

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Iqbal Hameedur Rahman
Mr. Justice Mushir Alam

Civil Petition No.3460 of 2015

Against order dated 09.11.2015 of Lahore High Court, Multan Bench, passed in Writ Petition No.16621 of 2015.

Munawar Hussain Bukhari

Petitioner(s)

VERSUS

Appellate Authority/Tribunal, Alipur District
Muzaffargarh & others

Respondent(s)

For the Petitioner(s): Syed Shabbar Raza Rizvi, ASC

For Respondent No.3: Mian Ahmed Mehmood, ASC
Ch. Akhtar Ali, AOR

Date of Hearing: 25.03.2016

ORDER

Mushir Alam, J- The petitioner challenged the candidature of Abu Bakar, respondent No.3 herein, from his being elected as a General Councilor, Ward No.1, Municipal Committee Alipur, Tehsil Alipur, District Muzaffargarh on twofold grounds. Firstly, that he was an employee of Utility Stores Corporation of Pakistan [*to be referred as **the Corporation***], and a period of five years has not lapsed since his dismissal from service on 26.12.2013 and secondly that he is involved in criminal cases and has been declared absconder from the Court of law and is thus disqualified to contest the elections under Section 27 of the Punjab Local Government Act, 2013 [*hereinafter to be referred as **'the Act, 2013'***]. The Returning Officer, vide order dated 08.10.2015 dismissed the objections raised by the petitioner and accepted the nomination papers filed by respondent No.3 to contest local bodies election. This order was maintained by the Appellate Authority/Tribunal, with the observations that "*the respondent No.2/candidate was not a regular employee of*

Utility Stores Corporation of Pakistan (Private) Limited. Moreover, the appellant did fail to produce any record regarding conviction passed by any court of law against the respondent No.2/candidate.”, vide order dated 04.11.2015. Writ Petition was also dismissed, vide impugned order dated 09.11.2015 and orders passed by the lower fora were maintained on the grounds that “the respondent No.3 is not a government servant/employee neither falls in the definition of a public servant and that the documents attached by the petitioner do not show, in any manner whatsoever, that respondent No.3 has been convicted by any competent Court. Hence, the present petition.

2. Learned counsel for the Petitioner at the very outset does not press the disqualification of the respondent No.3 on the last mentioned ground that he is involved in criminal cases and has been declared absconder from the Court of law, as he has not been able to procure any material to prove any conviction from the Court of competent jurisdiction as postulated under clauses (i) and (j) of sub section (2) of section 27 of the Act, 2013.

3. Heard learned counsel for the parties and perused the record. It is not disputed that respondent No.3 was an employee of the Corporation, which is admittedly owned and controlled by the Government of Pakistan. The Act, 2013 through clauses mentioned under sub-section (2) of Section 27 thereof not only enumerates disqualifications but also period of ineligibility on account of such disqualification for the candidates and elected members. Relevant for the purposes of present controversy are the disqualification enlisted in clauses (e), (g) & (h) of subsection (2) of Section 27 of the Act, 2013, which are reproduced as under:-

“(2) A person shall be disqualified from being elected or chosen as, and from being, an elected member of a local government, if he—

(e) is in the service of any statutory body or a body which is owned or controlled by the Government or a Provincial Government or the Federal Government or a local government or, in which any of such

Government or local government has a controlling share or interest, except the holders of elected public office and part-time officials remunerated either by salary or fee; provided that in case of a person who has resigned or retired from any such service, a period of not less than two years has elapsed since his resignation or retirement;

(g) has been dismissed from public service on the grounds of misconduct unless a period of five years has elapsed since his dismissal;

(h) has been removed or compulsorily retired from public service on the grounds of misconduct unless a period of three years has elapsed since his removal or compulsory retirement; (Underlined to add emphasis)

4. Learned counsel for respondent No.3 has not disputed the fact that the Corporation is a “body” corporate registered under Companies Ordinance 1984, which is owned and controlled by the Federal Government, and as per “*A Functional and Legal Classification of Corporations, Autonomous Bodies and Attached Departments*” issued by the National Commission for Government Reforms, Prime Minister’s Secretariat, Government of Pakistan, (placed on record through CMA#917/16). The Corporation, under the Ministry of Industries, Production & Special Initiatives, Government of Pakistan, find mentioned on page 57 at Serial No.7 thereof, therefore, there is no need to further dilate upon the status of the Corporation. Admittedly, the respondent No.3 was employed in the Corporation as a Record Keeper (BS-9) on contract basis for a period of one year, vide appointment letter dated 21.01.2013. It is also not denied that the respondent was found guilty of “*misconduct*” (*absent from duty, disobedience, willful negligence, inefficiency, dereliction in duty*) and the competent authority in terms of USC Service Rules inflicted major penalty of dismissal from service upon him with immediate effect, vide order dated 26.12.2013.

