IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

Civil Appeal No.2797 of 2022
(On appeal against judgment dated 20.07.2022 passed by High Court of Sindh, Circuit Court Hyderabad in C.P. No.D-2478 of 2022.)

Yasir Aftab **... Appellant**

vs

Irfan Gull and others **... Respondents**

For the Appellant	:	Mr. Shah Khawar, ASC Sh. Mehmood Ahmed, AOR
For Respondents No.1 & 2	:	Mr. Aftab Alam Yasir, ASC Mr. M. Kassim Mirjat, AOR
On Notice	:	Mr. Rashdeen Nawaz Kasuri, Addl. AGP Mr. M. Arshad, D.G. Law, ECP
Date of Hearing	:	09.11.2022

JUDGMENT

Munib Akhtar, J.: This matter arises out of the ongoing process of local government elections in Sindh, in relation to local bodies set by and under the Sindh Local Government Act, 2013 ("2013 Act"). In exercise of powers conferred by s. 138 of the said Act read with entry No. 1 of the Seventh Schedule thereto, the Provincial Government has framed the Sindh Local Councils (Election) Rules, 2015 ("2015 Rules").

2. The appellant filed his nomination papers for the seat of councilor in UC Jarki @ Chamber. The respondent Nos. 1 and 2 ("contesting respondents") sought rejection of the nomination papers on the ground, as presently relevant, that the appellant had not fully disclosed and declared his and his spouse's assets/ properties. The objection was rejected by the Returning Officer and the nomination papers accepted. The contesting respondents filed an appeal before the appellate authority constituted by the Election Commission of Pakistan ("ECP") under Rule 18(5) of the 2015 Rules.

The appeal was dismissed. The contesting respondents thereafter filed a writ petition under Article 199 of the Constitution before the High Court, which allowed the same by means of the impugned order in the following terms:

> "The learned appellate authority wrongly upheld the orders of the Returning Officer while accepting the nomination papers of the respondent No. 5 [i.e., the present appellant] who had intentionally and willfully concealed his assets which he was required to provide details on solemn affirmation."

The orders of the forums below were set aside with the result that the nomination papers stood rejected.

3. Being aggrieved by the said decision, the appellant sought leave to appeal against the same. Leave was granted vide order dated 22.09.2022. Learned counsel for the appellant made two submissions. The first (on which leave to appeal was primarily granted) was that under s. 23 of the 2013 Act returned candidates were required to make a post-election declaration of assets. There was no requirement for a declaration prior to election, and none at the time of the filing of the nomination papers as could lead to the rejection of the same. The second, and alternate, submission was that even if there was such a (pre-election) requirement which entailed the consequence just mentioned the nomination papers could not be rejected by reason of an immaterial or innocent omission. The omissions, if any, in the present case were neither material nor substantial nor deliberate or willful. Thus, on any view of the matter, the appellant's nomination papers ought not to have been rejected, as erroneously concluded by the learned High Court. Learned counsel for the contesting respondents supported the impugned order and prayed that the appeal be dismissed. The learned DG Law, ECP ably assisted the Court with regard to the relevant statutory provisions.

4. In order to resolve the questions raised in this appeal a conspectus of the relevant provisions will be useful, since the matter of elections to local bodies presents a surprisingly complex (and, if we may say so, rather fractured) legal landscape. Initially, under the Constitution local government in the Provinces (other than in cantonment areas) was wholly within the provincial domain, and exclusively the legislative competence of the Provincial Assemblies. Since elections to local bodies were but one aspect of local government the legislative competence in relation thereto likewise

vested exclusively in the Provinces. Certain constitutional amendments (which for brevity can be regarded as starting from the 18th Amendment (2010)) have however altered this position. Thus, Article 140A, as substituted in 2010, provides as follows (emphasis supplied):

> "**140A. Local Government**.— Each Province shall, by law, establish a local government system and devolve political, administrative and financial responsibility and authority to the elected representatives of the local governments.
>
> (2) *Elections to the local governments shall be held by the Election Commission of Pakistan*."

