Officer when the Nomination Papers were filed. Thereafter, an Election Petition could have been filed before the Election Tribunal constituted in terms of Article 225 of the Constitution. Other than the aforesaid remedies, the Petitioner could only have filed a writ of *quo warranto* before the learned High Court or this Court. In the instant

case, none of the aforesaid three courses of action was undertaken by the Petitioner. It is added that jurisdiction of the ECP with regard to the allegations raised by the Petitioner would cease upon the constitution of the Election Tribunal or 60 days after the elections were concluded and Respondent No.1 notified as a Returned Candidate. In the instant case, an application was filed before the ECP many years after the elections. It is added by the learned counsel that the judgments of this Court in which the ECP was directed to verify the eligibility of the Members of the Parliament are of no assistance to the Petitioner as in such cases the jurisdiction was exercised by this Court while the ECP only complied with the directions issued by the Court and was not exercising any independent power or authority.

8. Alternatively, the learned counsel contended that the conclusions have been drawn by the ECP without any evidentiary hearing and by ignoring the record. Thus, on one hand, the said Respondent No.1 was denied his Fundamental

Rights to a fair trial guaranteed by Article 10A read with Article 4 of the Constitution while on the other hand, the ECP has also ignored the relevant and material evidence on record. It is his case that when the allegations levelled against Respondent No.1 by way of a Press Conference held by the Petitioner alleging that Respondent No.1 was employed or had been employed as a Primary School Teacher, the Respondent No.1 on the very next day made an application to the Anti-Corruption Department, Government of KPK complaining that an offence of impersonation has been committed and somebody else by misusing the name and educational testimonials of Respondent No.1 had obtained employment as a Primary School Teacher. An inquiry was conducted which resulted in some startling revelation. It came to light that the thumb impression on the Service Book of the Primary School Teacher did not belong to Respondent No.1 but were of one Bakht Jehan as stood disclosed from the record of the National Database & Registration Authority (NADRA). It also became

apparent that the salary disbursed to the Primary School Teacher was recorded on a Register which did not show that any such salary had been personally received by Respondent No.1. Subsequently, the salary was disbursed through the National Bank of Pakistan (NBP). The record of the concerned Branch of NBP and the cheques utilized for drawing the money were sent to the Forensic Science Laboratory (F.S.L.) along with admitted signatures of Respondent No.1 and as per the Report of the Handwriting Expert of the F.S.L. the signatures in the Bank record and on the cheques were not that of Respondent No.1. Furthermore, as per the record, the said Primary School Teacher was 5 feet and 6 inches tall while the Respondent No.1 is over 6 feet. The aforesaid facts it was contended are self-evident which were not taken into consideration by the ECP while passing the order, which has been rightly set aside by way of the impugned judgment. The learned counsel added that more importantly, in presence of such facts and record it cannot in any event be

conclusively held that in fact it was the Respondent No.1 who was employed as a Primary School Teacher and his name and documents had not been misused by some other person, perhaps, the aforesaid Bakht Jehan. A conclusive finding, in this behalf, he added was not possible or permissible without recording of evidence. With regard to the Pay Slip regarding the salary drawn as an MPA and a Special Assistant to the Chief Minister, it was contended by the learned counsel that such Pay Slip was never given or supplied to Respondent No.1 and such salary was directly deposited in his account with the Bank of Khyber. Therefore, the Respondent No.1 had no knowledge that it was mentioned on his Pay Slip that he was an employee of the Government of KPK for the last two decades thus no adverse influence should be drawn against Respondent No.1.

9. The learned Additional Advocate General, KPK contended that as per the relevant record, more particularly, the evidence collected in the inquiry, it cannot be conclusively held that it was

the Respondent No.1 who was employed as a Primary School Teacher. The inquiry concluded, more particularly, on account of the material referred to above that in fact an offence of impersonation has been committed at the expense of the Respondent No.1 who cannot be penalized therefor being a victim.

