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Judgment Sheet

IN THE LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

W.P.No.15025/2010

JUDGMENT

WAHEED SABIR
VERSUS
RANA ZAHID HUSSAIN KHAN, ETC.

Date of hearing: 03.04.2013

Petitioners by: Mr. Arshad Malik Awan, Advocate.
Mr. Azam Nazir Tarar, Advocate.
Mr. Shahram Sarwar Ch., Advocate.
Kh. Saeed uz Zafar, Advocate.
Mr. Majid Karim Khokhar, Advocate.

Respondents by: M/s Maqbool Elahi Malik, Advocate, Umer Riaz, Advocate and Ali Sibtain Fazali, Advocate.
Mr. Nadeem-ud-Din Malik, Advocate with Khawaja Ijaz, for BISE, Faisalabad.
Mr. Jehangir Akhtar Jojha, Advocate.
Mr. M. Aqeel Wahid Ch., Advocate.
Mr. Asif Afzal Bhatti, Advocate/legal advisor for Punjab University.
Mr. Mehboob Azhar Sheikh, Advocate for BISE, Lahore.
Miss Uzma Zahoor, Advocate for CECP.

Muhammad Khalid Mehmood Khan, J. Through this single judgment, I propose to decide the following constitutional petitions W.P.No.15025/10, W.P.No.22151/10, W.P.No.9588/10, W.P.No.4299/10, W.P.No.19012/10 and W.P.No.11188/10 as during the pendency of these petitions, the National and Provincial Assemblies have been dissolved and fresh general elections have been announced.

2. The respondents have raised the legal objection to the effect that after the dissolution of National and Provincial Assemblies the cause of action has cease to exist. Learned Counsel for the parties

have addressed arguments on legal objection and to some extent on merits and it is decided that first the question of maintainability of the petition be resolved and if this court comes to the conclusion that petitions are maintainable then parties will address the detailed arguments on merits.

3. Learned Counsel for the respondents have raised a preliminary objection about the maintainability of petition with reference to article 199 (b)(ii) Constitution of Islamic Republic of Pakistan 1973 (*hereinafter referred to as the* ***Constitution***) and submit that after the dissolution of National and Provincial Assemblies the respondents are no more holding the Public Office and ceased to be the holder of Public Office, hence the constitutional petitions become infructuous and are liable to be dismissed.

4. Briefly stated the facts of all the petitions are that the petitioners have challenged the genuineness of the respondents/ parliamentarians educational degrees in terms of mandatory requirements of Section 99 (cc) of the Representation of the People Act of 1976 read with Article 62 and 63 of the Constitution. The petitioners allegation is that educational degree of graduation of respondents parliamentarian is fake document and as such the respondents be declared ineligible to hold the office of member parliament. The petitioners have prayed as under;

> "*It is, therefore, most respectfully prayed that by accepting the titled writ petition respondent No.1 may very kindly be directed to appear before this Hon'ble Court and to explain under what authority of law he has assumed the office of MNA and continue to hold the same thereafter his holding the office of MNA of NA-166 Arifwala may very kindly be declared as illegal and ordered to be set aside.*
>
> *Any other relief appropriate in the facts and circumstances of the case may also very kindly be granted to the petitioners in the interest of justice and fair play.*"

5. The respondents in the first instance have raised the objection about the maintainability of writ of quo warranto under Article

199(b) (ii) of the Constitution, the Hon'ble Chief Justice constituted a Full Bench for resolution of the respondents' legal objection. The Full bench of this Court vide judgment dated 29.7.2011 held that writ of quo warranto is maintainable, the respondents assailed the judgment of Hon'ble Full Bench of this Court before the Hon'ble Supreme Court of Pakistan, the Hon'ble Supreme Court of Pakistan vide Judgment dated 3.5.2012 remanded the case in the following terms;

> "*1. Let the High Court decide petitions pending before it on merits without being prejudice in any manner from the impugned judgment dated 29.7.2011.*
>
> *2. All the petitions arising out of the impugned judgment shall be placed before a bench of a High Court for the purpose of consolidated judgment as the question of law and facts seems to be common in all these matters.*
>
> *3. The petitioners shall free to approach this court after the judgment on merits pronounced if against them with further liberty to raise the question of maintainability of the petitions in the nature of qou warranto before this court in terms of the order impugned herein and in such eventuality no question of laches or limitation shall come in the way of the petitioners because the instant petitions raise a question of the constitutional nature.*"

6. The Hon'ble Chief Justice assigned all the constitutional petitions to this Bench. The petitions were pending disposal when on the advice of Prime Minster of Pakistan, the President of Pakistan dissolved the National Assembly on 16.3.2013 and announced the fresh general elections which are scheduled to be held on 11.5.2013.