Prior to this amendment, the ECP was of course only concerned with elections to the Federal and Provincial legislatures. Reference in this regard may also be made to Article 218(1), which (by way of amendment made in 2010) now brings elections to "such other public offices as may be specified by law" also within the remit of the ECP. Entry No. 41 of the Federal Legislative List confers an exclusive legislative competence on Parliament in relation, inter alia, to the Federal and Provincial legislatures. Local government found no mention in this entry and that position remains unaltered. Thus, under what might be termed as the "general" legislative competence, Parliament had, and has, no power to enact laws in relation to local government. However, Article 222 must be taken into consideration. It specifically identifies various aspects of elections in respect of which Parliament can make laws, spelt out in paras (a) to (f) thereof. Previously, this Article made no mention of local government. However, by the 22nd Amendment (2016) two (i.e., not all) of these clauses were amended to include specific reference to local government. As so amended, it now reads as follows (emphasis supplied):

> "**222. Electoral Laws.**—Subject to the Constitution, Majlis-e-Shoora (Parliament) may by law provide for—
>
> (a) the allocation of seats in the National Assembly as required by clauses (3) and (4) of Article 51;
>
> (b) the delimitation of constituencies by the Election Commission *including delimitation of constituencies of local governments*;
>
> (c) the preparation of electoral rolls, the requirements as to residence in a constituency, the determination of objections pertaining to and the Commencement of electoral rolls;

> (d) the conduct of elections and election petitions; the decision of doubts and disputes arising in connection with elections;
>
> (e) matters relating to corrupt practices and other offences in connection with elections; and
>
> (f) all other matters necessary for the due constitution of the two Houses, the Provincial Assemblies *and local governments*;
>
> but no such law shall have the effect of taking away or abridging any of the powers of the Commissioner or the Election Commission under this Part."

The changes made above must be read keeping in mind entry No. 58 of the Federal Legislative List which confers (exclusive) power on Parliament in respect of "[m]atters which under the Constitution are within the legislative competence of Majlis-e-Shoora (Parliament) or relate to the Federation". Finally, reference may also be made to Article 219 which sets out in some detail the duties of the ECP. As amended in 2010 and 2016, two of its clauses ((a) and (d)) make specific reference to local government elections. This appeal raises no constitutional issues as such so whatever is said here in relation to the above is tentative. But, the position that seems to emerge from the foregoing is as follows. Out of the legislative competence of "local government" one aspect, namely, elections to local bodies, has been carved out such that it is to be regarded as a legislative competence in its own right. But this competence has itself been split into at least two, and perhaps three, parts. One remains, as before, within the exclusive domain of the Provinces. The other appears to have been allocated exclusively to Parliament (i.e., the Federation). And there may even be a third part where the legislative competence is concurrent.

5. What exactly are the contours of the "parts" just mentioned, and their interplay and how they interact one with the other(s) is not something that needs to be considered here. However, the practical result is that elections to local bodies in the Provinces are governed by a rather peculiar mix of both federal and provincial law. In relation to Sindh, that law on the provincial side is the 2013 Act read with the 2015 Rules. These contain several detailed provisions in relation to elections to local bodies. But the 2013 Act also contains a general, catch-all provision to the following effect (as amended):

> "**71. Savings under this Chapter**.—Save as provided under this Act, the provisions of the Elections Act, 2017 shall be

applicable to the elections and the electoral process under this Act."

The Elections Act, 2017 ("2017 Act") was enacted by Parliament as comprehensive legislation in relation to elections to, inter alia, replace existing (federal) laws in force at that time (see s. 241). Since the Constitution by then also empowered Parliament in relation to local government, the 2017 Act also makes many provisions in relation thereto, and indeed devotes a whole chapter to that subject: ss. 219-229 (Chapter XIII, "Conduct of Elections to the Local Governments"). Section 229 provides generally as follows:

> "**229. Application of provisions to local government election.—**(1) Subject to this Chapter and the Rules relating to conduct of local government elections, election disputes, election offences and allocation of symbols, the provisions of Chapter V, Chapter IX, Chapter X and Chapter XII of this Act, as nearly as possible, shall apply to the conduct of local government election.
>
> (2) The qualifications and disqualification of a candidate in a local government election or a Member of a local government shall be decided under the applicable local government law."