10. Heard. Record perused.

11. By way of the impugned judgment dated 15.08.2017, a learned Division Bench of the Peshawar High Court, after referring to and reproducing in extenso various provisions of the Constitution and the ROPA of 1976, set aside the Order of the ECP, de-notifying Respondent No.1 and validated his elections as a Member of the Provincial Assembly of KPK. One of the pillars of the impugned judgment is that Articles 62 and 63 of the Constitution are applicable only to the Members of the Majlis-e-Shoora i.e. the Senate and the National Assembly and inapplicable to the Members of the Provincial Assemblies. Such finding of law has been recorded in paragraph 16 of the impugned judgment.

It is clear and obvious that the learned High Court has ventured to decide the *lis* before it by totally ignoring the provisions of Article 113 of the Constitution, which reads as follows:

"113. The qualifications and disqualifications for membership of the National Assembly set out in Articles 62 and 63 shall also apply for membership of a Provincial Assembly as if reference therein to "National Assembly" were a reference to "Provincial Assembly".

12. The aforesaid aspect of the matter obviously was not seriously contested either by the learned counsel for Respondent No.1 or by the learned Additional Advocate General, KPK. The impugned judgment appears to be anchored upon a rather shaky legal foundation.

13. The primary bone of contention between the parties was with regard to the jurisdiction of the ECP to pass an order of de-notifying a Returned Candidate several years after the elections. By referring to the various provisions of ROPA of 1976 especially Section 103AA(2) and the Constitution, more particularly, Article 225 of the Constitution, it has been held by way of the impugned judgment that a pre-election

disqualification or lack of qualification is to be adjudicated upon by various fora at various points of time. This aspect of the matter has very succinctly set forth by this Court in the judgment reported as Ch. Muhammad Ashraf Warraich and another v. Muhammad Nasir Cheema and others (2016 SCMR 998) in the following terms:

“15. It may be observed that candidature of a candidate could be challenged under the RoPA, 1976 at three different stages, right from the day of nomination till 45 days after the declaration of the official result. First stage is pre-election challenge at the time of scrutiny of nomination papers. Challenge to the candidature could be thrown by any of the contesting candidate, their agents, proposer, seconder, electors by filing objections against any of the candidate before the Returning Officer, on the grounds enumerated in clauses (a) to (d) to subsection (3) and subsection (5A) of section 14 of the RoPA. Any decision rejecting or accepting nomination paper, passed by the Returning Officer, is subject to right of appeal before the Tribunal comprised of not less than two and not more than three High Court Judges. Appeal is required to be decided summarily within prescribed time, if time lapses, appeal by virtue of deeming provision subsection (6) thereof is deemed to be rejected. Second stage is post-election challenge to the election of returned candidate before the Election Commission of Pakistan, under section 103AA of the RoPA, 1976. Election Commission, after such summary enquiry as to grave illegality or violation of the provisions of RoPA, 1976 or the rules framed there under, may declare

the poll in any constituency as void and may call upon constituency to elect member, but such jurisdiction to declare the poll void, could be exercised before the expiry of sixty (60) days after the publication of result of the election (per section 42 of RoPA), where after, the Election Commission, becomes functus officio, and the returned candidate is deemed to be elected, but subject to the decision of Election Tribunal, constituted Section 57 of RoPA. Provided such challenge is thrown, by any of the contesting candidate. Third opportunity to challenge the election of the returned candidate becomes available post-election, to be made by any candidate of the subject constituency, before the Election Tribunal constituted under Section 57 *ibid*, within forty five (45) days from the date of publication in the official gazette of the name of the returned candidate, of the subject constituency in the manner provided under the RoPA, 1976 itself."

