

Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.  
JUDICIAL DEPARTMENT

Election Appeal No. 01 of 2024

Muhammad Shoaib Shaheen  
Versus  
Returning Officer, NA-46 & another

Election Appeal No. 02 of 2024

Muhammad Shoaib Shaheen  
Versus  
Returning Officer, NA-47 & another

Election Appeal No. 03 of 2024

Muhammad Shoaib Shaheen  
Versus  
Returning Officer, NA-48 & another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	03.01.2024	Petitioner Mr. Muhammad Shoaib Shaheen in person with Sardar Masroof Khan, Mr. Ansar Mehmood Kiyani, Ms. Amna Ali and Mr. Nasir Saleem Advocates, Ms. Saman Mamoon, Legal Advisor and Mr. Zaighan Anees, Law Officer, ECP.

Arbab Muhammad Tahir J.- The listed three appeals filed by the appellant under section 63(1) of the Elections Act, 2017 (**‘Act of 2017’**) entail common questions of law and facts, therefore, being decided through this single judgment.

2- Tersely, relevant facts leading to filing of the subject appeals are that nomination papers of the appellant *Muhammad Shoaib Shaheen* for contesting General Elections 2024 from three constituencies i.e. NA-46, NA-47 and NA-48 Islamabad were rejected by the Returning Officer vide separate orders dated i.e. 30.12.2023 in following terms:-

NA-46 Islamabad

*"It is clear that Mr. Shoaib Shaheen is defaulter of property Tax under the constitutional and statutory framework duly attested and interpreted by the Honorable Superior Courts. Hence, I have no option but to reject the nomination papers of Mr. Shoaib Shaheen."*

NA-47 Islamabad

*"Mr. Muhammad Shoaib Shaheen is a defaulter having liability towards Capital Development Authority/MCI while filing nomination papers. Hence, Mr. Muhammad Shoaib Shaheen is ineligible to contest the Elections in terms of Section 62(9) of the Act."*

NA-48 Islamabad

*"Under the attending circumstances, it has been duly established that Mr. Muhammad Shoaib Shaheen is defaulter and failed to disclose his dues, liability towards Capital Development Authority /MCI while filing nomination papers for contesting on NA-48 ICT-III. Hence, Mr. Muhammad Shoaib Shaheen cannot be deemed sagacious, righteous and non-profligate, honest, ameen as warranted under Article 62(1)(f) of the Constitution read with Section 173 of the Elections Act, 2017. Therefore, under section 62(9) of the Act, the nomination papers of Mr. Muhammad Shoaib Shaheen are hereby rejected."*

3- The appellant contends that his case in no way can be termed to be one of willful default; the liability is not directly related to the appellant; the property against which the dues were outstanding is not owned by the appellant, rather the same is owned by one *Musarrat Khatoon*; soon after

receiving information relating to the unpaid property tax, the appellant forthwith deposited the outstanding dues/tax; to declare a candidate a willful defaulter is beyond the mandate of the Returning Officer in absence of any declaration or decree in this respect by a competent forum; that even otherwise, nomination papers of the appellant could not have been rejected in view of Section 62(10) of the Act of 2017 and that under the law, Returning Officer, can direct to make good the deficiency even in case of a substantial nature of defect; the Returning Officer was not competent to issue declaration under Article 62(1)(f) of the Constitution; he placed reliance upon case law reported as '*Yasir Aftab v. Irfan Gull and others*' (2023 SCMR 206), "*Rai Hassan Nawaz v. Election of Pakistan and others*" (2013 CLC 1101), "*Syed Shafqat Hussain Shah v. Returning Officer and others*" (2019 YLR 643 Sindh) and "*Anwar Zeb v. the Returning Officer, and others*" (2022 MLD 1951 Sindh).

4- On the other hand, learned Law Officer ECP submits that by the attending circumstances of the case, it has become an admitted position that the appellant committed default in clearing outstanding dues as he himself deposited the same on the day, fixed for scrutiny of documents; that case of the appellant squarely falls within the ambit of Article 62(1) (f) of the Constitution besides Section 173 of the Act of 2017, therefore, appeals are liable to be dismissed. Reliance is placed upon case law reported as "*Hameed Akbar Khan v. Election Appellate Tribunal and others*" (PLD 2013 Lahore 548).

5- Heard, record perused.

6- The primary question that requires determination is as to whether non-deposit of the government dues/tax well within time and non-disclosure of said liability in nomination

papers can be made basis to reject nomination papers of the appellate by treating it as a defect, substantial in nature, not curable. Furthermore, in order to examine whether the course adopted by the Returning Officer in rejecting nomination papers of the appellant was in accordance with law, it is of paramount importance to understand the true import of clause (ii) of the proviso to sub-section (9) of section 62 of the Elections Act, 2017. In the case in hand, the judgment of the Supreme Court rendered in the case titled 'Yasir Aftab v. Irfan Gull and others' (**2023 SCMR 206**) is relevant. The subject matter in the referred case was rejection of nomination papers of candidate for a seat of general councilor. The Supreme Court of Pakistan in the referred case interpreted clause (ii) of the proviso to Rule 18(3) of the Sindh Local Councils (Elections) Rules, 2015. The said provision is reproduced below.-

“(ii) *The Returning Officer shall not reject a nomination paper on the ground of any defect which is not of a substantial nature and may allow such defect to be remedied forthwith*”.

