

ISLAMABAD HIGH COURT, ISLAMABAD

NO. _____ IHC/Jude. Deptt.

(REVISED FORM OF BLUE SLIP)

Case No. W-P-1688-06-2013

Titled Sarfaraz M. Yaqoob Vs E.C.P. etc.
Khan Nasar

- | | | |
|-----|---|----------|
| (a) | Judgment approved for reporting | Yes / No |
| (b) | Judgment any comment upon the Conduct of the
Judicial Officer for Quality of the impugned
judgment is Desired to be made. | Yes / No |

(In case the answer is the affirmative Separate confidential note may be Sent to the Registrar drawing his Attention to the particular aspect).

Initial of the Judge.

NOTE

1. If the slip is used, the Reader must attach on top of first page of the judgment.
2. Reader may ask the Judge writing the judgment whether the judgment is to be approved for Reporting of any comment is to be made about the Judicial Officer/ quality of judgment.
3. This slip is only to be used when some action is to be taken.

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JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD.

W.P. No. 1688/2013

Sardar Mohammad Yaqoob Khan Nasar

....Vs....

Election Commission of Pakistan & another.

Petitioner by: -

**Mr Mohammad Munir Paracha assisted by Mr
Nauman Munir Paracha Advocate**

Respondent Nos. 2 by: -

Ch. Ali Muhammad Advocate

Date of hearing: -

14-05-2013

Riaz Ahmad Khan J: - This judgment is directed to dispose of writ petition No. 1688 of 2013.

2. Brief facts of the case are that the petitioner Sardar Muhammad Yaqoob Khan Nasar contested Election from constituency NA-263, Loralai-cum-Musakhel-cum-Barkhan. According to initial result, he was not declared as successful candidate. The petitioner was required to file return of election expenses, as required under S. 50 of the Representation of the People Act, 1976. The petitioner did not file the return of election expenses, however, filed election petition before Election Tribunal. Since the petitioner could not file return of election expenses, so respondent No.2 Sardar Muhammad Israr Tareen, who had been declared as returned candidate, filed petition before learned Election Commission with the prayer that Sardar

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(5)

Muhammad Yaqoob Khan Nasar had failed to file return of election expenses and therefore, was required to be prosecuted under S. 83(1)(a) of the Representation of People Act, 1976. During pendency of the petition before learned Election Commission, present petitioner Sardar Muhammad Yaqoob Khan Nasar was declared as returned candidate by the Election Tribunal. Thereafter, the learned Election Commission passed order on petition filed by respondent Sardar Muhammad Israr Tareen, however, the petition was dismissed on the ground that the status of the then petitioner was changed, as he was no more returned candidate, but had become contesting candidate. Consequently, the provisions of S. 50(1) would not be attracted and accordingly, the petition was dismissed. The said judgment was challenged in writ petition No. 2913/2011 in this Court. During proceedings, the present petitioner was proceeded ex-parte and vide judgment dated 13-09-2012, the judgment of learned Election Commission was set aside and the case was remanded to the learned Election Commission for deciding the case afresh in accordance with law. During this period, the judgment of Election Tribunal, by virtue of which Sardar Muhammad Yaqoob Khan was declared as returned candidate, was challenged before the Hon'ble Supreme Court of Pakistan. The Hon'ble Supreme Court of Pakistan in Para-2 of judgment dated 27-03-2013 held as follows:-

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"The tenure of the assembly to which the appellant was elected has expired and the National Assembly stands dissolved, therefore, neither the appellant nor the respondent No.1 can remain member of the Assembly. The grievance of the appellant appears to be the finding of the Election Tribunal on issues No.3 & 6, which are reproduced as under:-

3. Whether respondent No.1 with connivance of polling staff committed illegal, corrupt and massive rigging in the process of election and procured result in his favour?

6. Whether respondent No.1 cast bogus votes with the connivance of polling staff and security personnel?"

The Tribunal has held that the respondent No.1 is also responsible for rigging and, therefore, had committed illegal and corrupt practices in the election. This finding would obviously bar the appellant from contesting the forthcoming election under Section 99(1A) of the Representation of the People Act 1976."