(emphasis supplied)

14. A similar view was also expressed by this Court in the judgments reported as Bartha Ram v. Lala Mehar Lal Bheel and another (1995 SCMR 684) and Syed Fakhar Imam v. Chief Election Commission of Pakistan and others (PLD 2008 SC 730). However, it is the contention of the learned counsel for the Petitioner that in the afore-mentioned judgments of this Court has not been factored in the provisions of Article 218(3) of the Constitution. It is his case that the said Article 218(3) of the Constitution needs to be

interpreted dynamically so as to recognize and acknowledge the conferment of jurisdiction upon the ECP to fulfill its Constitutional mandate of ensuring free and fair elections irrespective of any limitation of a timeframe imposed by any sub-constitutional legislation, including ROPA of 1976, more particularly, Section 103 AA (2) thereof. It is also added that Article 225 of the Constitution must be interpreted and read in harmony with Article 218(3) of the Constitution.

15. Reference, in this behalf, was made to the observations made by this Court in the case reported as Muhammad Rizwan Gill v. Nadia Aziz and others (PLD 2010 SC 828) which is reproduced hereunder for ease of reference:

"14. ... a demanding duty stood cast on the Election Commission and on all others performing functions under various election laws to ensure not only that the elections were fair and honest; that no corrupt practices were practised in the elections but also that the individuals who had been declared disqualified to enter the Legislative institutions, were not allowed to break into the said houses and further that to discharge the said onerous obligations, the said functionaries had not been left at the mercy of the objectors or even of the rival candidates and that they could act in the matter even suo motu. Needless to

add that the Election Tribunals envisaged by Article 225 of the Constitution and performing functions under the said Act of 1976 and even this Court while acting as the Appellate Forum under section 67 of the Act of 1976, also stand charged with the same duties."

16. The learned counsel also referred to the judgment of this Court reported as Mian Najeeb-ud-Din Owaisi and another (*supra*) wherein it was observed as follows:

"4. ... if a Parliamentarian before or after the election is disqualified on this account, he would have no right to hold the Office as a Parliamentarian/Member of the National/Provincial Assembly or the Senate and in such situation, it is obligatory upon the ECP to proceed against such person by de-notify him. ..."

17. The question of availability of the jurisdiction with the ECP to decide the complaint and de-notify a Returned Candidate after the lapse of a period of sixty days provided in Section 103AA(2) of ROPA of 1976, is not without difficulty. The contentions of the learned counsel for the Petitioner cannot be simply brushed aside as frivolous. However, this aspect of the matter as canvassed by the learned counsel for the Petitioner needs not to be adjudicated upon in the instant case.

18. However, there can be no escape from the fact that if a person suffering from a pre-election disqualification or lack of qualification slips through the cracks and no objection is raised before the Returning Officer, no complaint is made to the ECP in terms of Section 103AA of ROPA of 1976 within the time specified therefor and no Election Petition filed before the learned Election Tribunal then the inherent disqualification of such person is obviously not cured nor can it be said that by mere absence of a challenge he acquires the qualification by lapse of time.

In such circumstances, where unqualified or disqualified person manages to escape through the net and trespass into the Majlis-e-Shoora or the Provincial Assembly, the Constitutional jurisdiction of the learned High Court under Article 199 of the Constitution and of this Court under Article 184(3) of the Constitution can always be invoked. Such powers were exercised by a five Member Bench of this Court in the case reported as Imran Ahmad Khan Niazi v. Mian Muhammad Nawaz Sharif, Prime Minister of Pakistan/Member National Assembly, Prime

Minister's House, Islamabad and 9 others (PLD 2017

SC 265) and in this behalf, it was observed as follows:

"86. However, it is now settled law and has been so settled through a series of judgments of this Court including Farzand Ali v. Province of West Pakistan (PLD 1970 SC 98) and Muhammad Azhar Siddiqui v. Federation of Pakistan and others (PLD 2012 SC 774) that a Constitution Petition in the nature of a writ of *quo warranto* is maintainable against the Member of the Majlis-e-Shoora, if he is disqualified or did not possess or has lost his qualification, in this behalf. Such Constitutional Petitions can always be filed before the learned High Court under Article 199 of the Constitution and before this Court under Article 184(3) of the Constitution, as has been filed in the instant case."

