

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE UMAR ATA BANDIAL

MR. JUSTICE QAZI MUHAMMAD AMIN AHMED

MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CIVIL APPEAL NO.1399 OF 2019

(On appeal against the judgment dated 12.08.2016 of the Lahore High Court, Multan Bench, Multan passed in W.P.No.136 of 2015)

Shamona Badshah Qaisarani

...Appellant(s)

VERSUS

Election Tribunal, Multan etc.

...Respondent(s)

For the Appellant(s): Mr. Muhammad Shahzad Shaukat, ASC

For Respondent No.3: Barrister Umer Aslam, ASC
Mr. Ahmed Nawaz Ch., AOR

For the ECP: Mr. M. Arshad, D.G. (Law)

Date of Hearing: 16.03.2021

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- Through this appeal by leave of the Court under Article 185(3) of the Constitution of Islamic Republic of Pakistan, 1973, the appellant has called in question the judgment dated 12.08.2016 passed by the Lahore High Court, Multan Bench, whereby while dismissing the constitution petition filed by her, the order of the Election Tribunal, Multan dated 01.01.2015 was upheld and the nomination papers to contest bye-elections in PP-240 Dera Ghazi Khan-I filed by the appellant were rejected. The said Tribunal also declared the appellant disqualified to contest elections under Article 62(1)(f) of the Constitution, which was also maintained by the learned High Court by upholding the same.

2. Briefly stated the facts of the matter are that appellant's husband was the returned candidate in the general elections held in

2013 in the constituency PP-240, Dera Ghazi Khan-I but subsequently, he was disqualified on account of fake degree. In the bye-elections held on 07.10.2013, the appellant contested and won the elections by securing the highest votes. The respondent No. 3 Khawaja Muhammad Dawood Sulemani who had also contested the said elections, challenged the elections by filing Election Petition No. 13 of 2013 before the Election Tribunal, Bahawalpur & D.G. Khan Divisions on the ground of corrupt practices but it was dismissed vide order dated 19.11.2014. During the pendency of the said Election Petition, the respondent No. 3 also filed an application under Section 76-A of the Representation of the People Act, 1976 before the aforesaid Election Tribunal praying that the election of the appellant may be declared void as the declaration of assets made by her in the nomination papers were false, incorrect and against the record because she did not disclose a piece of agricultural land which was in her ownership. The Election Tribunal Bahawalpur accepted the application filed by the respondent No. 3, declared the bye-elections void, de-notified the appellant and ordered fresh elections in the constituency. The appellant challenged the said order before this Court but her appeal stood dismissed vide judgment dated 09.05.2016. Thereafter, again bye-elections were scheduled to be held on 17.01.2015. The appellant again submitted her nomination papers whereupon the respondent No. 3 raised objection that according to the findings of the Election Tribunal Bahawalpur dated 19.11.2014 passed in an application under Section 76-A of the Representation of the People Act, 1976, the appellant is not "Sadiq" and "Ameen" and is not entitled to contest the elections. However, the Returning Officer accepted the nomination papers of the appellant vide order dated 27.12.2014. The respondent No. 3 challenged the acceptance of nomination papers of the appellant before the Election Tribunal Multan by filing Election Petition No. 04 of 2014, which was allowed vide order dated 01.01.2015, the appellant's nomination papers were rejected and on the basis of the order of the Election Tribunal Bahawalpur she was disqualified under Article 62(1)(f) of the Constitution. The appellant being aggrieved by the order of the Election Tribunal Multan, challenged it before the Lahore High Court, Multan Bench by

filing Writ Petition No. 136 of 2015 but it has been dismissed vide impugned judgment dated 12.08.2016. Hence, this appeal by leave of the Court.

3. *Learned counsel for the appellant inter alia contended that the appellant could not have been disqualified under Article 62(1)(f) of the Constitution because the declaration that she was non-sagacious, non-profligate, non-righteous etc was not granted after affording her proper opportunity to defend her case; that even the Tribunal is not a forum to issue a declaration without recording of evidence in this regard after provision of the right of due process and the same is based on surmises and conjectures; that even otherwise the act of the appellant of not mentioning the agricultural property inherited from her parents in the nomination papers was neither a dishonest act nor was a deliberate concealment to gain certain benefits/advantage; that this Court in the recent judgments has held that unless there is a dishonest intent behind concealment of an asset, one cannot be punished for life if he had made an innocent error; that non-mentioning of the assets in the nomination papers could have become fatal, if the omission would have been with the purpose to avoid payment of tax or other state dues etc, therefore, in view of the law laid down by this Court, the appellant could not have been permanently disqualified under Article 62(1)(f) of the Constitution.*