3. In Para-4 it was held as follows:-

"Since the learned counsel for the respondent concedes that the finding on issues No. 3 & 6 to the extent of appellant regarding illegality and corrupt practices cannot be upheld and we also finding ourselves in agreement with him, the appeal is partly allowed and the finding on issues No.3 & 6 are set aside to the extent of holding the appellant guilty of commission of corrupt and illegal practices."

4. On the other hand, an application was submitted by the present petitioner before this Court for setting aside exparte judgment dated 13-09-2012 passed by this Court. However, learned Election Commission after remand of case from this Court, passed the impugned judgment, wherein it was held that the petitioner had failed to comply with the provision of Section 50 of the Act within the stipulated period. The Returning Officer concerned was directed to launch proceedings as per provisions

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contained under Section 96 of the Act in the Court having jurisdiction in the matter. The said order was again challenged through the present writ petition. Since the fresh writ petition was filed, therefore, application for setting aside exparte proceedings order had become infructuous and the arguments were addressed on the present writ petition.

5. Learned counsel for the petitioner submitted that the status of the petitioner had changed. Though initially he was a contesting candidate and was required to file return of election expenses, but afterwards when the Tribunal declared him returned candidate he had filed the return of election expenses within the stipulated period before the learned Election Commission, which fact was accepted by the learned Election Commission in the earlier order, by virtue of which the learned Election Commission had turned down application of respondent No.2 for initiation of criminal proceedings against the present petitioner. Learned counsel further submitted that after filing of return of election expenses, there was no requirement of initiation of criminal proceedings against the petitioner.

6. On the other hand, learned counsel for respondent No.2 submitted that the petitioner had not come to the Court with clean hands and had concealed actual facts. It was further submitted that the petitioner though was declared as returned candidate by

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the Election Tribunal, however, the said judgment was set aside by the Hon'ble Supreme Court of Pakistan. As such, the petitioner had again become a contesting candidate and had failed to file election expenses within the stipulated period. It was further submitted that even this court at the time of remanding the case had held that initially the petitioner was a contesting candidate and was required to file return of election expenses within the stipulated period. Consequently, change in status did not effect the requirement of filing return of election expenses.

7. We have heard learned counsel for the parties and have also perused the record.

8. Admitted position in the present case is that in the year 2008, both the candidates, petitioner Sardar Mohammad Yaqoob Khan Nasar and respondent No.2, Sardar Mohammad Israr Tareen, had contested election from the same constituency No. 263. In the initial result, Sardar Mohammad Israr Tareen was declared as returned candidate. Sardar Mohammad Yaqoob Khan Nasar being candidate was required to submit return of election expenses within 30 days of the publication of name of the returned candidate. It is also admitted that he had failed to submit said return. Sardar Muhammad Yaqoob Khan Nasar thereafter was declared as returned candidate by the Election Tribunal and then within 10 days, he filed return of election expenses as

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required under Section 42(3)(a) of the Act. During this period, Sardar Mohammad Yaqoob Khan had filed application before learned Election Commission for initiation of criminal proceedings against Sardar Mohammad Yaqoob Khan for failing to file return of election expenses. The said application was turned down by the learned Election Commission on the ground that the status of the parties had changed. The order of the learned Election Commission was challenged before this Court and this Court while remanding the case back to the learned Election Commission made an observation that the change of status of the parties would not effect the requirement of Section 50. Apparently, it seems that the learned Election Commission was influenced by the observations made by this Court, however, it was ignored that in the end of judgment passed by this Court, it was held as follows:-

"Before parting with the judgment, we deem it necessary to clarify that observations recorded by us in para Nos. 9 and 10 of the judgment shall not deprive the respondent No. 2 from his right to plead and contest the accusation and charge on the plea and stance of change in status if the same is found beneficial under the law and he is so guided and counseled."

9. It obviously means that it was only observation of the Court and not a binding decision. Learned Election Commission thus passed the order that Sardar Muhammad Yaqoob Khan Nasar had failed to submit return of election expenses as required under Section 50 of the Representation of the People Act, 1976. Unfortunately, the fact which lost the notice of learned Election

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Commission was that Sardar Mohammad Yaqoob Khan Nasar had been declared as returned candidate by the Election Tribunal and the said judgment was not set aside by the Hon'ble Supreme Court of Pakistan by the final judgment dated 27-03-2013. The status of Sardar Mohammad Yaqoob Khan Nasar as such was that of the returned candidate.