19. A similar view was earlier expressed by this Court in the judgment reported as Nawabzada Iftikhar Ahmad Khan Bar v. Chief Election Commissioner Islamabad and others (PLD 2010 SC 817). The jurisdiction in the nature of *quo warranto* was also exercised by this Court in the case reported as Muhammad Hanif Abbasi v. Jahangir Khan Tareen and others (PLD 2018 SC 114) and a sitting Member of the National Assembly was declared disqualified in terms of Article 62(1)(f) of the Constitution read with Section 99 (1)(f) of ROPA, 1976 and de-notified.

Furthermore, in the case reported as Muhammad Hanif Abbasi v. Imran Khan Niazi and others (PLD 2018 SC 189) although this Court assumed similar jurisdiction under Article 184(3) of the Constitution against a Member of the National Assembly, however, these proceedings eventually failed.

20. We are aware that in the instant case, the *lis* has reached this Court not by invoking Article 184(3) of the Constitution (though the learned High Court was exercising its Constitutional jurisdiction under Article 199). Be that as it may, this Court is not precluded from converting one type of proceedings into another type, including the existing proceedings under Article 185(3) of the Constitution and exercising our jurisdiction under Article 184(3) of the Constitution so as to adjudicate upon disqualification or lack of qualification of Respondent No.1. This Court in the judgment reported as Muhammad Akram v. DCO, Rahim Yar Khan and others (2017 SCMR 56) held as follows:

“7. The Courts are sanctuaries of justice, and in exercise of authority to do *ex debito justitiae*, that is to say remedy a wrong and to suppress a mischief to

which a litigant is entitled. No fetters or bar could be placed on the High Court and or this court to convert and treat one type of proceeding into another type and proceed to decide the matter either itself provided it has jurisdiction over the lis before it in exercise of another jurisdiction vested in the very court or may remit the lis to the competent authority/forum or court for decision on merits. Courts have been treating and or converting appeal into revisions and vice versa and Constitution Petitions into appeal or revision and vice versa."

The said view was further fortified by the judgment of this Court rendered in the case of Muhammad Jibran Nasir and others Vs. The State and others (Criminal Appeals No.1-K to 3-K of 2018 converted into Suo Motu Case No.01 of 2018), wherein it was held that:

"4. ... Apart from that the jurisdiction of this Court under Article 184(3) of the Constitution is an independent original jurisdiction which is not affected by pendency of any matter on the same subject matter before any other court or forum or even by a prior decision of the same issue by any other court or forum below and a reference in this respect may be made to the cases of Muhammad Yasin v. Federation of Pakistan through Secretary, Establishment Division, Islamabad and others (PLD 2012 SC 132), Miss Benazir Bhutto v. Federation of Pakistan and others (PLD 1988 SC 416), Mian Muhammad Nawaz Sharif v. President of Pakistan and others (PLD 1993 SC 473), Suo Motu Case No. 10 of 2009 (2010 SCMR 885), Shahid Orakzai v. Pakistan through Secretary Law, Ministry of Law,

Islamabad (PLD 2011 SC 365), Khawaja Muhammad Asif v. Federation of Pakistan and others (PLD 2014 SC 206) and Jamshoro Joint Venture Ltd. and others v. Khawaja Muhammad Asif and others (2014 SCMR 1858). For these reasons we have converted these appeals into a Suo Motu Case under Article 184(3) of the Constitution.”
(emphasis provided to simple underlining)

21. An overview of the Constitution of the Islamic Republic of Pakistan, 1973 would reveal that the most salient of its salient features is that power is to be exercised on behalf of the people of Pakistan by their chosen representatives. It is the right of the people of Pakistan to be governed by their chosen representatives which is the most fundamental of the Fundamental Right guaranteed under the Constitution. Reference, in this behalf, may be made to the judgment of this Court reported as Imran Ahmad Khan Niazi (*supra*), wherein it was observed as follows:

“7. The foundation of our Constitutional dispensation as is evident from the Constitutional provisions, more particularly, the opening lines of its Preamble is that the Sovereignty vests in Almighty Allah and authority is to be exercised by the people of Pakistan through their chosen representatives. This is the heart and soul of our Constitution, which is also reflected in Article 17, the Fundamental Right of

“Freedom of association”. It is an unalienable right of the people of Pakistan to be governed by and under the authority of their chosen representatives. A right on which the entire edifice of our Constitutional and Legal Framework rests. This aspect of the matter in the context of the jurisdiction of the Court under Article 184(3) of the Constitution has been considered in various judgments of this Court, including the judgment, reported as Air Marshal (Retd) Muhammad Asghar Khan v. General (Retd) Mirza Aslam Baig, Former Chief of Army Staff and others (PLD 2013 SC 1), wherein it has been observed, *inter alia*, as follows:-

“102. Above are the reasons for our short order of even date whereby the instant petition was disposed of as under:-

“The Constitution of the Islamic Republic of Pakistan commands that it is the will of the people of Pakistan to establish an order wherein the State shall exercise its powers and authority through the chosen representatives of the people, wherein the principles of democracy, freedom, equality, etc., shall be fully observed, so that the people of Pakistan may prosper and attain their rightful and honoured place amongst the nations of the world, and make their full contribution towards international peace and progress and happiness of humanity. People of Pakistan had been struggling to establish a parliamentary and democratic order since long within the framework of the Constitution and now they foresee a strong system which is established by the passage of time without any threat and which is subject to the constitution and rule of law.

2. The essence of this Human Rights case is based on the fundamental right of citizens enshrined in Article 17 of the Constitution. It raises an important question of public importance to enforce the fundamental rights, inter alia, noted hereinabove, therefore, in accordance with the provisions of Article 184(3) of the Constitution, jurisdiction has been assumed and exercised to declare, for the reasons to be recorded later, as under:-

(1) That citizens of Pakistan as a matter of right are free to elect their representatives in an election process being conducted honestly, justly, fairly and in accordance with law. ..."

22. The qualifications and disqualifications of the persons entitled to be Members of the Majlis-e-Shoora or a Provincial Assembly and thereby act as chosen representative of the people of Pakistan have been set forth in the Constitution in Articles 62 and 63 thereof as well as in sub-constitutional legislation, including ROPA of 1976. The question that floats to the surface is where a person, who is either not qualified or disqualified under the Constitution and the law from being a Member of Majlis-e-Shoora or a

Provincial Assembly sneaks into such House, would the Constitutional right of the people of Pakistan be infringed and violence down to the very spirit of the Constitution?

23. This Court in its judgment reported as Malik Iqbal Ahmad Langrial v. Jamshed Alam and others (PLD 2013 SC 179) held as follows:

"10. ... In the case of Muddasar Qayyum Nahra v. Ch. Bilal Ijaz (2011 SCMR 80) this Court had upheld the findings of Election Tribunal, Punjab whereby it was held that a person who indulges into using unfair means in procuring his educational qualifications does not deserve to claim to be an honest, righteous or Ameen person so that he be assigned the high responsibilities of performing national functions of running the affairs of the country. The spirit with which the words sagacious, righteous, non profligate, honest and Ameen have been used by the Constitution of Islamic Republic of Pakistan, 1973 for the eligibility of the candidates contesting the elections of Members National or Provincial Assembly cannot be allowed to be frustrated if persons who secure their educational documents through unfair means and are found guilty of such a condemnable act by the competent authority are allowed to be given entry into the doors of National or Provincial Assemblies of our country. The respondent (therein) is thus not worthy of credence and cannot be allowed to be entrusted with State responsibilities of Law Making; to be in-charge of the National Exchequer or be eligible to represent the people of Pakistan."