"Applicable local government law" is defined in s. 2(ii) as meaning "an Act of *Majlis-e-Shoora* (Parliament) or of a Provincial Assembly for establishment of a local government and includes an Ordinance". As is apparent, how exactly the 2013 Act on the one hand and the 2017 Act on the other are to interact in relation to local body elections is an exercise that can be complex and (if only occasionally) even fraught. While this appeal does not directly raise any such issue there can be little doubt that the scheme now in place constitutionally and legislatively is not without difficulties.

6. Turning now to the submissions made by learned counsel for the appellant and taking up the first ground, we are, with respect, unable to agree that there is only a post election requirement to declare assets, as called for in terms of s. 23 of the 2013 Act. Before proceeding further one point may be made. It will be noted that s. 229(2) of the 2017 Act leaves the matter of the qualifications and disqualifications to the applicable local government law. Sections 35 and 36 of the 2013 Act make provision in this regard, respectively. For present purposes, it is to be noted that these sections contain nothing that is equivalent to Article 62(1)(f) of the Constitution. It will be recalled that it is with reference to this constitutional provision (which, as such, applies only to elections to the Federal

and Provincial legislatures) that a failure to properly declare assets in the prescribed manner in the nomination papers can lead to a declaration that the candidate is not qualified to be a member of the concerned legislature. The consequences that can follow from such declaration are well known and need not be elaborated here. However, since there is no provision equivalent to Article 62(1)(f) in the 2013 Act, it follows that a failure to make a proper declaration of assets in the nomination papers, if there be such a requirement, that does not entail any consequence as in relation to the Federal and Provincial legislatures. The only consequence is that the nomination papers stand rejected and the candidate cannot participate in that particular election. But even this statement must be qualified. Rule 16(5) of the 2015 Rules provides as follows: "A person may be nominated in the same electoral unit by not more than five nomination papers". Proviso (i) to sub-rule (3) of Rule 18 provides, in effect, that if multiple nomination papers are filed for a candidate and one suffers from any defect but the other(s) do not, it is only the first set that will stand rejected and the candidate will be able to contest the election on the basis of the other(s). Thus, the consequence of a failure of the nomination papers to be statutorily compliant and, in particular, a failure to properly disclose assets (if that is indeed so required) is much less drastic in relation to local government elections under the 2013 Act than under the 2017 Act in relation to elections to the Federal or Provincial legislatures.

7. This brings us to the nub of the first question: is there a requirement to make a declaration of assets in the nomination papers filed by a candidate? The answer to this has to be in the affirmative. Annexed to the 2015 Rules are various forms. The first five of these are in relation to nominations for the various offices to which a person may wish to contest elections. Form III relates to the election of a member to a District Council and is relevant for present purposes. That this is the form to be used is made clear by Rule 16(3). This form has appended to it a declaration, whereby the declarant (i.e., the candidate, here the appellant) "solemnly declare[s] that no movable property or immovable property, land, house, apartment, shop, share certificate, securities, bonds, insurance policies, gold jewelry and motor vehicle are held by [him] or any member of [his] family dependent upon [him] except as below" and there then follows a table in which the particulars and details of the assets have to be set out. If the candidate is

successful, he then has to make another declaration as required by s. 23, as set out in Form XVII annexed to the 2015 Rules. This form is essentially the same as the pre-election declaration. However, the requirement under s. 23 obviously cannot obviate the necessity of the form that applies at the pre-election stage. If any objection is raised to the declaration of assets therein and the same is sustained then the nomination may be rejected by the Returning Officer, subject to what has been said above in respect of multiple nomination papers and the right of appeal (see Rules 16 to 18 of the 2015 Rules). The consequence of course is only that the candidate cannot contest that particular election, but the submission now under consideration, namely, that an incorrect declaration is wholly without any consequence by reason of s. 23 cannot, with respect, be accepted. The primary ground taken accordingly fails.

