

IN THE SUPREME COURT OF PAKISTAN
(REVIEW JURISDICTION)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE FAISAL ARAB
MR. JUSTICE MAZHAR ALAM KHAN MIANKHEL

C.R.P.NO.218 OF 2013 IN C.P.NO.1033 OF 2013

(On review of this Court's order dated 09.07.2013
passed in C.P.No.1033/2013)

Allah Dino Khan Bhayo

...Petitioner(s)

VERSUS

Election Commission of Pakistan etc.

...Respondent(s)

For the petitioner(s): Mr. Wasim Sajjad, Sr. ASC

For Federation of Ch. Aamir Rehman, Additional Attorney
Pakistan: General

For ECP: Mr. M. Arshad, D.G. Law

For respondent No.5: Raja M. Ibrahim Satti, Sr. ASC

Date of hearing: 04.02.2020

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ORDER

UMAR ATA BANDIAL, J.- The question in issue is whether a finding dated 03.12.2007 given by the Returning Officer against the petitioner in summary proceedings held for scrutiny of nomination papers during general elections is final and binding for the purpose of permanently disqualifying the petitioner from contesting any general election under Article 62(1)(f) of the Constitution. The said finding concludes that the equivalence certificate issued by Shah Abdul Latif University, Khairpur about the petitioner's claimed *sanad* was fake thereby disqualifying the petitioner from contesting the election from PS-12 Shikarpur-II in 2008. As a result, the petitioner stepped out of the elections and did

not challenge the finding by the Returning Officer. In 2007 Article 62(1)(f) of the Constitution read as follows:

“62. A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless –

.....
(f) he is sagacious, righteous and non-profligate and honest and ameen”

However, the 18th Amendment to the Constitution amended Article 62(1)(f) in the year 2010 to incorporate a condition that only a declaration, *inter alia*, of dishonesty given by a court of law could disqualify a candidate from contesting elections to the Parliament or a Provincial Assembly. The amended Constitutional provision reads as under:

“62. (1) A person shall not be qualified to be elected or chosen as a member of Majlis-e-Shoora (Parliament) unless –

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

2. The petitioner got elected as a member of the Sindh Provincial Assembly in the year 2013. However, on a complaint filed against him, the Election Commission of Pakistan (“**ECP**”) in exercise of its powers under Section 103-AA of the Representation of People Act, 1976 (“**ROPA**”) declared vide order dated 11.06.2013 that the petitioner was disqualified, *inter alia*, under Article 62(1)(f) of the Constitution to contest in the general election of 2013. The decision was based on the aforementioned finding recorded against the

petitioner by the Returning Officer on 03.12.2007 which had ousted him from the corresponding general election held in 2008. The petitioner's challenge to the said finding was ultimately rejected by this Court which upheld the order of the ECP *vide* judgment dated 09.07.2013 reported as **Allah Dino Khan Bhayo Vs. Election Commission of Pakistan, Islamabad and others** (2013 SCMR 1655).

3. In this review against our judgment dated 09.07.2013, the question for our consideration is whether the finding by the Returning Officer given during scrutiny of nomination papers qualifies as a declaration given by a court of law within the terms of Article 62(1)(f) of the Constitution. This is important because by the year 2013 a few judgments by the Supreme Court including **Malik Iqbal Ahmad Langrial Vs. Jamshed Alam** (PLD 2013 SC 179) and **Abdul Ghafoor Lehri Vs. Returning Officer, PB-29** (2013 SCMR 1271) had interpreted and held the unamended terms of Article 62(1)(f) to permanently disqualify a non-compliant candidate.

4. Both sides have relied upon the judgment delivered by a larger bench of this Court reported as **Sami Ullah Baloch and others Vs. Abdul Karim Noursherwani and others** (PLD 2018 SC 405) to advance their rival pleas with respect to the review of our judgment dated 09.07.2013. Learned counsel for the petitioner has referred the said authority to assert that the petitioner's disqualification under Article 62(1)(f) of the Constitution cannot be permanent unless his disability under the said Article is declared by a court of law. Conversely, the respondents claim that our above mentioned judgment in the **Sami Ullah Baloch** case has approved our judgment dated 09.07.2013 that is now under review before us. The

endorsement by the larger Bench has fortified the view expressed in the judgment under review. In **Sami Ullah Baloch's** case this Court affirmed the rule that Article 62(1)(f) of the Constitution creates a permanent bar against contesting the general election. However, the impact of the change made by the 18th Amendment in Article 62(1)(f) of the Constitution and its legal effect was noted in paragraph 23 of the said judgment. This is reproduced as below:

“23. ...In the present context, the conditions and qualifications in Article 62(1)(f) of the Constitution were retained in toto; and made objectively and transparently enforceable by the prescription of a judicial declaration for precipitating the loss of the electoral qualification specified in the said clause. Where a declaration made by a Court of law against a candidate for election warrants a conclusion of his misrepresentation, dishonesty, breach of trust, fraud, cheating, lack of fiduciary duty, conflict of interest, deception, dishonest misappropriation, etc. to be derived from such a verdict, then it stands to reason that the consequential incapacity imposed upon the candidate for election should last for as long as the declaration is in force.”