(emphasis supplied)

The aforesaid quotation was also reproduced with approval in the case reported as Allah Dino Khan Bhayo v. Election Commission of Pakistan, Islamabad and others (2013 SCMR 1655). It was reiterated in the case reported as Abdul Ghafoor Lehri v. Returning Officer, PB-29, Naseerabad-II and others (2013 SCMR 1271) and was re-emphasized in the case reported as Syed Mehmood Akhtar Naqvi v. Federation of Pakistan through Secretary Law and others (PLD 2012 SC 1089).

24. This Court in the case reported as Nawabzada Iftikhar Ahmad Khan Bar (*supra*) held as follows:

“14. The Parliament of any country is one of its noblest, honourable and important institutions making not only the policies and the laws for the nation but in fact shaping and carving its very destiny. And here is a man who being constitutionally and legally debarred from being its member, managed to sneak into it by making a false statement on oath and by using bogus, fake and forged documents polluting the piety of this pious body. His said conduct demonstrates not only his callous contempt for the basic norms of honesty, integrity and even for his own oath but also undermines the sanctity, the dignity and the majesty of the said august House. He is guilty, inter alia, of impersonation --- posing to be what he was not i.e. a graduate. He is also guilty of having been a party to the making of false

documents and then dishonestly using them for his benefit knowing them to be false. He is further guilty of cheating --- cheating not only his own constituents but the nation at large."

(emphasis supplied)

The aforesaid observations were reiterated in the case reported as Muhammad Rizwan Gill (*supra*).

25. In the case reported as Muhammad Khan Junejo v. Federation of Pakistan through Secretary, M/o Law and Justice and Parliamentary Affairs and others (2013 SCRM 1328), it was held as follows:

"7. There is no doubt that the petitioner had submitted fake and bogus documents in order to become a Member of the Parliament, as such, he has not only played a fraud on the electors of his constituency but he has also cheated the Returning Officer to believe him to be graduate on the basis of fake and forged documents and such a person cannot be trusted to lead the nation as a legislature. ..."

26. In the case reported as Muhammad Hanif Abbasi (*supra*), it was held as under:

"113. Considering applicable legal criteria, it is a fundamental right of people of Pakistan that its public representatives discharge their offices in public interest and not for their personal gain. Such public officers are fiduciaries discharging a trust vested in them by the people of Pakistan for which office the attributes, *inter alia*, of probity, honesty, integrity and trustworthiness are constitutional requirements. The fulfillment of these conditions by the decision makers in

Parliament and in government is essential for the existence and progress of a democratic and law based order in the polity which is a basic feature of our Constitution. ..."

27. An overview of the afore-quoted provisions of the Constitution, as interpreted by this Court through its various juridical pronouncements referred to and reproduced herein above leads to an irresistible and irrefutable conclusion that our Constitutional dispensation is erected upon the democratic principle that the authority vest with the people of Pakistan can only be exercised through their chosen representatives. Such authority, including the power of law making and control over the public exchequer is to be conferred upon the chosen representatives by way of trust and the trust can only be reposed upon those who are worthy thereof.

28. In the above context, the qualification and disqualification of persons, entitled to act as the chosen representatives of the people and to act on their behalf as Members of the Majlis-e-Shoora and the Provincial Assemblies are set forth in the Constitution itself, more particularly, in Articles 62

and 63 thereof as well as other sub-Constitutional legislation. An elaborate process and procedure has been prescribed by law to filter out those who are disqualified or not qualified to contest the elections to the Majlis-e-Shoora and the Provincial Assemblies as is apparent primarily from the provisions of ROPA of 1976. With regard to pre-election disqualification, such process includes objections before the Returning Officer at the time of filing of the Nomination Papers, an application to the ECP under Section 103-A of ROPA of 1976. And subsequently, an Election Petition before the Election Tribunal established under Article 225 of the Constitution. If no objection is raised or challenge thrown or relevant proceedings initiated before the appropriate forum at the appropriate time, the disqualification of a candidate is not cured nor an abscent qualification acquired.