8. This brings us to the second ground, namely, that it is only a material defect or omission in the declaration of assets, if willfully, knowingly or deliberately made that can result in the rejection of the nomination papers. This submission requires a consideration of Rule 18(3) which provides as follows (emphasis supplied):

> "The Returning Officer, may either on his own motion or upon any objection, conduct such summary enquiry as he may think fit and reject a nomination paper if he is satisfied that-
>
> (a) the candidate is not qualified to be elected as a member;
>
> (b) the proposer or the seconder is not qualified to subscribe to the nomination paper;
>
> (c) any provision of rule 16 or rule 17 has not been complied with; or
>
> (d) the signature of the proposer or the seconder is not genuine:
>
> Provided that –
>
> (i) the rejection of a nomination paper shall not invalidate the nomination of a candidate by any other valid nomination paper;
>
> (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*;
>
> (iii) the Returning Officer shall not enquire into the correctness or validity of any entry in the electoral roll."

9. The rejection of a set of nomination papers by reason of any defect or omission in the declaration of assets is covered by clause

(c) (i.e., that a provision of Rule 16 has not been complied with). However, this is subject to the proviso, of which we have already seen clause (i). What is now relevant is clause (ii). It provides, in our view, a complete answer to the second submission. There is a statutory ground available by way of a defence to an objection that the particulars set out in the declaration of assets are incorrect or incomplete. It is therefore necessary only to consider what it is that, as a matter of law, is required by and for purposes of clause (ii) of the proviso (herein after referred to as “the provision”). In our view, the provision requires a two-step exercise by the Returning Officer. The first step is that he must make a determination whether the defect pointed out by the objector is of a “substantial nature”. If the answer is in the negative, then the objection must be overruled. This is made clear by the use of the mandatory “shall” with which the provision opens: the Returning Officer has no discretion in this regard. In making this determination the Returning Officer must keep at least two points in mind. The first is that the provision covers “any” defect. This must be construed and applied broadly. The second is that in determining whether “any” such defect is of a substantial nature the Returning Officer must consider not merely the defect itself but place it in the context of the nomination papers as a whole. A defect, if considered in isolation and in and of itself, may appear to be of a substantial nature but may take a different color when placed in context. An example may help to explain the point. Suppose the objection is that the candidate failed to disclose a bank account, in which as on the relevant date (say) Rs. 100,000/- stood to his credit. Taken in isolation this may appear to be a defect of a substantial nature. But suppose the total value of the assets declared by the candidate is Rs. 10,000,000/- (or higher). The amount not disclosed is but 1% of the assets declared (or less). In context, the defect may therefore turn out not be of a substantial nature. On the other hand if the total value of the assets declared is (say) Rs. 1,000,000/- (or less), the amount not disclosed would be 10% (or more). This may well be a defect of a substantial nature, but even here there may be other facts available that could lead to the conclusion that, on a consideration of the whole of the nomination papers and in context, it is not so. We may clarify that these examples are not to be used as a rigid yardstick. They are only set out for illustrative purposes. The Returning Officer is required to apply his mind to the nomination papers both as a whole and in relation to each particular objection and take into consideration also

such explanation (if any) as is put forward by the candidate. Context may well prove to be critical and provide a ready justification and explanation for what, if considered in isolation, may appear to have a different meaning. It is only in this manner that a proper and lawful conclusion can be arrived at, and a determination made as to whether the defect is of a substantial nature.

10. 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.