10. Regarding filing of return of election expenses, there are two divergent views of learned Election Commission. In the earlier order dated 11-08-2011, learned Election Commission held that since status of the parties had changed and Sardar Mohammad Yaqoob Khan Nasar had been declared as returned candidate and thereafter, he had filed the return of election expenses, therefore, there was no need of initiation of criminal proceedings. Though the judgment was set aside, yet the opinion remained the same. In the second round, the learned Election Commission held that the subsequent change in the status did not alter the situation and Sardar Muhammad Yaqoob Khan Nasar as a candidate was required to file return of election expenses and since he had failed to file the return of election expenses, therefore, criminal proceedings were to be initiated against him.

11. Because of above said two divergent views of the learned Election Commission, the requirement is to determine the scope

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of S. 50 as well as 42(3)(a) of the Representation of the People Act, 1976.

12. For the sake convenience, S. 50 of the Representation of the People Act, 1976 is reproduced hereunder:-

50. RETURN OF ELECTION EXPENSES: -

(1) Every contesting candidate, other than the returned candidate, shall submit the return of his election expenses within thirty days of the publication of the name of the returned candidate.

(2) The return of election expenses of the returned candidate referred to in sub-section (3A) of section 42 and of every contesting candidate referred to in sub-section (1) shall be submitted to the Returning Officer in the prescribed form containing—

- (a) a statement of all payments made by him together with all bills and receipts;*
 - (b) a statement of all disputed claims;*
 - (c) a statement of all unpaid claims, if any; and*
 - (d) a statement of all moneys, securities or equivalent of money received from, or spent, by any person for the benefit of the candidate, specifying the name of every such person.*
- (3) The returns submitted under sub-section (2) shall be accompanied by an affidavit of the candidate in the prescribed form.*

13. Section 42(3)(a) and (4) is to the following effect:-

42(3A) Every returned candidate shall, within ten days from the poll of an election, submit a return of election expenses in accordance with the provisions of section 50].

(4) The Commission shall publish in the official Gazette the name of the returned candidate.

[Provided that the result of a returned candidate shall not be published who fails to submit the return of expenses specified in subsection (3A)].

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14. Bare reading of sub-section 2 of section 50 would clearly show that it provides the manner, object and purpose of filing of return of election expenses. The purpose of filing of return of election expenses in both the sections is the same and that is to place on record the expenses incurred by the candidate in elections. It is the violation of sub-section 2 of section 50, which makes the candidate liable to punishment; the sections though are different. In case of a candidate other than returned candidate, the consequences would be initiation of criminal proceedings under Sec. 96 of the Representation of the People Act, 1976, whereas the consequences provided under Sec. 42(4) are that in case of non-filing of return of election expenses, the name of the returned candidate would not be notified. Once the name of the returned candidate is notified, that would mean that the object of the section 42(3A) as well as section 50 have been fulfilled. The notification that a candidate has become the returned candidate would mean that the candidate has filed the return of election expenses.

15. In the present case, there is no doubt that Sardar Mohammad Yaqoob Khan Nasar as a candidate was required to file the return of election expenses. For non-filing of return of election expenses, he could be prosecuted, but once he was declared as a returned candidate and he was notified, that would mean that the return of election expenses filed by him were

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accepted by the Election Commission. As such, the requirement of sub-section 2 of section 50 were fulfilled and thereafter neither proceedings under Sec. 50 nor 42(4) could be initiated against Sardar Mohammad Yaqoob Khan Nasar.

16. It would be incorrect to hold that section 50 and 42(3) are different sections of law and therefore, a candidate if fails to file return of election expenses, he must be prosecuted, even if afterwards he was declared as returned candidate and had filed the return of election expenses within specified time and then notified as well.

17. In view of the above said circumstances, we are of the considered view that the learned Election Commission had erred in holding that the petitioner Sardar Mohammad Yaqoob Khan Nasar had to be prosecuted for non-filing of election expenses. Accordingly, we accept this writ petition and set aside the impugned order of learned Election Commission dated 14-02-2013.

(Noor-ul-Haq N. Qureshi)
Judge

(Riaz Ahmad Khan)
Judge

Announced in the open Court on 23-05-2013

Wajid

Judge

Judge

Uploaded By: "Zulgarnain Shah"

Approved for Reporting.

Blue slip added.

JUDGE.