29. Consequently, where a disqualified or unqualified person slips through the cracks sneaks into the Majlis-e-Shoora or the Provincial Assemblies, his presence in the said House can always be challenged through exercise of the Constitutional

jurisdiction of this Court under Article 184(3) of the Constitution and before the learned High Court under Article 199 of the Constitution by way of a Writ in the nature of *quo warranto*. Even where a matter comes before this Court regarding the qualification or disqualification of a Member of the Majlis-e-Shoora or the Provincial Assemblies otherwise by way of proceedings other than under Article 184(3) of the Constitution, this Court not only has the jurisdiction to convert such proceedings to proceedings under Article 184(3) of the Constitution but is bound to do so, as to permit an unqualified or disqualified person to continue to defile and desecrate the Majlis-e-Shoora or the Provincial Assemblies and masculate as a chosen representative of the people would amount to frustrating the Constitutional provisions. In such an eventuality, if this Court looks other way, it would perhaps constitute a failure to protect and preserve the Constitution.

Thus, we find ourselves unable to decline the prayer of the Petitioner to examine the merits of the case so as to determine on the basis of the material

available on record whether Respondent No.1 was qualified or disqualified from being a Member of the Provincial Assembly, KPK. Any refusal on our part to avoid or evade such an exercise would constitutes a departure from the law as laid down by this Court and perhaps would even amount to a betrayal of the Constitution. Hence, we convert these proceedings into Suo Motu proceedings under Article 184(3) of the Constitution.

30. It is self-evident from the record that one Abdul Munim son of Habib-ur-Rehman, having CNIC No.15505-0222605-3 was employed as a Primary School Teacher in Kohistan. The said Primary School Teacher for the purposes of payment of salary was awarded a Personal Number i.e. 00335754. It is also common ground between the parties and as is also evident from the record that the said Primary School Teacher retired from service with effect from 31.03.2013. It is not disputed between the parties that Respondent No.1's CNIC Number is 15505-0222605-3. In the above backdrop, it is the case of the Petitioner that in fact it is the Respondent No.1

who obtained employment as a Primary School Teacher in the year 1987 and continued to be in service till 31.03.2013 as a ghost employee, hence, he was not qualified to contest the elections held in May, 2013 or be a Member of the Provincial Assembly. On the other hand, it is the case of Respondent No.1 that by impersonating and using the Name, CNIC Number and perhaps his educational testimonials some one else obtained employment as a Primary School Teacher in Kohistan without the knowledge of Respondent No.1.

31. There is nothing on record to suggest nor it is the case of the either party that Respondent No.1 ever worked as a School Teacher and personally drew salary. In fact, there is no salary record, in this behalf, which could be directly connected to Respondent No.1. The Pay Roll Register and the Bank Account in Kohistan could not conclusively connect with Respondent No.1.

32. However, eventually the Respondent No.1 was appointed as a Special Assistant to the Chief Minister, KPK and in such capacity entitled to salary

from the Government of KPK. A computerized Pay Slip was generated, which is available on record that bears the same Personal Number and CNIC Number as that of Abdul Munim as the Primary School Teacher in Kohistan. More importantly, it clearly exhibits his length of service as about 20 years when coincide with the employment of Abdul Munim, as a Primary School Teacher. Respondent No.1 received such salary as Special Assistant without hesitation or protest, leaving no manner of any doubt that he was aware that he as per record was employed as a Primary School Teacher and such employment was obviously with his knowledge, consent and connivance.