7. The respondents parliamentarian after the dissolution of National and Provincial Assemblies filed application for dismissing the constitutional petitions having been infructuous, the petitioners opposed the petition and submits that inspite of the dissolution of the parliament, the petition can continue as is held by the Hon'ble Supreme Court of Pakistan *Syed Mehmood Akhtar Naqvi v.*

Federation of Pakistan trough Secretary law and others **(PLD 2012 SC 1089).**

Learned counsel further submits that no doubt respondents have ceased to hold their offices but there are other acts which the respondents have done during the usurpation of offices or prior to their termination as holders of public office. It is yet to be decided that the respondents are liable to refund the huge amounts drawn in the shape of salaries and other benefits knowingly that they were holding the office on the basis of a fake degree.

8. Learned Counsels for respondents submit that after the dissolution of national and provincial assemblies the respondents have ceased to be the holder of public office and petitions become infructuous. Learned Counsels vehemently argues that the relief of quo warranto could not be granted where it is useless and effective measures can not be taken for undoing the acts done by the person concerned. They further argued that disqualification to hold a public office must exist both at the time of the filing of the constitutional petition and at the time of its decision and submit that on the day of filing the constitution petition the requirement of graduation degree was not the statutory requirement for the legislators and as such the petition is liable to be dismissed in addition to the preliminary objection about the maintainability of the petition. The writ of quo warranto can only be issued where the person under attack must have the real possession of the public office. The court can issue writ only when the public office is held by a particular person in an illegal manner.

Learned Counsels have relied on *Khuda Bakash v. Mir Zafar Ullah Jamali* (1997 SCMR 561), *Ch. Muneer Ahmed and Others v. Malik Nawab Sher and Others* (PLD 2010 Lahore 625), *Haji Khizar Hayat v. Sarfraz Khan & another* **(PLD 1968 Lahore 381),** *P. L. Lakhanpal v. Ajit Ray, Chief Justice of India, New Delhi and others* **(AIR 1975 Delhi 66),** *Sardar Asseff Ahmad Ali v. Muhammad Khan Junejo and others* **(PLD 1986 Lahore 310),** *Dr.Kamal Hussain and 7 others v. Muhammad Sirajul Islam and others* **(PLD 1969 SC 42),**

Muhammad Liaquat Munir Rao v. Shams ud Din and others **(2004 PLC (CS) 1328),** *Rana Muhammad Hayat Khan v. Rana Imtiaz Ahmad Khan* **(PLD 2008 SC 85),** *Khuda Bakhsh v. Mir Zafarullah Khan Jamali* **(1995 CLC 1860),** *Rana Aftab Ahmad Khan v. Muhammad Ajmal and another* **(PLD 2010 SC 1066),** *Abdul Hamid v. Muhammad Shahidullah and 3 others* **(PLD 1969 SC 535),** *Pakistan through the Secrtary, National Aswembly v. Khondkar Ali Afzal & another* **(PLD 1960 SC Pak 1),** *Jumma Khan Baluch v. The Government of Pakistan, etc.* **(PLD 1957 (W.P.) Karachi 939)**, *unreported judgment of Hon'ble Supreme Court of Pakistan titled "Khalid Mehmood v. Muhammad Anwar Khan, etc."* **(C.P. No.513- L/2013),** *Judgment passed by Hon'ble Supreme Court of Pakistan in case titled "Ghulam Akbar Lang v. Dewan Ashiq Hussain Bukhari and others"* **(C.P.No.632/2011),** *Order passed by Lahore High Court, Multan Bench, Multan in case titled "Ghulam Akbar Lang v. Sewan Ashiq Hussain Bukhari, etc."* **(W.P.No.11538/10),** *Meyer v. Strouse (Supreme Court of Pennsylvania)* **(422 Pa. 136 (1966),** *Pundlik Vishwapath v. Mahader Binjraj and others* **(AIR 1959 Bombay 2 (V 46 C 2),** *The State of Bombay v. Smt. Shrish V. Pai and others* **(AIR 1959 Bombay 6 (V 46 C 3),** *Carlton R. Seavey v. Frank A. Van Hatten, and Edward W. Lambert et al. (Appellate Division of the Supreme Court of State of New York, Forth department)* **(276 A.D. 260 (1949),** *Parmatma Ram and others v. Siri Chand and others* **(AIR 1962 Himachal Pradesh 19 (V 49 C 9),** *K. C. Chandy v. R. Billa Pillai* **(AIR 1986 Kerala 116),** *The University of Mysore v. C.D.Govinda Rao and another* **(AIR 1965 Supreme Court 491 (V 52 C 80)** and *Sajid Hussain v. Shah Abdul Latif University, Khairpur thorugh registrar and 4 others* **(PLD 2012 Sindh 232)** and *Malik Nawab Sher v Ch. Muneer Ahmed and others* **(Civil Petition No.175-L of 2012**).