4. *On the other hand, learned counsel for the respondent No. 3 controverted the arguments advanced by the learned counsel for the appellant by submitting inter alia that the agricultural property was deliberately not mentioned by the appellant in her nomination papers; that this fact was believed by the Election Tribunal Bahawalpur in its judgment dated 19.11.2014 passed in an application in Election Petition No. 13/2013 under Section 76-A of Representation of People Act, 1976 after affording her ample opportunity to put up her case; that the judgment of the Tribunal was upheld by this Court, therefore, it cannot be said that the declaration to disqualify the appellant was based on surmises and conjectures.*

5. *We have heard learned counsel for the parties and have perused the relevant record as also the relevant law.*

6. After hearing the arguments advanced by the learned counsel for the parties, the issues which crop up for our consideration are whether the omission of the appellant of non-mentioning the agricultural property inherited from her parents was sufficient enough to disqualify her permanently, and whether the declaration of disqualifying the appellant in terms of Article 62(1)(f) of the Constitution was based on proper scrutiny of the evidence evaluated by a court of competent jurisdiction and in accordance with the law laid down by this Court.

7. It is now a well settled principle that every non-disclosure 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 non-disclosure 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 Vs. 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. It would be advantageous to reproduce the relevant portion of the judgment, which reads as under:-

"9. While considering a case of dishonesty in judicial proceedings what should not be lost sight of is that on account of inadvertence or honest omission on the part of a contesting candidate a legitimately acquired asset is not declared. This may happen as an honest person may perceive something to be right about which he may be wrong and such perception cannot necessarily render him dishonest though the omission would invariably result in rejection of his nomination paper had such a fact is pointed out to the Returning Officer at the time of scrutiny of nomination papers or in proceedings available under the election laws. There are many conceivable instances where an omission to

declare an asset on the face of it cannot be regarded as dishonest concealment. For example, where an inherited property is not declared on account of mistake of fact or an asset acquired from a legitimate source of income is not listed in the nomination paper. Suchlike omissions at best could be categorized as bad judgment or negligence but certainly not dishonesty. As mentioned earlier even the proviso to section 14(3)(d) of RoPA envisaged that rejection of a nomination paper on account of failure to meet the requirements of section 12 of RoPA would not prevent a candidate to contest election on the basis of another validly filed nomination paper. Hence mere omission to list an asset cannot be labeled as dishonesty unless some wrongdoing is associated with its acquisition or retention which is duly established in judicial proceedings. In our view attributing dishonesty to every omission to disclose an asset and disqualify a member for life could never have been the intention of the parliament while incorporating Article 62(1)(f) in the Constitution. All non-disclosures of assets cannot be looked at with the same eye. In our view no set formula can be fixed with regard to every omission to list an asset in the nomination paper and make a declaration of dishonesty and impose the penalty of lifetime disqualification. In a judgment from the foreign jurisdiction in the case of Aguilar v. Office of Ombudsman decided on 26.02.2014 by the Supreme Court of Philippines (G.R. 197307) it was held that dishonesty is not simply bad judgment or negligence but is a question of intention. There has to exist an element of bad intention with regard to an undeclared asset before it is described as dishonest. Unless dishonesty is established in appropriate judicial proceedings, Article 62(1)(f) of the Constitution cannot be invoked to disqualify an elected member for life.

10. Where a matter with regard to an undisclosed asset is taken to court, it would not form the opinion that it is a case of dishonest concealment without first calling upon the elected member to explain the source from which such an asset was acquired. Where no satisfactory explanation is forthcoming and the undeclared asset also does not commensurate with the elected member's known sources of income, it would give rise to the presumption that unlawful means may have been applied with regard to such an asset. 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. The test of honesty with regard to non-disclosure of assets and liabilities is to be applied in that context only and certainly not in a case where a clean asset has not been declared on account of bad judgment or inadvertent omission. In the impugned judgment, the learned High Court itself was conscious of the fact that where there is a case of non-disclosure of an asset the same ipso facto does not render a person to be dishonest. In this regard, a judgment of this Court cited by respondent No. 1's counsel in the case of Rai Hassan Nawaz v. Haji Muhammad Ayub (PLD 2017 SC 70) was referred where it was held as follows:-

"8. We, therefore, observe that any plausible explanation that exonerates, inter alia, mis-declaration of assets and liabilities by a contesting

candidate should be confined to unintended and minor errors that do not confer any tangible benefit or advantage upon an elected or contesting candidate. Where assets, liabilities, earnings and income of an elected or contesting candidate are camouflaged or concealed by resort to different legal devices including benami, trustee, nominee, etc. arrangements for constituting holders of title, it would be appropriate for a learned Election Tribunal to probe whether the beneficial interest in such assets or income resides in the elected or contesting candidate in order to ascertain if his false or incorrect statement of declaration under section 12(2) of the ROPA is intentional or otherwise. This view finds support from the statutory aim and purpose of requiring all contesting candidates to file their statements and declarations as envisaged in section 12(2) of the ROPA. Clearly there is a public interest object behind the statutory prescription for obtaining the said statements and declaration. It is to ensure integrity and probity of contesting candidates and therefore all legislators."