5. It may be observed that disqualification of the nature as prescribed in terms of clauses (a) to (j) to sub

section (2) of Section 27 of the Act of 2013, more particularly, in terms of clause (e), (g) and (h) *ibid* subject matter of present controversy are not something novel or new to the election laws, somewhat similar disqualification in one or the other form find mentioned in various election laws, right from provisions contained under Article 5(I)(a) of the Elective Bodies (Disqualification) Order, 1959 and under the present constitutional dispensation in terms of Clauses (i), (j) and (k) of sub-Article (1) of Article 63 of the Constitution of Islamic Republic of Pakistan, 1973, Clauses (i), (j) and (k) of subsection (1A) of Section 99 of the Representation of People Act, 1976 and Clause (g) and (h) of the Punjab Local Government Ordinance, 1979 since repealed through present Act of 2013 prescribe similar disqualification for the candidates and elected members of either house of the Parliament/Assembly and or Local Bodies.

6. In order to appreciate the rival contentions of the learned ASC for the parties, it would be appropriate to define "*Public Service*" as used in clauses (g) and (h) of subsection (2) of Section 27 *ibid*. "*Public Service*" has not been defined under the *Act of 2013*. In Black's Law Dictionary (sixth Edition year 1999) "*Public Service*" is defined as follows:

"A term applied to the objects and enterprises of certain kinds of corporation, which specially serve the needs of the general public or conduce to the comfort convenience of an entire community, such as railroad, gas, water, and electric light companies; and companies furnishing public transportation. A public service or quasi public corporation is one private in its ownership, but which has an appropriate franchise from the state to provide for a necessity or convenience of the general public, incapable of being furnished by private competitive business, and dependent for its exercise on eminent domain or governmental agency. It is one of a large class of private corporations which on account of special franchises conferred on them owe a duty to the public which they may be compelled to perform".

And the "*Public Service Corporation*" is defined therein as "*a utility company privately owned but regulated by the government. It may sell gas, water or electricity but its rates are established by the State*". It is not disputed that the *Corporation*, is fully owned and controlled by the Federal

Government as discussed in proceeding paragraph 3, above. *The Corporation*, through network of its utility stores all across Pakistan, provides provisions stores at subsidies rates, to the general public. Service of such bodies, may it be statutory corporate or otherwise owned and controlled by the Government or local government or where any of such governments has a controlling share or interest is "*Public Service*". Even otherwise, "*Service of Corporation*" has been declared to be service of Pakistan, under section 5 of the *Corporation Employees (Special Powers) Ordinance 1978 (PLD (CS) 75)*. Merely because, a person is in '*service of corporation*' or merely for the reason that any service in terms of Article 160 of the Constitution, 1973 is declared to be service of Pakistan, would not confer such person with the status of civil servant, within the contemplation of *Civil Servant Act, 1973*. For the purposes of attracting disqualification under clause (e) of subsection (2) of section 27 *ibid*, it is to be seen that the candidate or the elected member of the local body is in the service of "*statutory body*" or "*body*", which is owned and controlled by or that controlling share or interest therein is of Federal, Provincial or Local Government. Thus the service of a "*statutory body*" or "*body*" of the kind mentioned in clause (e) of provision noted herein is undoubtedly "*Public Service*" within the contemplation of clause (g), (h) and (i) of the subsection (2) of section 27 *ibid*. The term '*in the Service of any statutory body or a body which is owned or controlled by the Government or a Provincial Government or a local government or, in which any of such Government or Local government has a controlling share or interest*' is a phrase similar to phrase "*in service of Pakistan or of any statutory body or any body which is owned or controlled by the Federal, Provincial Government or Local Government*". Per clauses (i), (j) and (k) of sub-Article (1) of Article 63 of the Constitution of Pakistan, 1973 such phrase is further qualified with "*or in which the Government has a controlling share or interest*". This Court in the case of *Muhammad Mubin-us-Salam and others v. Federation of Pakistan* (PLD 2006 S.C 602) has held that "*Civil*

Servant is included in the definition of Service of Pakistan, the vice versa is not true". Likewise a person in the service of "statutory body" or "body" of the kind mentioned in clause (e) of section 27 (2) *ibid*; performs "public service" and despite falling within the class of employees in service of Pakistan is not a "civil servant" within the purview of section 2 (a) of *Civil Servants Act, 1973* and or section 2 (a) of the *Services Tribunal Act, 1973*. Any person, who was under the employment of a *statutory body* or *body* as discussed above and who has been removed from "Public Service" on the ground of "misconduct", comes within the mischief of clause (g) of subsection (2) of section 27 *ibid* and is disqualified from being elected or chosen as member of local government unless a period of five years has lapsed from the date of such dismissal. Admittedly, Respondent No.3 was dismissed from service of *the Corporation* on 26.12.2013. He filed Nomination papers for the general election of local body scheduled on 2.12.15 on the date of filing Nomination papers period of five years had not lapsed from the date of his dismissal from service, and still period of embargo of such disqualification clinches to the Respondent No.3 from being a candidate and or member of Local Government.