9. **Heard**, record perused.

10. It is an admitted fact between the parties that National and Provincial assemblies have been dissolved and the General Elections

have been scheduled to be held on 11.5.2013 and at present the respondents are not holding any public office.

11. The argument of learned counsel for petitioners is that it is a proven fact on record that graduation degree claimed by the respondent is fake as is confirmed by the concerned University and the Board of Intermediate. The Hon'ble Supreme Court of Pakistan has already held in *Mian Najeeb ud Din Owasi & another v Amir Yar Waran, etc.* (CMA No.1712/12 in CA Nos.191-L & 409/10) as under;

> *"Notwithstanding whether the condition of being a graduate or having a degree equal to the requisite academic skill was not available subsequent to the General Election 2008, and the judgment in the case of Muhammad Nasir Mahmood and others v. Federation of Pakistan through Secretary M/O Law (PLD 2009 SC 107) yet if a candidate has made a declaration in the column meant for academic qualification and declared himself to be a graduate, but subsequently, it is found that he was not a graduate then he would equally be liable to face the consequences under Articles 62 & 63 of the Constitution."*

The learned counsel submits that the General Election 2013 has been announced and in case the respondents' degrees were not declared fake, the holders of fake degrees will again contest the election and will usurp the most important office meant for legislation for the country.

12. The crucial point requires for determination is whether after dissolution of National and Provincial Assemblies, a writ of quo-warranto can be issued or not.

13. For appreciating the argument of learned counsels for the respondents, Article 199(b)(ii) is reproduce as under;

> "*(b) on the application of any person, make an order---*
>
> *(i) ……*
>
> *(ii) Requiring a person within the territorial jurisdiction of the Court holding or purporting to hold a public office to show under what authority of law he claims to hold that office; or"*

14. It is settled principle of law that a writ of quo-Warranto is information in nature placed before the Court and the petitioner may

not be an aggrieved person. Halsbury's Laws of England, Third Edition, Volume 11, Para 281 defines the writ of quo Warranto as under:

> "*An information in the nature of a quo Warranto was not issued, and an injunction in lieu thereof will not be granted, as a matter of course. It is in the discretion of the Court to refuse or grant it according to the facts and circumstances of the case …….. the Court might in its discretion decline to grant a quo Warranto information where it would be vexatious to do so, or where an information would be futile in its results, or where there was an alternative remedy which was equally appropriate and effective.*"

15. The words in Article 199(b)(ii) of the Constitution are "holding or purporting to hold a public office".

16. It is an admitted fact that after dissolution of the Parliament, the respondents are ceased to be its members and the holders of the public office. In Indian jurisdiction, a similar question arose whether writ of quo warranto can be issued where holder of public office ceased to hold the office; *P.L.Lakhanpal v. Ajit Nath Ray, Chief Justice of India, New Delhi and others* **(AIR 1975 Delhi 66 Full Bench)**. In this case, Government of India by ignoring three senior Judges of the Supreme Court of India appointed a Chief Justice who was fourth in seniority, all the three senior Judges resigned and the matter was brought before the Court. The Full Bench of the Delhi High Court held that the issuance of quo Warranto will be a futile exercise as the three senior Judges have already resigned. The Full Bench opined as under:

> "*13. I now deal with the points urged by the Attorney-General. Relying upon the petitioner's own case that the convention of appointing the senior-most puisne Judge of the Supreme Court as the Chief Justice of India since the establishment of the Supreme Court is a rule of law and inheres in Article 124(2) of the Constitution, he contends that the issue of a writ of quo Warranto by this Court will be futile because as a result of the resignations of Justices Shelat, Hegde and Grover, who were senior to him, Justice A. N. Ray became the senior-most puisne Judge and not only could be re-appointed but would be entitled to be re-appointed as Chief Justice of India. This contention would not have been available to the respondents if the three Judges who were senior to Justice A. N. Ray had not vacated their office by resignation but now it is. The contention is countered by Mr. Lakhanpal, who appeared in person, by arguing that if the appointment of Justice A. N. Ray as Chief Justice of India is set at naught by a writ of quo Warranto, then he will automatically ceased to be a Judge of the Supreme Court because on his appointment as Chief Justice of India, the warrant of his appointment as a Judge of the Supreme Court automatically ceased to exist or to have any validity or effect.* "

17. A similar question again was considered by Bombay High Court in *Pundlik Vishwapath v. Mahader Binjraj and others* **(AIR 1959 Bombay 2 (V 46 C 2)**, the Bombay High Court held as under:

> "*(14) The petitioner has also prayed in his petition a relief for a writ of quo Warranto against the respondent No.1 and a direction restraining him from acting as a Councilor of the Nagpur Corporation and/or represent the defunct Chamber. This question cannot be considered in this petition, particularly as respondent No.1 has not assumed office, as we are informed. This prayer is rejected in limine. The petitioner will be at liberty to apply, if he is so advised, in case and when the respondent No.1 assumes office.*"

18. The Bombay High Court in *The State of Bombay v. Smt.Shirish V. Pai and others* **(AIR 1959 Bombay 6 (V 46 C 3)** in the similar circumstances held as under:

> "*(18) At first blush there appears to be a good deal of force in the contention advanced on behalf of the respondents, but on closer scrutiny the contention advanced on behalf of the petitioners will be found to be more forceful so far as the prayer for the issue of a writ of quo Warranto is concerned. The aforesaid writ is a common law process of great antiquity, a writ of right for the King against one who claimed or usurped an office, franchise or liberty to enquire by what authority he asserted a right thereto in order that it might be determined. As information in the nature of quo Warranto is tis modern form. It has been held in the case of Pundit Vishwapath v. Mahadeo Binjraj, AIR 1959 Bom 2 that a petition for a writ of quo Warranto against a councilor elected to a municipal corporation does not lie where the councilor has not assumed office. Thus unless a person occupies an office an inquiry into the validity of the authority for the occupation of that office cannot be made and the present petition so far as it relates to the issue of a writ in the nature of quo Warranto cannot be said to have been filed after inordinate delay. The aforesaid aspect of the matter does not appear to have been raised or considered in the earlier writ petitions dismissed by this Court on the ground of delay. So far as the prayer for the issue of a writ of mandamus is concerned, there can be no doubt that the prayer is a belated one and must be refused.* "

19. When the Constitution of the Islamic Republic of Pakistan, 1962 was abrogated, the appeals relating to election disputes were pending before the Hon'ble Supreme Court of Pakistan against the writ petitions decided by the High Courts. The legality and maintainability of the pendency of the appeals were examined by the Hon'ble Supreme Court of Pakistan in *Abdul Hamid v. Muhammad Shahidullah and 3 others* **(PLD 1969 SC 535)** and the Hon'ble Supreme Court of Pakistan held as under:

> "*It is common knowledge, that according to the old practice the petition abated or dropped in such a case. Keating, J. was of the same opinion, for, he too held that "the effect of the dissolution, as it seems to me, is to cause the petition to drop". It is clear, therefore, that the moment the*

> *dissolution takes place the petition is at an end for all purposes. These principles are, in our view, applicable with equal force in the present case. The National Assembly having itself been dissolved by the Proclamation of the 25th March 1969, the position, in our opinion, is the same and all pending petitions must be dropped as having become infructuous. In these circumstances we dismiss both these appeals on the ground that they have become infructuous but make no order as to costs.*"