In the case in hand, clause (ii) of the proviso to sub-section (9) of section 62 of the Elections Act, 2017 is relevant, which is reproduced below.-

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

7- The above reproduced two provisions are *pari materia* insofar as placing restriction upon the authority of the Returning Officer in rejecting a nomination papers on the ground of any defect which is not of a substantial nature. The Returning Officer is, however, empowered to allow such defect to be remedied forthwith. The Supreme Court in Yasir Aftab's case, supra, has dealt with the words "substantial nature" used in clause (ii) of the proviso to Rule 18(3) (ii) of the Sindh Local Councils (Elections) Rules, 2015, which are *pari materia* with the provisions of clause (ii) of the proviso to section 62(9) of the Act of 2017, as follows.-

"This brings us to the second step of the exercise. If the Returning Officer concludes that the defect is of a substantial nature, what then? This requires a consideration of the last part of the provision: "and may allow such defect to be remedied forthwith". This portion confers discretion on the Returning Officer: he may (or may not) allow "such" defect to be "remedied forthwith". Which is the defect to which the last portion applies? The immediate response would seemingly be that it refers to the defect that is not of a substantial nature. However, this conclusion poses a problem. The discretion conferred on the Returning Officer would then clash with the mandatory manner in which the provision opens. For, if the Returning Officer in his discretion refuses to allow the defect to be remedied (forthwith) then the result would be that defect would remain. The nomination papers would then have to be rejected. But that is made impermissible by the imperative nature of the opening words: the Returning Officer "shall not reject a nomination paper". It is of course possible to read the "may" at the end also as "shall", i.e., that the Returning Officer has no discretion. But the same result would have obtained in any case if the provision had ended on the words "substantial nature". Why then does the provision contain the concluding words now under consideration? This leads to a second, though less intuitive, possibility: the "such" preceding the "defect" refers not to a defect that is not of a substantial nature but to one that is

determined to be of a substantial nature. In other words, even if the determination is against the candidate in this regard, the Returning Officer is conferred discretion in allowing him to remedy the substantial defect, provided always that it can be done forthwith. The candidate of course cannot claim this as of right or in mandatory terms: it is for the Returning Officer to exercise his discretion in this regard.”

8- In light of the above principles and law, the Returning Officer is required to undergo two-step exercise, at first; he has to determine whether the defect is of a substantial nature? A negative answer to this question would conclude the exercise and he is bound not to reject the nomination papers. If the answer is in the affirmative, then the matter moves to the second stage. He must, in his discretion, consider whether, to allow the defect to be removed (*even if it is of a substantial nature as long as the same can be remedied forthwith*). If he exercises his discretion in favour of the candidate and the defect is remedied forthwith, nomination papers stand accepted. In the event the Returning Officer refuses to exercise his discretion in matter of a defect determined to be of substantial nature, then of-course nomination papers stand rejected. The Supreme Court in *Yasir Aftab's* case, *supra*, further held that whatever the action of the Returning Officer will be, it is mandatory for him to record reasons appropriately and accordingly, in relation (as the case may be) to both stages of the exercise of authority. As noted above, the Returning Officer can allow a candidate to make good the deficiency/defect of a substantial nature, provided it can be remedied forthwith and in case the Returning Officer is not inclined to exercise its discretion in favour of the candidate it then becomes mandatory for him to give appropriate reasons for not exercising discretion in favour of the candidate.

9- The Hon'ble Supreme Court in the case titled "*Murad Bux v. Kareem Bux and others*" (2016 SCMR 2042) has held that where the explanation of a party contesting the election is plausible in regard to non-disclosure of any fact in the affidavit, it cannot be denied the right to contest elections. However, if the party has willfully made a false and or incorrect statement in the affidavit sworn in with the nomination paper concealing material particulars in order to avoid disqualification, then the Tribunal would not travel deeper into the explanation, once it is established that the disclosure of such material particulars would have exposed him to disqualification. It was further held that if non-disclosure about pendency of a criminal case has been made, however, the petitioner has offered a reasonably plausible explanation, then the affidavit could not be considered as false or incorrect declaration. In the case titled "*Sheikh Muhammad Akram v. Abdul Ghafoor and others*" (2016 SCMR 733), it has been held that a candidate is not disqualified to contest elections merely because a criminal case is pending against him. Non-disclosure of a pending case cannot be equated with the non-disclosure of a criminal case in which a person has been convicted and one which may entail his disqualification. It is also important to refer to the judgment of Lahore High Court in the case titled "*Muhammad Masood ul Hassan v. Election Appellate Tribunal and others*" (2019 CLC 130) wherein it has been held that the relevant clause of the affidavit submitted alongwith the nomination papers requires information regarding pending cases of criminal offences. An FIR by its very nature cannot be termed as a pending criminal case. The Lahore High Court held that by not mentioning the details of FIRs in the affidavit, the candidate was not guilty of mis-declaration.