7. As noted above learned Appellate Authority, dismissed the appeal solely on the ground that the Respondent No.3 "was not a regular employee of Utility Stores Corporation of Pakistan" and the learned Judge in Chambers in the High Court dismissed the Writ Petition observing that the "Respondent No.3 was an employee of a public company, in any case is not a government servant/employee neither fall in the definition of public servant". Disqualification for a period of two years, five years and three years respectively from the date of resignation, dismissal, removal or compulsorily retirement from service of a person in the service of *the Corporation* as enumerated in clauses (e), (g) and (h) of section 27 (2) applies equally to the persons in the service of Pakistan, which includes civil servants and so also to all persons in "service of any Statutory body" or "body" of the

kind mentioned in clause (e) of subsection (2) *ibid*. Only exception carved out is person who is "holders of public office and part time officials remunerated either by salary or fee". Respondent No.3 does not fall within the excepted category. The provision under discussion also does not make any distinction between the regular or contractual employee of the *statutory body* or *body* of the kind under discussion.

8. In the case of Muhammad Nasir Turyali v. Ghulam Sarwar Khan (PLD 2005 Supreme Court 570), wherein the appellant was appointed as a *Management Trainee* in a company owned by the Federal Government, duly elected and such election was successfully challenged and maintained up to this Court. Para 9 thereof, specifically dealing with the nature of disqualification as urged in the case in hand is reproduced as under:-

"The Expressions "service of any statutory body or any body which is owned or controlled by the Government or in which the Government has a controlling share or interest" should not be confused with "Civil Service" or a "Civil Servant". It is not circumscribed by any concept of salary or fee. It connotes any service, post or office in the statutory body regulated by the Rules or Regulations framed by the competent authority. The only rider is that the said statutory body should either be owned or controlled by the Government. It is nobody's case that the Company is not owned and controlled by the Federal Government. Appellant Muhammad Naseem Turyali was appointed as Management Trainee and he was in the service of the Company which was owned by the Federal Government and thus he was squarely hit by Article 63(1)(e) and (k) of the Constitution of Islamic Republic of Pakistan"

9. Plea of "*contractual employment*" , as urged by the Respondent No.3 herein, was considered by a Larger Bench (5 members) of this Court in the case of Abida Hussain v. Tribunal for N.A. 69 (PLD 1994 S.C 60) and while interpreting Section 99 of Representation of People Act, 1976 read with Articles 63(1), 260(1) & 240 of the Constitution of Islamic Republic of Pakistan, 1973 it maintained the disqualification as a period of two years having not passed since the petitioner therein relinquished the charge of her post as an Ambassador, which was a contractual appointment for a period of two years. It was held that irrespective the person

was not a civil servant within the meaning of Civil Servants Act would not put him beyond the pale of the definition of service of Pakistan.

10. In another case cited as Imtiaz Ahmed Lali v. Ghulam Muhammad Ali (PLD 2007 Supreme Court 369), the appellant therein, was dismissed from Police Service on the ground of misconduct; challenge to his nomination papers were, sustained by the *fora* below, however, the High Court allowed him to contest the election. Post election challenge made through election petition, was sustained and it was held that *"dismissal from service on the ground of misconduct is self acquired and cannot be removed by afflux of time"*. In the case of Waqar Hussain Shah v. Returning Officer, Union Council No.31 (2002 SCMR 404), contention of the petitioner therein that he was an employee on contract basis and therefore not disqualified was repelled and this Court in para 4 of its judgment while interpreting analogous provision held that *"the Legislature in its own wisdom has not excluded employees on contract basis from the purview of this section"*.

11. Learned counsel for the respondent when confronted with the above, has placed heavy reliance on a Lahore High Court's larger Bench (three members) decision reported as Muhammad Iqbal v. District Returning Officer (PLD 2006 Lahore 13), wherein the similar disqualification as noted in clause (e) of section 27(2) *ibid* contained in Section 152 (1)(g) of Punjab Local Government Ordinance, 2001 came under discussion of the Court, nomination of the petitioner therein rejected by the District Returning Officer was accepted by the High Court and it was held that:

"prima facie, petitioner No.1 was not a regular employee of WASA/LDA and his tenure as work charge employee each time remained short of 90 days and he was not confirmed in service. Tentatively, he was not disqualified to contest the election. Since determination of his disqualification requires holding of detailed trial and recording of evidence which exercise is not permissible within constitutional jurisdiction of this Court. The Province of East Pakistan v. Kshiti Dhar Roy and others (PLD 1964 SC 636) up-to date, including the case of Muhammad Younas Khan and 12 others v. Government of NWFP

through Secretary Forest and Agriculture, Peshawar and others (1993 SCMR 618) and since the petitioners have succeeded in the elections and their result has already been notified, we dispose of this petition allowing the petitioners to continue in office and permitting the respondents to challenge their election, if they so wish, on the basis of pre-election disqualification through a petition under Rule 76 of the Punjab Local Government Rules, 2005, where-under such a petition is maintainable before the Election Tribunal concerned."

Above cited judgment does not rescue the Respondent No.3, as the High Court observed that "Tentatively, he was not disqualified to contest the election." It may be observed that even under the repealed Punjab Local Government Ordinance 2001, "holders of (elected) public office and part time officials remunerated either by salary or fee" {word (elected) is additional word} were also kept out of the pale of such barring provisions. In cited case *"employee on work charged"* basis, on tentative determination, was not considered to be falling within the category of employee coming within the net of barring clause. It may be observed that it was merely a tentative assessment, and not a conclusive determination of the Court whether the work charge employee would fall within the exempted category of the employee of *the Corporation* or otherwise. Such controversy was left to be determined in regular election Petition and the Bench abstained from making a conclusive determination to such an effect, nor we intend to enter into such realm, being not germane to the issue in hand.

12. In view of the foregoing discussion, impugned judgments of the High Court and orders of the forums below cannot be sustained. On the date of nomination, Respondent No.3 was under legal bar to contest election of Local Government as five years had not elapsed from the date of his dismissal dated 26.12.2013 from public service of the Corporation.

13. It was vainly urged that since elections have been held and the respondent has returned successful, the petition is liable to be dismissed as the petitioner could have

challenged such election through regular Election Petition under Section 38 of the Act, 2013. Indeed, under the *Punjab Local Government (Conduct of Elections) Rules 2013* Returning Officer, and so also the Appellate Tribunal are vested with summary jurisdiction to examine and decide question of qualification and or disqualification of a candidate, in case such determination is dependent on detail enquiry or necessitating recording of evidence; than such determination is left to be agitated and determined at the regular trial in post election petition under Section 38 before the Election Tribunal constituted under Section 39 of the *Act, 2013*. In the instant case, it is noted that the Respondent No.3 was still under the spell of five years bar within the contemplation of clause (g)' of subsection (2) of section 27 of the *Act, 2013* to contest election on the seat of General Councilor, Local Government, scheduled to be held on 5.12.2015. The bar to run for the election was attached all along right from the inception of nomination papers, throughout the challenge and even during the pendency of instant CPLA, however, during the course of proceedings before this Court on 03.12.2015 while adjourning the matter, the Court declined to stay the process of election and it was however ordered that *"the respondent No.3 is, however, allowed to contest the elections which will be subject to the decision of this Court"*.

14. In instant case no detail and or elaborate enquiry was required to be made by the *fora* below; facts were straightforward and mostly admitted. The disqualification (*i.e. "dismissed from public service on the ground of misconduct"*) of the Respondent No.3, within the contemplation of *clause (g) of Section 27 (2) of the Act, 2013*, as the bar to contest election of local government subsisted since very inception of filing of his nomination papers as the period of five years from the date of his dismissal (*w.e.f. 26.12.1013*) from service of *the Corporation* had not lapsed. Even otherwise, in view of the legal position as discussed above fate would not have been different than what is being achieved at the time of final determination now. In the case of *Mohd. Sadeque v. Rafiq Ali*

(PLD 1965 Dacca 330), a Division Bench of the Dacca High Court, repelled the contention that delay in decision of the writ petition, when the respondent earned the qualification during the pendency of the petition, was not entertained to deny the relief. In instant case, the bar still subsists, we have no doubt in our mind that at the time of filing nomination papers the Respondent No.3 was not eligible to put up his candidature for the office of General Councilor of Ward No.1 Alipur, his election is void *ab-initio*, and as observed above, even the fate of the challenge to his election, in post election scenario would not have yielded a different result.

15. Consequently, impugned judgment of the High Court dated 9.11.2015 and so also order of the Appellate Tribunal *Alipur*, dated 4.11.2015 and that of the Returning Officer dated 8.10.15 are set aside. Objections filed by the Petitioner to the candidature of Respondent No.3 are sustained. Nomination papers filed by the Respondent No.3 stand rejected. This Petition is converted into appeal and allowed with cost throughout.

Judge

Judge

ISLAMABAD, THE
25th of March, 2016
ZR/-