33. Confronted with the aforesaid situation, the learned counsel for Respondent No.1 initially took up a plea that the Pay Slips were never communicated to Respondent No.1, hence, he had no knowledge of its incriminating contents. This Court summoned the District Education Officer, Kohistan, Accounts Officer & Assistant Accounts Officer, A.G., Office, KPK and A.C.O., Dasso Kohistan, who in unequivocal terms

stated that the Pay Slips as Special Assistant were in fact communicated to Respondent No.1 in the normal course. The aforesaid is reflected in the Order of this Court dated 22.02.2018. Finding it impossible to deny the service of the Pay Slips and obvious knowledge of its contents a rather belated attempt was made to set up a plea that Respondent No.1 was unable to comprehend the true import and meaning of the contents of the Pay Slips. Respondent No.1 was a Member of the Provincial Assembly and was a Special Assistant to the Chief Minister, KPK, therefore, it is, difficult to accept this after thought that he was unable to understand the contents of the Pay Slip. It appears that upon being appointed as a Special Assistant to the Chief Minister, KPK, he was entitled to draw salary from the Government of KPK. It appears that his Name, Parentage and CNIC Number was fed into the system, a Pay Slip was generated with the particulars and the same Personal Number and CNIC Number as that of the Primary School Teacher with the length of service and availability of the General Provident Fund (GPF)

clearly mentioned. The Respondent No.1 was served with the said Pay Slips during his tenure as a Special Assistant to the Chief Minister. He accepts the salary without making any attempt for rectification of the Pay Slip, thus, conclusively establishing that he, the Respondent No.1, was in fact employed as a Primary School Teacher at Kohistan since 1987 though he was a ghost employee. In the circumstances, a period of two years had not lapsed on 31.03.2013 the date of resignation. When he contested the elections held on May, 2013 and submitted his Nomination Papers, therefore, he was disqualified in terms of Article 63(1)(k) of the Constitution and further having deliberately concealed material facts in his Nomination Papers by failing to disclose that he was in fact disqualified under Section 63(1)(k) of the Constitution and being a ghost employee he can hardly be considered to be honest in terms of Article 63(1)(f) of the Constitution, hence, was not qualified in view of the aforesaid provisions of law. Reference, in this behalf, may be made to the judgment of this Court reported as Abdul Ghafoor Lehri (*supra*).

34. Consequently, it is held that Respondent No.1 was not qualified to be and disqualified from being a Member of the Provincial Assembly of KPK at all material times, hence, was liable to be de-notified as such by the ECP. Furthermore, he was obliged to return all the benefits i.e. salary and other allowances received by him as a Member of the Provincial Assembly and also criminal proceedings as provided under the law are also directed to be taken against him. Therefore, the impugned judgment of the learned High Court dated 15.08.2017 needs to be set aside and the Order of de-notification issued by the ECP revived.

The aforesaid are the reasons of our short Order dated 23.02.2018, which are reproduced hereunder for ease of reference:

" Barrister Qasim Wadood, learned Additional Advocate General, KPK, has filed in Court four sealed envelopes along with a Register containing the documents which were sent to the Forensic Science Laboratory for comparison of signatures and thumb impression of the private Respondent, namely, Abdul Munim. The said documents are taken on record.

2. The Bench will reassemble today after perusal of the said documents.

Late Diary:

3. For the reasons to be recorded later, this Civil Petition is converted into Appeal and the same is allowed. The impugned judgment dated 15.08.2017 of the learned Peshawar High Court, Peshawar, passed in Writ Petition No.1687-P of 2017, is set aside. As a consequence whereof, the Order dated 19.04.2017 passed by the Election Commission of Pakistan declaring election of Respondent No.1 as a Member of the Provincial Assembly, KPK from PK-88, Shangla-II as null and void and withdrawing his Notification as a Returned Candidate is revived. The salary and other allowances be recovered and criminal proceedings as provided under the law are also directed to be taken against him."

35. The original record made available in a sealed envelope by the learned Additional Advocate General, KPK be returned to him.

Judge

Judge

Islamabad, the
23rd February, 2018
'APPROVED FOR REPORTING'
*Mahtab H. Sheikh/**

Judge