(Underlined to lay emphasis)

8. In the case of Shakeel Awan Vs. Sheikh Rasheed Ahmed (PLD 2018 SC 643) the appellant had sought disqualification of the respondent on the ground that the returned candidate/respondent has deliberately concealed certain agricultural land in his nomination papers; has declared his land holding to be 983 Kanals 17 Marlas while it has been established on record that the respondent owned 1049 Kanals and 13 Marlas and also not correctly disclosed the market value of certain immovable property. This Court while dismissing the appeal held that in cases where the non-disclosure or misdeclaration gives an illegal advantage to a candidate then such non-disclosure or misdeclaration would terminate his candidature, and if he has been elected to his disqualification and consequent removal but the misdeclaration made by the respondent apparently did not offend any law, in that if he had disclosed his entire land holding and had shown the value of the said house to be forty eight million rupees he would still be able to contest the elections. In Muhammad Hanif Abbasi Vs. Imran Khan Niazi (PLD 2018 SC 189), Faisal Arab, J, as he then was, while agreeing with the majority view observed that there can be many examples where it can be safely said that an omission on the face of it is not dishonest. Omission to list an

inherited property or the pensionary benefits received by one's spouse or the plot allotted by the government in acknowledgment of services rendered are some of the instances which cannot be said that a member intentionally concealed its disclosure in order to cover some financial wrongdoing. Suchlike omissions at best could be categorized as bad judgment or negligence but not dishonesty. In Murad Bux Vs. Kareem Bux (2016 SCMR 2042), the petitioner in the nomination papers filed for contesting local council election had failed to disclose that a criminal case is pending against him, which on objection raised by the respondent, led to rejection of his nomination papers. However, this Court allowed the petition by holding 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 for elections and that the non-disclosure of a fact which otherwise, if disclosed, could not debar the Petitioner from contesting the election, cannot be made a ground to preclude the Petitioner from contesting the election.

9. *In view of what has been discussed above, before disqualifying the appellant, the learned fora below ought to have established whether the act of the appellant of non-mentioning of landed property was a dishonest act with a view to gain some benefits i.e. to evade tax payment etc or the property was acquired later on after elections by using corrupt practices etc. However, we have noted that the learned fora below have made no effort to ascertain these aspects of the matter. The learned Election Tribunal Multan while disqualifying the appellant vide judgment dated 01.01.2015 only made basis to the earlier order passed by the Election Tribunal Bahawalpur dated 19.11.2014 in an application filed by the respondent No. 3 under Section 76-A of the Representation of the People Act, 1976. Under Section 76-A, the Election Tribunal can declare the election of the returned candidate void or declare any other contesting candidate to have been duly elected and nothing else. In those proceedings, the stance of the appellant was that the property was inherited from her parents, which has been transferred to her brothers and in this regard the "Tamleek Nama" has been executed on 04.07.2013. The learned Election Tribunal Bahawalpur vide order dated 19.11.2014 de-*

seated the appellant mainly on the ground that as the bye-elections were to be held on 07.10.2013, therefore, she was to declare her assets on the preceding 30th of June i.e. 30.06.2013 and as the "Tamleek Nama" was executed after the cutoff date i.e. 30.06.2013, therefore, it was held that she ought to have mentioned the agricultural property. However, in this order, the learned Election Tribunal had admitted the fact that the property was legitimate as it was inherited from her parents vide duly attested mutations. This judgment was upheld by this Court and thereafter, again bye-elections were scheduled to be held on 17.01.2015. For the second bye-elections to be held on 17.01.2015 the appellant filed nomination papers, which were objected to by the respondent No. 3 on the basis of the order of the Election Tribunal Bahawalpur dated 19.11.2014 but these were accepted. It was in the appeal before the Election Tribunal Multan against acceptance of nomination papers of the appellant for the second bye-election that the Election Tribunal Multan for the first time while relying on the order of the Election Tribunal Bahawalpur dated 19.11.2014 disqualified the appellant but failed to take into consideration that in the order of the Election Tribunal Bahawalpur, there was nothing mentioned about disqualification of the appellant and the earlier bye-election was only declared void by holding that the appellant ought to have mentioned about the property which was in her possession before the cutoff date i.e. 30.06.2013 and as the "Tamleek Nama" was executed on 04.07.2013 after the cutoff date, therefore, it was not taken into consideration. No wrongdoing was associated with the acquisition of the property or its retention, therefore, in view of the law laid down by this Court referred above, the act of non-mentioning of the property could not have been termed as dishonest act, rather it could only be termed as bad judgment or negligence but certainly not dishonesty. This Court in Muhammad Siddique Baloch Vs. Jehangir Khan Tareen (PLD 2016 SC 97) has held that in cases involving a finding of fact about the disqualification of a returned candidate in election matters, such finding must be based on affirmative evidence and not on presumptions, inferences and surmises. It would be in order to reproduce the relevant portion of the said judgment, which reads as under:-