11. Having considered the point, we are of the view that it is the second possibility that, as a matter of law, accords better with the statutory intent even though it is less intuitive. We come to this

conclusion for the following reasons. Firstly, it allows for both the “shall” and the “may” to be used in their ordinary and primary meanings, without setting up any clash between the first and the second parts of the provision. Secondly, provided always that the defect can be remedied forthwith, it allows for greater and maximal participation in the electoral process. In this context it is to be kept in mind that the awareness of candidates in local body elections of legal niceties and requirements may not be as sophisticated as that of candidates who contest elections at the national and provincial levels. Local bodies operate at the grass root level and candidates for such offices may more than make up any (supposed or actual) lack of legal sophistication in terms of their commitment to, and enthusiasm for, the local community. Such candidatures should be encouraged and stimulated and not denied or discouraged. At the same time it is also to be remembered that many regard local bodies as being, inter alia, nurseries for “higher” elective office. Such nurseries should be allowed to flourish with maximal participation in the electoral process. Thirdly, the defect, even if properly determined to be of a substantial nature may be of an essentially technical nature. To revert to the example given above, even if a candidate fails to disclose a bank account having Rs. 100,000/- in credit, on total assets of Rs. 1,000,000/- (or less) and this failure is determined to be of a substantial nature, the non-disclosure may not be willful or deliberate and may only be due to a genuine oversight. The position of the objector (who would invariably be another candidate or his supporter) is protected both by conferring discretion on the Returning Officer and the limiting feature, namely, that the defect must be remediable forthwith. Such discretion must of course be lawfully exercised, in terms of principles that are well established and settled in the case law and require no elaboration here. It may well be that it is rightly and properly exercised in favor of rejecting the nomination papers. But that is a matter to be decided on a consideration of the facts and circumstances of each case as comes before the Returning Officer. On this understanding of the provision, objections to defects not of a substantial nature automatically fall by the wayside; where the defect is of a substantial nature there is still discretion vested in the Returning Officer, and if the matter can be remedied forthwith, he may allow the candidacy to move forward to a contested election. We are therefore of the view that it is the second possibility that constitutes

the correct interpretation and application of the last portion of the provision.

12. The foregoing discussion may be summarized as follows. As regards the first ground taken, with reference to s. 23 of the 2013 Act, we are, with respect, unable to agree with learned counsel that it has merit. As regards the second ground, that is to be decided in terms of clause (ii) of the proviso to sub-rule (3) of Rule 18. It requires a two-step exercise to be carried out by the Returning Officer. In the first stage he must determine whether the defect objected to is of a substantial nature. If the answer is in the negative, that concludes 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 consider whether, in his discretion (exercised in a lawful manner), to overrule the objection to the defect though it be of a substantial nature, as long as it can be remedied forthwith. If he exercises his discretion in favor of the candidate and the defect is remedied forthwith the nomination papers stand accepted. If he refuses to exercise his discretion then of course the nomination papers stand rejected. But whatever his action the Returning Officer must record his reasons appropriately and accordingly, in relation (as the case may be) to both stages of the exercise.

13. An examination of the record as produced before us shows that the learned High Court, with respect, did not properly and correctly appreciate the relevant statutory provisions, as set out and explained above. It relied on a passage from an earlier decision of the High Court (CP D-633/2022). However, the view that appears to have found favor in that case (to judge from the passage reproduced) is not, in our view and with respect, correct. The learned High Court has also cited a decision of this Court but that was a matter decided in relation to the Representation of the People Act, 1976, where the statutory provisions were rather different from those at hand. The disposal of the writ petition by the learned High Court by means of the impugned order cannot therefore be sustained.

14. In view of the foregoing position, we allow this appeal. The impugned order is set aside and the matter stands remanded to the High Court to consider whether, in the facts and circumstances of the case, and consistently with what has been said herein above,

the appellant was entitled to the benefit of clause (ii) of the proviso to sub-rule (3) of Rule 18 of the 2015 Rules. Since the matter relates to an ongoing electoral process we are sanguine that the High Court will dispose of the writ petition (which shall be deemed to be pending) within a period of thirty days from the date when a certified copy of this judgment is filed on the record thereof. The writ petition to be listed in the High Court accordingly. There shall be no order as to costs.

Judge

Judge

Judge

Announced in Court on 30.11.2022 at Islamabad

Judge

Islamabad;
Approved for reporting