10- The Lahore High Court in the case titled "*Malik Taj Ahmad v. Malik Muhammad Nawaz, Member of Provincial Assembly (MPA), Punjab and others*" (PLD 2018 Lahore 723) has held that it is evident from the above that a non-disclosure sans an element of design, scheme or intent would also not make a candidature open to be questioned if it could be shown that it was a bona fide error and that there was no intention to gain any benefit by withholding such information from the constituents. The scrutiny for the purposes of Article 62(1)(f) of the Constitution is not based on moralistic or subjective criterion. The said condition does not contemplate perfection but in simple words requires a person to be honest, reliable and trustworthy.

11- The Supreme Court in the case titled "*Shamona Badhshah Qaisarani v. Election Tribunal, Multan and others*" (2021 SCMR 988) has held that every nondisclosure or mis-declaration would not be sufficient enough to permanently disqualify a member of the Parliament or a candidate. The purpose and intention needs to be seen behind the nondisclosure or mis-declaration. The returned candidate would be disqualified only when if he/she has dishonestly acquired assets and is hiding them to derive certain benefits. If the non-disclosure or mis-declaration is such that it gives an illegal advantage to a candidate then it would lead to termination of his candidature. This Court in the case of *Khawaja Muhammad Asif v. Muhammad Usman Dar* (2018 SCMR 2128) has candidly held that merely the fact that a candidate has not declared an asset in the nomination papers would not end in his disqualification but it has to be seen whether the act of non-disclosure of the asset is with dishonest intent or not and only if there is dishonest intent behind the non-disclosure, the candidate would be disqualified. It is the credibility of the explanation



that would be the determining factor as to whether non-disclosure of an asset carries with it the element of dishonesty or not.

12. It divulges from the pleadings of the appeals in hand that the dues in terms of property tax were outstanding against one Musarrat Khatoon pertaining to the year 2022-2023. The bill of said property tax available on record reveals that the same was issued in the name one Musarrat Khatoon. Nothing is available on record through which it could be ascertained that the appellant was in the knowledge of said notice at the time or prior to filing of his nomination papers or that any notice was issued to the appellant requiring him to deposit the amount due and that the mischief, constitutes willful default on his part. Therefore, even if it is considered a defect of substantial nature in terms of the clause (ii) of the proviso to section 60(9), it can be remedied forthwith by directing the appellant to deposit the same and produce receipt thereof. The impugned order, on the face of it, lacks mandatory reasoning as to why the Returning Officer opted not to exercise his discretion by affording an opportunity to the appellant to remove the defect, even if determined to be of a substantial nature.

13- Section 62(10) of the Act of 2017 prohibits the Returning Officer from rejecting nomination papers of a candidate who deposits any amount of loan, tax or government dues and utility expenses payable by him of which he was unaware at the time of filing his nomination papers. Subsection (10) of section 62, therefore, covers a situation where the candidate had already filed nomination papers and was not in the knowledge of any outstanding government dues/taxes. It, therefore, ousts any possibility of instantaneous rejection of nomination papers, in case it is

established that the default in payment of government dues/taxes was not willful or not in the knowledge of the candidate before submission of nomination papers. The Returning Officer is "bound" to afford opportunity to the candidate to remove the deficiency, *inter alia*, by allowing him to deposit the outstanding dues forthwith. The Returning Officer failed to correctly appreciate the provisions of section 62(9) read with 62(10) of the Act of 2017 and proceeded in a slipshod manner by rejecting the nomination papers of the appellant.

14- The second question is whether the Returning Officer was competent to hold that the appellant was not qualified to be elected as Member of the Parliament in terms of Article 62(1)(f) of the Constitution. The provision states that *a person shall not be qualified to be elected as Member of the Parliament unless he is sagacious, righteous, non-profligate, honest and ameen, there being no declaration to the contrary by a court of law.* The Supreme Court in the case titled "*Imran Ahmed 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] has held as follows.-

"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 "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."

The impugned orders did not indicate that any declaration had already been passed against the appellant by a "court of law" that the appellant is not sagacious,

righteous, non-profligate, honest and ameen. Therefore, in absence of such a declaration by a 'court of law' against the appellant, findings/conclusion of the Returning Officer to this effect is not legally sustainable. The mandate of the Returning Officer is restricted to the authority vested in him in terms of section 62 (Scrutiny) of the Act of 2017 and not beyond that. Returning Officer is not vested with any authority to issue declaration of disqualification against a candidate in terms of Article 62(1)(f) of the Constitution.

15- The sequel of above discussion is that the impugned orders dated 30.12.2023 are not legally sustainable as the appellant has already removed the deficiency by depositing outstanding dues forthwith. Therefore, these appeals stand allowed and the impugned orders are accordingly set-aside. Consequently, nomination papers filed by the appellant for Constituencies NA-46, NA-47 and NA-48 Islamabad are accordingly accepted. Copy of this Judgment shall be transmitted to the Election Commission of Pakistan and the Returning Officer concerned for information and compliance.

(ARBAB MUHAMMAD TAHIR)  
JUDGE

***Approved for reporting.***

\*Luqman Khan.