"29. At this juncture, it is important to emphasize that in cases involving a finding of fact about the disqualification of a returned candidate in election matters, such finding must be based on affirmative evidence and not on presumptions, inferences and surmises. That does not mean that proceedings in an election petition before an Election Tribunal are strictly criminal proceedings. It is settled law that even in civil proceedings, a finding of fact must be based on positive and affirmative evidence. This requirement rests in the basic principles of the Qanun-e-Shahadat Order, 1984 and is articulated in Allah Din v. Habib (PLD 1982 SC 465). For that reason and the serious consequences that follow a finding of disqualification under Article 62(1)(f) of the Constitution, an additional evidentiary safeguard is adopted by the Court, namely, that any reasonable hypothesis available in the recorded evidence to avoid the disqualification of the returned candidate ought to be adopted by the Court of law. The foregoing safeguards have already been laid down in relation to the proof of corrupt practice by a candidate in an election. Section 78(3)(d) of the ROPA treats a false statement by a candidate about his educational qualification to be a corrupt practice.

30. The earliest pronouncement on this subject is rendered by this Court in Muhammad Saeed's case (PLD 1957 SC 91), wherein it is held that:

"... the burden of proof of corrupt practices is on the petitioner; that the evidence of proof of such practices must be restricted to the charges or instances mentioned in the petition and the particular; that each ingredient of a corrupt practice so charged must be affirmatively proved by evidence, direct or circumstantial; and that where the evidence is wholly circumstantial, the commissioners before finding a corrupt practice proved must exclude all reasonable hypotheses which are consistent with that corrupt practice having not been committed...."

31. A case directly pertaining to disqualification of a returned candidate was heard by this Court in Mohammad Yusuf's case (PLD 1973 SC 160) wherein whilst adopting the view taken in Muhammad Saeed's case (PLD 1957 SC 91) this Court has observed that finding of disqualification must be based on positive evidence and should not be rendered inferentially on mere surmises; that since a disqualification was penal in nature, therefore, the terms thereof were subject to strict interpretation; and the benefit of doubt was to be extended in favour of a returned candidate. The later judgments of this Court rendered in Saeed Hassan's case (PLD 1976 SC 6) and Muhammad Afzal's case (1986 SCMR 1736) approve the principles enunciated in the afore-noted two judgments."

(Underlined to lay emphasis)

10. In the case of Allah Dino Khan Bhayo Vs. Election Commission of Pakistan (PLD 2020 SC 591), this Court has held as follows:-

“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 v. 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 v. 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 v. Sargodha Bhera Bus Service (PLD 1958 SC (Pak) 437) and Mollah Ejahar Ali v. Government of East Pakistan (PLD 1970 SC 173).

11. It is well-settled that no man should suffer because of the fault of the court. There is an old maxim ‘actus curiae neminem gravabit’, which means that an act of court shall prejudice no man and the same becomes applicable in the present case as the learned fora below were under obligation to do justice with the appellant. This maxim is founded upon justice and good sense which serves a safe and certain guide for the administration of law. In a case, where any undeserved or unfair advantage has been given to a party invoking the jurisdiction of the court (the respondent No. 3 in the present case) and the same requires to be neutralized, the said maxim is to be made applicable.

12. For what has been discussed above, we are of the view that the learned Election Tribunal Multan disqualified the appellant in a slipshod manner. The act of the appellant at best could be termed as bad judgment or negligence and as the property was legitimately acquired through inheritance, the same could not be

labeled as acquired through dishonest means. For this negligence, she could not be disqualified for life. Consequently, this appeal is allowed and the impugned judgment is set aside.

13. *The above are the detailed reasons of our short order of even date.*

JUDGE

JUDGE

JUDGE

Islamabad, the
16th of March, 2021
Approved For Reporting
Khurram