(emphasis added)

The foregoing view with respect to a judicial declaration is elaborated in paragraph 35 of the judgment which holds that:

“35. It is clear from the findings recorded in the afore-noted four judgments by this Court that the absence of a time limit for the ineligibility of a candidate for election in Article 62(1)(f) of the Constitution is the basis for holding his incapacity to be incurable by efflux of time. The reasons recorded in our judgment reinforce that conclusion. It may also be noted

that the Constitution envisages other situations in which a permanent bar to the eligibility of a candidate for election is enforced so long as the judgment that records or justifies the disability of the candidate remains in existence and occupies the field. This view is supported by Articles 63 (1)(a) and 63(1)(b) of the Constitution that provide disqualifications on account of judicial declaration regarding the mental unfitness or the undischarged insolvency of a candidate for election. These disabilities also continue so long as the adverse judgment is in the field. Finally, it may be noted that the prescription by the 18th Constitutional Amendment of an adverse judicial declaration to precipitate the ineligibility of a candidate for election has provided a lawful, transparent and fair mechanism to a candidate under challenge both for contesting and for avoiding the onset of an embargo on his eligibility to contest elections. The restriction imposed by Article 62(1)(f) of the Constitution for the eligibility of a candidate for election to Parliament serves the public need and public interest for honest, upright, truthful, trustworthy and prudent elected representatives. The judicial mechanism in Article 62(1)(f) of the Constitution grants a fair opportunity and adequate remedy for relief to a candidate under challenge to vindicate himself.

(emphasis added)

5. The upshot of the said judgment is that a disqualification under Article 62(1)(f) of the Constitution can only be imposed by or under a declaration made by a court of law. By such prescription Article 62(1)(f) creates a lawful, transparent and fair mechanism for an election candidate to contest an allegation that he is disqualified under one or more of the grounds listed in the said Constitutional provision. Accordingly, in the case reported as **Sardar Yar**

Muhammad Rind Vs. Election Tribunal Balochistan, Quetta and others (PLD 2020 SC 137) this Court held that a judicial declaration disqualifying a candidate under Article 62(1)(f) of the Constitution must necessarily be based on oral or documentary evidence. In the case reported as **Imran Ahmad Khan Niazi Vs. Mian Muhammad Nawaz Sharif** (PLD 2017 SC 265), the learned Judge speaking for the majority elaborated that even an Election Tribunal can only disqualify a candidate when its declaration is issued on the basis of evidence before it. Such a requirement is implicit in Article 10A of the Constitution which makes both due process and fair trial a fundamental right in lawful judicial proceedings. Thus the determination of a dispute relating to a right or liability, the recording of evidence including the right of cross-examination, a hearing of the arguments of the parties and a reasoned judgment are essential attributes of a court of law (ref: **Tariq Transport Co., Lahore Vs. Sargodha Bhera Bus Service** (PLD 1958 SC (Pak) 437) and **Mollah Ejahar Ali vs Government of East Pakistan** (PLD 1970 SC 173).

6. It is evident that the summary finding given by the Returning Officer against the review petitioner in the year 2007 did not comply with the requirement laid out in Article 62(1)(f) of the Constitution as amended in the year 2010, namely a declaration by a court of law. This is because a Returning Officer does not record evidence in his proceedings which are summary in nature. His finding, unless set aside, is therefore valid only for the corresponding election. In these circumstances, the doctrine of *res judicata* would also be inapplicable to the finding of the Returning Officer because although the said finding remained unchallenged, the same was given without the recording of evidence including the right of cross-examination. His finding thus lacked the attributes of a declaration

given by a court of law. (ref: **Roshan Ali Buriro Vs. Syed Murad Ali Shah** (2019 SCMR 1939). Both these conditions: one that evidence is recorded before a court of law and two, that a finding given by such court is based on the evidence on record, are essential for a finding with binding effect to be governed by res judicata (ref: Section 11 of the Code of Civil Procedure, 1908 and **Muhammad Saleem Ullah Vs. Additional District Judge, Gujranwala** (PLD 2005 SC 511).

7. According to settled law, the amended provision of Article 62(1)(f) is effective prospectively from the date of its enforcement. This provision governs all disqualification claims that arise after its promulgation in the year 2010. In the present case, disqualification of the petitioner was sought in the general election held in 2013 when a declaration by a court of law was necessary to attract the Constitutional disqualification. On the other hand, the finding given by the Returning Officer in the present case was rendered in 2007 prior to the amendment in Article 62(1)(f) of the Constitution. Such a finding was not a verdict given after a trial by a court of law; namely, for the purposes of this case, an Election Tribunal or a Court of plenary jurisdiction. Since the forum of the Returning Officer lacks the attributes of a court of law therefore the electoral disqualification imposed on the review petitioner under Article 62(1)(f) of the Constitution ceased to be effective after the 18th Amendment. The said impact of the 18th Amendment went unnoticed in our judgment under review dated 09.07.2013 thereby constituting an error apparent on the fact of the record.

8. Having said that, a finding of dishonesty remains an ignoble impediment against the election of the petitioner. Therefore, it must be overcome by the petitioner if at any stage in the future he wishes to contest elections. An allegation of dishonesty based on the certificate of Shah Abdul Latif University, Khairpur rather than the

finding of the Returning Officer dated 03.12.2007, may still be invoked against the petitioner. This would involve the allegation that the petitioner committed forgery in the year 2007 by falsely claiming his educational qualification to be equivalent to a graduation degree. As this allegation remains unchallenged and unrebutted by the petitioner till date, any aggrieved party can in future object before the competent forum that dishonesty of the petitioner is apparent from the University's finding to the effect that he relied on a fake equivalence certificate for his *sanad* issued by a madrassa.

9. In view of the foregoing, this review petition is allowed and the observation that the petitioner is disqualified under Article 62(1)(f) of the Constitution in the circumstances of the case is recalled.

JUDGE

JUDGE

JUDGE

Islamabad, the
4th of February, 2020
Approved for reporting
Waqas Naseer/Meher LC