20. In *Pakistan through the Secretary, National Assembly v. Khondkar Ali Afzal and another* **(PLD 1990 SC 1)** in a similar issue the Hon'ble Supreme Court of Pakistan held as under:

> "*Secondly, the relief prayed for in the petition had ceased to be available to the respondent because the post of the Joint Secretary to the National Assembly had been abolished before the announcement of the judgment. On the day the judgment was rendered the High Court could not have issued a writ of mandamus requiring the Government to reinstate the respondent to a post which had been validly abolished. Though this aspect of the matter must have been present to the minds of the learned Judges, there is not one word about it in the judgment and the matter has been decided and a writ issued against the Government in respect of a matter to which the attention of the parties was never directed. It is of the very essence of judicial proceedings that the relief to be granted should follow as a legal result from the right alleged and found. The error in the proceedings is therefore fundamental where the relief granted is different form the one prayed and flows not from the right alleged but from a right which has not been pleaded and as to which the Court has never heard the parties. This is true in all proceedings but more so in proceedings for prerogative writ where the Court does not generally act ex debito justitiae but confines the petitioner to a specific right and a specific relief. We allow this appeal, set aside the judgment of the High Court and dismiss the respondent's petition for a writ. In the circumstances, we have mentioned, parties will bear their own costs.*"

21. From the above said judicial pronouncement it is clear that writ of quo warranto can be issued against a person who is holding a public office without any lawful authority or he is a usurper. The word used in Article 199 (b)(ii) of the Constitution are "**the holder of public office"** denotes that relief of writ of quo warranto will be available to a person against a holder of public office and not a retired person. The intention of the legislator is clear that relief of quo Warranto is available only against those who are present not who were Public Office holder or would be Public Office holder. When the holder of public office ceased to hold the office, the relief of quo Warranto also becomes not available to an aggrieved party or any other person.

22. The only object of the writ of quo warranto is to inquire into and determine the authority of a person holding a public office, and

the consequence of the acceptance of the petition is the ouster of the person from the public office, the relief by way of writ of quo warranto remain only available so long as the person attacked is in actual possession and user of the office.

23. As a general rule, therefore, quo warranto to question a person's title to office will not be granted after he has ceased to hold that office.

24. The second argument of learned counsel for petitioner is that although the respondents have ceased to hold their offices, but the other matters as to the recovery of salaries and other benefits which the respondents have taken or enjoyed knowingly that they have been elected by defrauding their voters are yet to be adjudicated upon and this court can grant relief under the established principle of law that court has the powers to grant modified relief. This argument of learned counsel is not sustainable as it is an established principle of law that no such relief can be available in a proceeding for quo warranto. The writ of quo warranto cannot be used to quash acts already done by a usurper. Quo warranto is meant to prevent a continued exercise of authority unlawfully asserted, not to correct what already has been done under it or to vindicate private rights.

25. As far as the right of a person to ask for refund of salaries or other benefits from a usurper to a public office is concerned, It could not to be determined in a proceeding for quo warranto. The said determination is an independent right and can be ascertained in appropriate proceedings according to law.

26. The argument of learned counsel for the petitioners that the respondents are proven to be the holders of fake educational degrees, they violated the law, they defrauded their voters and caused loss to the government exchequer, they all are unable to legislate law which is their basic duty being legislature is concerned, the petitioners have the right to initiate appropriate proceedings against the respondents according to law. As I have come to the conclusion that petitions are

not maintainable due to legal infirmity, both the parties are at liberty to get their grievance redressed according to law in an appropriate legal proceedings.

27. As the fresh general election has been announced, the petitioners have a remedy, they may raise objection before the Returning Officer against the respondents if the respondents intends to contest the election and the respondents have filed the nomination papers for contesting the election. The Returning Officer according to law is duty bound to decide the eligibility of the candidate qua Article 62 and 63 of the Constitution of the Islamic Republic of Pakistan, 1973.

28. The upshot of the above said discussion is that the petitions are disposed of having become infructuous.

(**Muhammad Khalid Mehmood Khan**)
Judge

KMSubhani

Announced in open Court on 04.04.2013.

(**Muhammad Khalid Mehmood Khan**)
Judge

KMSubhani

Approved for reporting.